

Friday 12 March 2021

Senior Advisor
Not-For-Profit Unit, Not-for-profits and Tax Administration Branch
Treasury Melbourne
Level 16, 530 Collins Street
Melbourne VIC 3000

via email: charitiesconsultation@treasury.gov.au

Dear Senior Adviser

Unlawful activity - changes to Governance Standard 3 for registered charities

Thank you for the opportunity to provide a submission on the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (Draft Instrument)* and explanatory materials for changes to standard three of the *Australian Charities and Not-for-profits Commission Regulation 2013 (the Governance Standards)*.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits (**NFP**), large and small businesses, and the government sector.

The NFP sector is a major focus of the AICD's work with a significant majority of our members involved in the governance or work of NFPs, many of them making contributions as directors on a voluntary basis. The AICD is committed to advocating for a fit for-purpose regulatory regime for the NFP sector that supports and promotes good governance, is streamlined, national and will support good practice in this important sector. The AICD supports good governance in the NFP and charities sector in a range of ways, including AICD's Not-for-profit Governance Principles¹, NFP governance education and NFP governance resources.

The AICD applauds government initiatives to reduce red-tape in the charities (and broader NFP) sector, particularly harmonisation of Federal, State and Territory regulations as they apply to fundraising and reporting. The AICD also supports proposed increased harmonised financial reporting thresholds for Australian Charities and Not-for-profits Commission (**ACNC**) registered charities and will be lodging a separate submission on that consultation.

1. Executive summary

The AICD strongly supports compliance with the law and does not condone unlawful activities by registered charities. However, the AICD has significant concerns with the Draft Instrument and does not support it proceeding as drafted.

¹ The AICD's NFP Governance Principles (<https://aicd.companydirectors.com.au/nfp>) state that: "All organisations must comply with the law. It is important that boards understand the legal framework that applies to their organisation and that they are satisfied with the steps taken to comply." (Principle 9 – Conduct & Compliance).

The AICD opposes the proposal to expand the scope of Governance Standard 3 by adding that registered charities are not entitled to remain registered with the ACNC if they breach a summary offence (such as trespass or unlawful entry or vandalism of personal property) or “fail to take reasonable steps to ensure its resources are not used to promote” such acts. The AICD does not consider it appropriate that the ACNC Commissioner has the discretion to remove charities from the register on the basis of a “reasonable belief” that such offences may occur.

Given the severe consequences that removal from the ACNC register can have on a charity (including losing Commonwealth charity tax concessions such as income tax concessions), such a power is only appropriate if it is proportionate to the misconduct and subject to procedural fairness such as rights of appeal. As the Draft Instrument stands, the proposed amendments to Governance Standard 3 do not satisfy these criteria.

The proposed instrument also runs counter to the recommendations of the 2018 ACNC Review², which noted that existing Governance Standard 3 is not appropriate and should be repealed.

As set out below, the AICD believes that the Government should not proceed with the Draft Instrument.

2. AICD comments on the Draft Instrument

(a) Lack of proportionality between the offence and sanction

Current Governance Standard 3 prohibits charities from acting in a way that may be dealt with:

- as an indictable offence under Australian law; or
- by way of a civil penalty of 60 penalty units or more.

The Draft Instrument proposes to expand the scope of Governance Standard 3 by adding that registered charities are also not entitled to remain registered with the ACNC if they:

- do an act (or omit to do an act) that may be dealt with as a summary offence under an Australian law relating to real property, personal property or causing personal injury or harm to an individual; or
- fail to take reasonable steps to ensure its resources are not used to promote acts (or omissions) by any entity that may be dealt with as an indictable offence, a relevant summary offence, or a civil penalty of 60 penalty units or more.³

Generally, indictable offences are offences where the accused has the right to have the matter heard before a Judge and jury in a higher court (usually the District Court or the Supreme Court). They are considered more serious offences than summary offences, which are heard in lower courts and without a jury.

The current standard applies to serious offences, whereas the new standard would capture summary offences. These can be relatively minor offences. For example, s10A of the *Queensland Summary Offences Act 2005* creates a summary offence of unlawful assembly. This merely requires “three or more persons” gathering on property to “likely” disrupt the operation of a business. There is no requirement of

² Strengthening for purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018 (the **2018 ACNC Review**). <https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf>

³ Draft Instrument, Schedule 1, 1, 2 and 3.

physical violence or threatening conduct. Consequently, three or more members of a charity that may be undertaking a peaceful protest, albeit on private property, could cause a charity to lose its charitable registration.

