



Submission to:

The Treasury

and

The Hon. Michael Sukkar MP

Assistant Treasurer and Minister for Charities

**Australian Charities and Not-for-profits Commission
Amendment (2021 Measures No. 2) Regulations 2021**

March 2021

Introduction

This submission provides an overview of critical concerns held by the Community Council for Australia (CCA) in relation to the proposed *changes to governance standard three in the Australian Charities and Not-for-profits Commission Regulation 2013 to expand the scope of impermissible activities that registered charities must not engage in or promote others to engage in*.

CCA has consulted with members (see listing in appendix A) in framing this submission, however, it is important to note that this submission does not override the policy positions outlined in any individual submissions from CCA members. CCA has also consulted with charity lawyers and other experts.

CCA has long been a supporter of the need for an independent regulator of charities in Australia. CCA has advocated for the establishment and retention of the ACNC as a way of delivering increased transparency, accountability, and sustainability for the Australian charities and not-for-profit sector.

The content of this submission includes: a brief background to CCA; an overview of the current context for the NFP sector; a summary of proposed changes to the ACNC governance standards, some key points about the collective impact of the proposed changes, an outline of specific concerns with six of the proposed changes, and a conclusion.

CCA welcomes this opportunity to provide input into this consultation on changes to the powers of the ACNC and is keen to engage in detailed discussion about any proposals arising from the Inquiry.

It is important to note that David Crosbie, CEO of CCA, was one of the founding ACNC Advisory Board members.

The Community Council for Australia

The Community Council for Australia is an independent non-political member-based organisation dedicated to building flourishing communities by enhancing the extraordinary work undertaken by the charities and not-for-profit sector in Australia. CCA seeks to change the way governments, communities and not-for-profits relate to one another. It does so by providing a national voice and facilitation for sector leaders to act on common and shared issues affecting the contribution, performance and viability of NFPs in Australia. This includes:

- promoting the values of the sector and the need for reform
- influencing and shaping relevant policy agendas
- improving the way people invest in the sector
- measuring and reporting success in a way that clearly articulates value
- building collaboration and sector efficiency
- informing, educating, and assisting organisations in the sector to deal with change and build sustainable futures
- providing a catalyst and mechanism for the sector to work in partnership with government, business and the broader Australian community to achieve positive change.

Our success will drive a more sustainable and effective charities and not-for-profit sector in Australia making an increased contribution to the well-being and resilience of all our communities.

Context: the state of the not-for-profit sector

COVID-19 highlighted the critical role played by charities and Not-for-profits (NFPs) in Australia. The government acknowledged this role in extending a modified form of JobKeeper payments to charities as well as supporting increased giving during the pandemic. These measures have been important to many charities, but 2021 is still going to be incredibly challenging for the charities and NFP sector.

Research conducted by the Centre for Social Impact (CSI) and Social Ventures Australia suggests around 30% of all charities are now facing serious questions about ongoing viability. CSI's latest survey of the for-purpose sector ([Pulse of the For-Purpose Sector | CSI](#)) found that while 8 in 10 organisations had increased demand, 77% of organisations agreed or strongly agreed that the recent events have put considerable strain on their organisation's finances, 85% reported a reduction in revenue even with JobKeeper, and 52% were worried about their ability to continue to provide services in the current environment.

Some charities will have to hibernate programs and services in the hope of being able to re-establish their income streams in the coming years. For many charities, COVID-19 has meant increased costs, a decline in revenue, reduced access to volunteers, and increased demand for community-based services.

While generalisations across all charities are very difficult within the COVID-19 context, the one certainty is that COVID-19 will have a negative impact on thousands of charities and thousands of workers within the charities sector.

The charities and NFP sector encompass over 600,000 organisations - from large to very small. Australia's 55,000+ charities employ over 1.3million staff (around 10% of all employees in Australia), collectively turn over more than \$147 billion each year and hold around \$300 billion in assets.

These facts tell only a small part of the story. The real value of the charities sector is often in the unmeasured contribution to Australian quality of life. Charities are at the heart of our communities, building connection, nurturing spiritual and cultural expression, and enhancing the productivity of all Australians. Collectively, they make us a more resilient society.

In Australia there have been various initiatives seeking to: promote social enterprise; reduce compliance costs for NFPs; encourage a diversification of financing options to build a more sustainable funding base; streamline and refine the regulation of NFPs and charities; establish less bureaucratic reporting requirements while building community transparency; increase philanthropy; promote impact investing; and increase sector performance measurement. CCA supports all these activities.

The establishment of the ACNC has proved to be a positive step towards red tape reductions, increased transparency, and trust in the community by prospective volunteers and donors. But there is still a lot of work to do in streamlining and improving the regulation of charities in Australia.

While the history of the NFP sector is framed by growth and reform, the current situation is that many charities are struggling to survive. Given the size of the sector and its critical role in our community especially post-pandemic, the Federal Government should very carefully consider the impact of any proposed changes to the powers of the ACNC.

Our communities, our economy and our country all benefit when charities are enabled to operate effectively to deliver public benefit. This includes their capacity to advocate for change and seek to improve public policies.

