

**AMNESTY
INTERNATIONAL**



SUBMISSION TO THE TREASURY CONSULTATION AROUND
CHANGES TO THE GOVERNANCE STANDARDS FOR
REGISTERED CHARITIES - UNLAWFUL ACTIVITY

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Submitted by

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide this submission to the Treasury on the Changes to Governance Standards for Registered Charities - Unlawful Activity.
- 1.2 Amnesty International is supportive of the Australian Charities and Not-for-profit Commission (ACNC) and its regulatory regime. Its advisory role is exemplary, with questions being answered in a timely manner on a wide range of issues. This is incredibly helpful particularly to small charities with limited resources.
- 1.3 Its regulatory regime is graduated from reminders, through warnings, investigations then to deregistration depending on the scale and frequency of non-compliance. We believe this is appropriate for as diverse a sector as the charitable sector.
- 1.4 Amnesty International is supportive of measures taken to increase accountability to members of the public within the parameters of not unduly burdening charities and not detracting from their ability to advocate around the subject matter of their charitable purpose/s.
- 1.5 However, it is Amnesty International's view that the proposed changes the subject of this consultation are unnecessary, undesirable, introduce standards higher than those imposed on other sectors and could limit charities' legitimate advocacy activities.
- 1.6 They seek to expand the scope of a governance standard a recent comprehensive review of the ACNC regulatory framework recommended be abolished.
- 1.7 Further, we believe that the proposed changes do not create greater certainty, but rather introduce new areas of ambiguity in relation to proscriptions already established in the ACNC regime and other laws applicable to the charity sector.

Recommendation

Amnesty International recommends that the *Australian and Not-for-profits Commission Amendment (2021 Measures No.2) Regulations 2021* not be passed in any form.

2. The Proposed Amendments to the ACNC Regulations

Amnesty International believes that the current ACNC regulatory regime strikes the right balance between accountability, transparency (which both enhance public trust in the sector) and reducing the administrative burden on Australia's more than 50,000 charities.¹

The proposed amendments are to Governance Standard 3, contained in the *Australian Charities and Not-for-profits Commission Regulation 2013* (the ACNC Regulations). All registered charities are required to comply with the ACNC Regulations as a condition of registration.

Governance Standard 3 provides that a registered charity must not act in a way that may be dealt with as an indictable offence or by way of a civil penalty of 60 penalty units or more. This standard aims to increase the public confidence that the entity is properly governed and prevents misuse of its operations or assets. A serious infringement of Australian law may allow the Commissioner to exercise their enforcement powers under Part 4-2 of the *Australian Charities and Not-for-Profit Commission Act 2012* (the Act) following consideration of the matters listed in ss 35-10(2) of the Act.

The *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the Proposed Amendments) seeks to expand the scope of Governance Standard 3 to add that registered charities are also prohibited from:

- doing an act (or omitting to do an act) that may be dealt with as a summary offence under 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.²

Amnesty International does not believe that the Proposed Amendments are either necessary or desirable for the reasons set out below.

¹ <https://www.acnc.gov.au/tools/reports/australian-charities-report-2017> accessed on 8 March 2021.

² Exposure Draft Explanatory Statement p.1 accessed at: <https://treasury.gov.au/consultation/c2021-149084> on 23 February 2021.

Current Regulation of the Sector

- 2.1 Amnesty International notes that the sector is large and diverse. It comprises over 50,000 charities of a variety of sizes, charitable purposes and geographical areas of operation.³ It is responsible for engaging over 4 million people as either volunteers or as employees.⁴ Its revenue is \$148.6bn⁵ which in 2018 represented over 8% of Australia's GDP.⁶
- 2.2 The sector plays a critical role in providing services to the most vulnerable in Australia and around the world, advancing religion, culture, education, health, social and public welfare, promoting reconciliation, mutual respect and tolerance between individuals and groups, promoting human rights, advancing the natural environment and the welfare of animals.⁷ The sector participates in dialogue on issues of public interest with government decision makers.
- 2.3 This dialogue is preserved in the *Charities Act (Cth)* 2013 (the Charities Act) in section 12(1)(l)⁸:
- (l) *the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:*
 - (i) *in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or*
 - (ii) *in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.*
- 2.4 However, as with the private, corporate and public sectors, issues involving maladministration, fraud and other criminal behaviour have the capacity to damage the sector as a whole. But, only a very small proportion of the charitable sector have been the subject of the ACNC's

³ See for example the ACNC's data on the diversity of the sector at: <https://www.acnc.gov.au/tools/reports/australian-charities-report-2017> accessed on 8 March 2021

⁴ Ibid.