The above Queensland example demonstrates the serious lack of proportionality between the offence (small peaceful gathering) and sanction (removal from the register) – ‘the punishment does not fit the crime’. In the AICD’s view, the correct balance has not been struck between the targeted objective of the Draft Instrument, public interest and the harm done to a charity (and its beneficiaries) that loses its charitable status.

(b) Procedural fairness

The Explanatory Statement states that:

the ACNC Commissioner’s powers... may be exercised if the ACNC Commissioner reasonably believes that it is more likely than not that the entity will not comply with a governance standard. This means a registered entity does not need to be charged or found guilty of a relevant summary offence for the ACNC Commission to take appropriate enforcement action.⁴

This makes it clear that no offence needs to have been committed, let alone proven in court, for the ACNC Commissioner to have the power to revoke a charity’s registration. This appears to be a largely unfettered power with potentially severe consequence – a charity’s registration should not be revoked based on subjective assessments under wide regulator discretion.

Additionally, the instrument does not incorporate procedural fairness safeguards that would usually apply to such a broad-based power, including the right to seek a merits review of such a decision before removal from the register. We would expect any such power to remove a charity from the register would provide the charity with:

- an opportunity to make submissions, and to appear or be represented at a private hearing on the matter; and
- a right to apply for review of the decision to remove from the register.

Should the Government proceed with the Draft Instrument, it should be amended to clarify that only charities that have been convicted of a criminal offence can be found to be in breach of Governance Standard 3. Procedural fairness safeguards highlighted above should also be incorporated into the Draft Instrument.

(c) Additional red tape – an unreasonable burden

The AICD is concerned that section 45.15 of the Draft Instrument, which requires charities to take “reasonable steps” to ensure their resources are not used to promote unlawful activities, is unclear and ambiguous. While section 45.15(4) attempts to define “resources”, it is a non-exhaustive list and includes “websites, social media accounts and other publications”.

While the AICD agrees that charities and directors should have in place safeguards to govern how their resources are lawfully used, information may be used in ways that inadvertently breach the governance standard. For example, would a research institute or university lose its charitable status if a research paper (published by it or merely on its website) that noted trespass as an activist tool to protest against certain

⁴ Exposure Draft Explanatory Statement, Australian Charities and Not-for-profits Amendment (2021 Measures No. 2) Regulations 2021.

farming practices? What steps would the institution be required to demonstrate that the charity had taken reasonable steps to ensure the proper use of such resources?

We are concerned that the steps required to ensure a charity and its directors do not fall foul of the “reasonable steps” requirement are unreasonable, unclear and will impose a burden on charities not applicable to other organisations. This is out of step with one of the ACNC's objects, which is to reduce red tape and “promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.”⁵

Additionally, the Explanatory Statement does not produce any evidence to support the need for expanded regulation and the additional regulatory burden as proposed, let alone the need for section 45.15 of the Draft Instrument. The Explanatory Statement does not have a statement of compatibility with human rights (including the constitutional implied right to freedom of political communication), nor does it include a regulatory impact statement for consultation that sets out the regulatory costs that NFPs will incur because of the changes.

If the Government wishes to pursue the Draft Instrument, further consultation should be undertaken, and evidence produced as to the administrative costs of compliance and any impacts on human rights. In our view, section 45.15 of the Draft Instrument should also be removed.

(d) Inconsistent with 2018 ACNC Review

The Draft Instrument does not align with the recommendations of the 2018 ACNC Review that noted that Governance Standard 3 is not appropriate as a governance standard and should be repealed. The review went on to state:

*Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence (unrelated to the ACNC's regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.*⁶

The AICD does not condone unlawful activities by charities. However, the AICD agrees with the review recommendations that it is not the function of the ACNC to take steps to require charities to enquire whether they may or may not have breached the law. The law should be enforced by the relevant authorities, as appropriate.

The AICD suggests that the Government reconsider repealing Governance Standard 3 in line with the recommendations of the 2018 ACNC Review.

We note that the Explanatory Statement refers to recommendation 20 of the 2018 ACNC Review as the basis for the Draft Instrument. Recommendation 20 states that “Test case funding should be made available to develop the law in matters of public interest, including disqualifying purposes.”⁷ In response, the Government said it would explore legislative options to develop the law in matters of public interest. The AICD does not consider the Draft Instrument proportionate to the recommendation which was about testing the law on permissible advocacy. The AICD recognises the valuable contribution that charities make through legitimate advocacy work.

⁵ ACNC Act 2012, s15-5(1)(c).

⁶ 2018 ACNC Review, pg 54.

⁷ Ibid.

3. Next steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Christie McGrath, Senior Policy Adviser at cmcgrath@aicd.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

Louise Petschler GAICD

General Manager, Advocacy