⁵ Ibid.

⁶ *Review of Australian Charities and Not-for-profits Commission (ACNC) legislation* <https://treasury.gov.au/consultation/c2017-t246103>, accessed 8 March 2021. See also Deloitte Access Economics, *Economic contribution of the Australian charity sector Australian Charities and Not-for-profits Commission*, November 2017, <https://www.acnc.gov.au/tools/reports/economic-contribution-australian-charity-sector>, accessed 8 March 2021.

⁷ See for example the list of charitable purposes set out in the *Charities Act 2013* (Cth) section 12.

⁸ <https://www.legislation.gov.au/Details/C2013A00100> accessed on 8 March 2021.

compliance regime in 2018.⁹ In 2018 the ACNC only progressed 179 investigations and assessed 696 concerns.¹⁰ Further, of those investigations only 16 revocations were made, representing 0.04% of all registered charities in 2018.¹¹ This represented a decrease in revocations from previous years;¹² suggesting that rates of serious misconduct have also decreased.

- 2.5 The Commissioner also deployed a number of other disciplinary powers under Chapter 4 of the Act including issuing penalty warning letters, penalty notices, regulatory advice, and entering into compliance agreements and enforceable undertakings.¹³ This demonstrates that the ACNC has been successfully able to minimise the risk of misconduct and repeat offences through a variety of enforcement mechanisms, without needing to resort to deregistration.
- 2.6 In 2018, the most common kinds of concerns which were investigated were primarily issues of receiving private benefits or poor governance, not members of the charities engaging in unlawful activity.¹⁴ This indicates that preventing unlawful activities is not prevalent in the sector nor is there any apparent necessity for the passage of the proposed changes.
- 2.7 As mentioned above, Governance Standard 3 currently requires a charity not to engage in conduct (or omit to engage in conduct) where the conduct or omission can be dealt with as an indictable offence or a fine of 60 penalties units or more. A serious infringement of Australian law may allow the Commissioner to exercise their enforcement powers. Thus it is evident that there are clear rules in place against misconduct.
- 2.8 However, one of the considerations in s 35-10(2) of the Act requires the Commissioner to take into account the nature, significance and persistence of any contravention or non-compliance with the Act or the governance standards.
- 2.9 The current policy of the ACNC is that they will not investigate every alleged breach of the law but only those that constitute serious offences which would endanger public confidence.¹⁵

⁹ Submission to the Review from the Australian Charities and Not-for-profits Commission paragraph 1.68

¹⁰ Charities Compliance Report 2018, <https://www.acnc.gov.au/tools/reports/compliance-report> accessed on 8 March 2021.

¹¹ This does not include the 113 revocations for double defaulting, however these are not revocations due to misconduct.

¹² See: <https://www.acnc.gov.au/tools/reports/australian-charities-report-2017> accessed on 8 March 2021

¹³ Charities Compliance Report 2018, <https://www.acnc.gov.au/tools/reports/compliance-report> accessed on 8 March 2021.

¹⁴ Ibid.

¹⁵ Governance Standard 3, ACNC Website, <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/3-compliance-australian-laws> accessed on 8 March 2021

Moreover, under the Commissioner's Policy Statement: *Compliance and Enforcement* (CPS 2013/01) any compliance measures and responses adopted will be proportional to the problem they seek to address. This means that where charities have made an honest mistake or oversight, the Commission will ordinarily work with them to correct the error and get the charity back on track.

- 2.10 Amnesty International believes that this regulatory regime is consistent with the principles of best practice regulatory design encompassing the "regulatory continuum" by graduating responses from reminders to deregistration depending on the scale and frequency of non-compliance. As mentioned above we believe this is appropriate. For example, a compliance oversight by a small, tightly resourced charity is provided with a reminder, rather than a fine or other penalty. Such a measure is proportional to oversight and does not involve resource taxing responses. Conversely, gross misconduct, fraud or continued non-compliance are still met with serious consequences.
- 2.11 Importantly, the compliance regime is underpinned by an excellent educational and supportive service which efficiently assists charities meet their obligations. This is consistent with the Commission's approach to provide guidance and education to assist charities to comply with their obligations.
- 2.12 We believe that the Commissioner already has sufficient powers to combat these issues. The effect of these proposed amendments is to remove this careful balance by imposing an additional penalty when members engage in wrongdoing that is completely disproportionate to the summary nature of the offences, or any potential negligence engaged in by the organisation. Again, such a regime is not imposed on corporate or political entities.

Concerns with the Proposed Amendments

- 2.13 In the explanatory statement¹⁶, the proposed amendments are justified as serving to implement the Government response to Recommendation 20 of the *Strengthening for Purpose: Australian Charities and Non-for-profits Commission Legislation Review 2018* (the Review).¹⁷

¹⁶ Ibid note 2 above.

¹⁷ Hammond, G, McCluskey, S, Turnour, M, *Strengthening for Purpose: Australian Charities and Non-for-profits Commission Legislation Review 2018*, Commonwealth of Australia accessed at <https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf> on 8 March 2021

2.14 Recommendations 19 and 20 of the Review state:

Chapter 9 – Advocacy

19. The ACNC be resourced to enable the Commissioner to enforce and develop the law where registered entities engage in disqualifying purposes (within the meaning of the Charities Act 2013 (Cth)).

20. Test case funding be made available to develop the law in matters of public interest, including disqualifying purposes.¹⁸

2.15 By way of context for these recommendations, the Review states:

Advocacy is a key aspect of a vibrant civil society and plays an important role in the development of social policy. It allows Australians to voice their concerns and influence public policy and legislative development. The role of advocacy by charities is acknowledged as integral to community wellbeing.

*While there is direction from the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*¹⁹¹ (*Aid/Watch*), the *Charities Act 2013 (Cth)* (*Charities Act*) and the ACNC guidance, there is still ambiguity in the public domain regarding the threshold between issues-based advocacy and political advocacy that may constitute a ‘disqualifying purpose’ under the *Charities Act*.¹⁹*

2.16 Recommendations 19 and 20 go to addressing the difference between - and ambiguity in assessing - issues based advocacy, and political advocacy. The recommendation is to develop case law in order to bring a nuanced clarification of that difference.

2.17 This is an important distinction as issues based advocacy is an important, valuable role the sector plays in informing government policy decisions that impact the people and issues (such as the environment and animals) it seeks to serve.

2.18 The Proposed Amendments instead exacerbate the issue of ambiguity referred to above by empowering the Commissioner to take enforcement action on a discretionary basis in relation to discrete activities amounting to ‘summary offences’ that a charity may fail to take reasonable steps to prevent.

¹⁸ Ibid p 13

¹⁹ Ibid p 78

- 2.19 The summary offences identified in the Proposed Amendments relate to property or injury to a person. These kinds of offences cover a large range of activities and do not require conviction for the Commissioner's deregistration powers to be invoked.
- 2.20 It is worth noting that Recommendation 9 of the Review provides that Governance Standard 3, as currently formulated, be repealed altogether:
- Governance standard 3 is not appropriate as a governance standard. 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.*²⁰
- 2.21 The Proposed Amendments require of registered charities precisely that which the Review rejects - that is, to force enquiry into whether they may or might engage in the proscribed conduct. In fact, the Proposed Amendments extend the obligation to a wider dragnet of conduct, which conduct does not need to have actually occurred.
- 2.22 Amnesty International is also concerned that the Proposed Amendments are diluting or undermining the primary purpose test which governs charitable status.
- 2.23 The definition of charity is a not-for-profit entity that is engaged in a charitable purpose (which also represents the requirements of Governance Standard 1).²¹ The focus is on the charitable purpose of the entity.
- 2.24 A charity must not have a disqualifying purpose; either one that is unlawful or contrary to public policy.²² The ACNC determines the purpose of an organisation by examining their governing documents, the organisation's activities, annual reports, financial statements and corporate documents.²³
- 2.25 Specifically the ACNC advises that *'[a] 'one-off' activity is unlikely to demonstrate a purpose of promoting or engaging in that activity.'*²⁴

²⁰ Ibid p 47

²¹ *Charities Act 2013* (Cth), s 5.

²² Ibid, s 11.

²³ Australian Charities and Not-for-Profit Commission, *Charitable Purpose*, <https://www.acnc.gov.au/for-charities/start-charity/before-you-start-charity/charitable-purpose>, accessed 8 March 2021.

²⁴ Ibid.

- 2.26 By empowering the Commissioner to deregister charities based on the actual or possible activities of their members or on a failure to take reasonable steps to prevent the ‘misuse’ of their resources, the Proposed Amendments shift the focus of charitable status from the purpose of an entity to the activities in which it engages, or in which it might engage.
- 2.27 Finally, Amnesty International is concerned that the Proposed Amendments introduce criteria for deregistration that are far lower than those of other sectors, such as the corporate, for-profit sector.²⁵ This appears to be a perverse outcome.

Concerns around Adverse Consequences of the Proposed Amendments on Charities

- 2.28 Amnesty International is deeply concerned that the Proposed Amendments will operate to stifle the voices of those that the charitable sector seek to amplify in its advocacy.
- 2.29 As referred to above, advocacy is an important part of the work of charities and is protected by law. The Proposed Amendments are so broad that charities may find themselves uncertain as to conduct that is advocacy and conduct that may lead to deregistration.
- 2.30 The consequences of the Proposed Amendments could be in turn lead to an inconsistency with Australia’s human rights obligations. Art 19 of the *International Covenant on Civil and Political Rights* to which Australia is a party, mandates a right to freedom of expression; protection the right of all people to seek, receive, and impart information of any form, including political discourse, commentary on one’s own and on public affairs, journalism, cultural and artistic expression, teaching, and religious discourse.²⁶ Article 22 of the ICCPR also protects the rights to freedom of peaceful assembly and association, which both the UN Human Rights Committee and the UN Special Rapporteur have stressed includes safeguarding the capacity of Non-Government Organisations (NGOs) to engage in advocacy work and ensuring that registration requirements are not overly restrictive or political.²⁷

²⁵ For example, under the *Corporations Act* the Australian and Securities and Investment Commission may deregister a company if:

- the company has not paid its annual review fee within 12 months of the due date;
- the company has not responded to a Company compliance notice, has not lodged any documents in 18 months, and ASIC think it's not in business; or
- the company is being wound up and there is no liquidator.

²⁶ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR], Art 19.

²⁷ Ibid., Art 22; Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178, p. 21.

- 2.31 Amnesty International has reported upon and monitored governments around the world seeking to suppress the voices of NGOs through legislative reform. These include measures introduced in India²⁸, Hungary²⁹ and Turkey³⁰ in particular.
- 2.32 To be abundantly clear, Amnesty International is not suggesting the Proposed Amendments are remotely similar to the regimes introduced in the countries mentioned above. They merely serve as an example of measures introduced which can be used to suppress the voices of NGOs and charities advocating for human rights.
- 2.33 The Proposed Amendments could detrimentally impact human rights in two ways.
- 2.34 First, the Proposed Amendments could place a disproportionately high administrative burden on charities, diverting resources from providing frontline services or other activities to achieve the charity's purpose/s.
- 2.35 Under the proposed s45-15(3) a charity must "take reasonable steps to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions by any entity."
- 2.36 This will require organizations to have documentary evidence to demonstrate that they have taken such reasonable steps to ensure their resources are not so used including the development and evidence of implementation of appropriate policies. Organizations may also

²⁸ The *Foreign Contribution Regulation Act* (2010) (FCRA), ostensibly developed to regulate foreign funding, has in practice, been used to restrict foreign funding for NGOs that are critical of government policies or that protest against the government's large development projects. In tandem with amendments to the *Foreign Contribution (Regulation) (Amendment) Rules* 2020 (such as Rules 9(1)(f), 12(5)(6)(6A), 17(A)), it has become more onerous for an NGO to operate in India.

²⁹ Hungary's 'Stop Soros Legislative Package' passed in 2018, in particular Draft Article 353/A of the Criminal Code on Facilitating Illegal Migration targets people seeking asylum and NGOs who support them; it considers foreign-funded NGOs working on migration a risk to national security

³⁰ In December 2020, the Turkish parliament passed the Law on Preventing Financing of Proliferation of Weapons of Mass Destruction, which was intended to ensure Turkish compliance with a UN Security Council counterterrorism resolution (1373 of 2001). However, it has granted new powers to the Interior Ministry and introduced restrictions and strict oversight rules affecting NGOs and fundraising. Under this law, the heads of NGOs who face terrorism charges, can be replaced by the Minister of the Interior, who can seek restrictions on the activities of those organizations in court. The Turkish government commonly applies terrorism charges to target and silence activists, journalists, scholars, artists, and lawyers. The new law relies on ambiguous and problematic definitions of terrorism, far from international standards. Amnesty International Turkey's former chairman, Taner Kilic alongside three other human rights defenders (the Buyukada case), were sentenced to more than six years in prison on charges of membership in a "terror organization" when attending a workshop; he was freed after 14 months and still faces charges for his human rights work with refugees and marginalised communities.

have to seek legal advice regarding what would constitute “reasonable steps” adding additional costs. Given that more than 60% of registered charities are small (with a turnover of less than \$250,000)³¹ it is unreasonable, especially with the ongoing economic impacts of the pandemic,³² to expect them to engage in further administration that is not central to their purpose. This ultimately impacts on those who rely on these charities and those who generously give financially to them.

2.37 Moreover, the possible impact of the Proposed Amendments is inconsistent with the objects of the ACNC to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.³³ It is also inconsistent with statements by the ACNC Commissioner.³⁴

2.38 Secondly, the Proposed Amendment could discourage charities from engaging in advocacy activities that are central to their charitable purpose. Indeed, the High Court has acknowledged the importance of advocacy to charity work:

“It could scarcely be denied, these days, that it may be necessary for organisations, whose purposes are directed to the relief of poverty or the advancement of education to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes.”³⁵

3. Conclusion

3.1 Amnesty International has been and remains supportive of the role of the ACNC in enhancing accountability and public trust in the charitable sector. We believe the regulatory regime is appropriate and its educational and advisory services exemplary.

3.2 In Amnesty International’s view The Proposed Amendments will create further uncertainty for the sector, will introduce standards not found in other regulatory environments for other sectors, such as the for-profit sector, and stifle important advocacy conducted on behalf of

³¹ *Australian Charities Report 2018*, <https://www.acnc.gov.au/tools/reports/australian-charities-report-2018>, accessed 8 March 2021.

³² See: Centre for Social Impact and Social Ventures Australia, *Will Australian charities be COVID-19 casualties or partners in recovery? A financial health check*, June 2020, <https://www.csi.edu.au/research/project/charities-and-covid-19-financial-health-check/> accessed 8 March 2021.

³³ *Australian Charities and Not-for-Profit Commission Act 2012*, s 15-5(1)(c).

³⁴ Johns, G, “Reducing Red Tape for the Charity Sector”, *Commissioner’s Column*, 6 August 2020, <https://www.acnc.gov.au/media/news/reducing-red-tape-charity-sector>, accessed 8 March 2021

³⁵ *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 564 (Kiefel J).

some of the most vulnerable members of Australian society, and those who have no voice at all.

- 3.3 Amnesty International recommends that the Proposed Amendments do not proceed in any form.