Summary of proposed changes to the ACNC governance standards

The proposed changes to governance standard three within the *Australian Charities and Not-for-profits Commission Regulation 2013* seeks to deliver five main outcomes:

1. Extends a governance standard the ACNC review expert panel recommended should be repealed
2. Expands the range of activities that can be considered unlawful or potentially unlawful
3. Expands the range of what might be considered to be supporting or promoting unlawful action
4. Increases the discretion of the ACNC Commissioner to make a reasonable judgement that an unlawful action might take place in the future
5. Shifts the emphasis for enforcement action by the ACNC away from whether the charity is pursuing its purpose to an action the charity may be promoting or supporting
6. Introduces costly administrative requirements that provide no regulatory benefit.

Key points about the collective impact of the proposed changes

This submission opposes all the proposed changes, each of which is discussed in more detail below. It is also important to make some key points about the collective impact of the proposed changes.

Politicisation of the ACNC: These proposed changes allow for the politicisation of the ACNC. For instance, an ACNC Commissioner may be opposed to Indigenous people protesting about inequality. Local Indigenous groups may plan to march down the main street of their city in protest of their lack of opportunity, creating the potential for a summary offence charge to be laid (e.g., blocking a footpath). If a local charity (it may be a church, youth group or a health service) offers their support and promotes the event on their website, they may face ACNC enforcement action from an overly zealous ACNC Commissioner – even before the protest has occurred or a summary offence charge has been laid.

The principles of justice and due process: The proposed approach to enforcement of charitable status is counter to the principles espoused in the acts establishing the ACNC. There are threshold issues here about fairness, justice and due process, none of which are reflected in the proposed changes. Without a workable appeals process and no real process to challenge the judgment of the Commissioner about potential law breaking, these changes go too far in giving power to the ACNC Commissioner.

Over-reach beyond expertise and capability: There are serious questions about whether the ACNC Commissioner has, or even should have, the skills, resources or power to determine whether a summary offence may have occurred, let alone whether one might potentially occur. Police and courts operate in these spaces, and so they should. They are who the ACNC Commissioner should rely upon to determine if unlawful activity has taken place. The ACNC Commissioner should not pretend an expertise and capability the office of the ACNC does not have and was never set up to have.

The chilling effect: None of us agrees with every charity. We do not all support all protests. Most of us believe consistent law breaking has no place in our communities. But few of us would argue that the world would be a better place without protest, without communities being able to find a voice, express a view, raise their concerns. Many major achievements in civil life are a product of charities pushing back against power, protesting, highlighting a better way forward. The establishment of our system of parliament, women having the vote, the ending of wars, breaking down of walls, saving of unique cultural and environmental treasures, most would not have happened without protest. This legislation makes all protesting, even the support of one protest, a potential threat to charities and their future. A country where charities fear raising their voice is not the kind of Australia we want to live in.

Specific concerns with the proposed changes

1. Extends a governance standard the ACNC expert panel recommended should be repealed

The expert panel appointed to review the ACNC Act observed that registered entities must comply with all applicable laws and recommended that Governance Standard 3 be repealed (page 50).

Where a charity breaks the law, it can be dealt with not only under the criminal law but also under Governance Standard 5 relating to the duties of responsible persons. There is no need for these changes.

2. Expands the range of activities that can be considered unlawful or potentially unlawful

The proposed increase to the range of unlawful actions (a potential summary offence relating to property or people) is too broad. Examples of an act that might be a potential summary offence charge include:

- leaving the gate to a private property open
- blocking a footpath
- trespassing on private property (e.g. at the gateway to a building site)
- not moving on when legally instructed to do so
- damaging any property (e.g. writing on a public sign or building).

3. Expands the range of what might be considered to be supporting or promoting unlawful action

Under the proposed new governance standard, charities are required to *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*. In practice this means a staff member who tweets support for an action that could possibly be charged as a summary offence (like blocking the footpath in a protest march) could see enforcement action taken by the ACNC against their charity employer if such action was not actively discouraged. Allowing on-line posts by staff, mentions in websites, promotion through Facebook or twitter by one or more staff to be used by the ACNC Commissioner as offering support or promotion of unlawful activity seems absurd. This is especially problematic given the ACNC Commissioner can be judging the potential for an action - not actual actions - that could potentially be charged as a summary offence.

4. Increases the discretion of the ACNC Commissioner to make a reasonable judgement that an unlawful action might take place in the future

It is counter to basic principles of criminal law that the ACNC Commissioner is empowered to form a view on the potential commission of a summary offence without proper evidence, testing of that evidence and without due process. There is no reference to defences that may excuse the offence. The Commissioner can act on their own belief without testing that belief against possible mitigating factors or excuses. Previously the Commissioner needed to consider a course of conduct, a pattern of behaviour, not one act.

This potential to focus on one single act is compounded by the lack of a meaningful appeals process. The ACNC Act grants wide discretions to the ACNC Commissioner that are not reviewable afresh on appeal (de novo review). Even within the courts, there is little if any scope to challenge the decisions of the ACNC Commissioner.

5. Shifts the emphasis for enforcement action by the ACNC away from whether the charity is pursuing its purpose to an action the charity may be promoting or supporting

s.45-10 ACNC Act (Regulations establishing Governance Standards) state:

- (6) *The regulations must not require an entity **not** to comment on, or advocate support for, a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:*
- (a) the comment or advocacy furthers, or is in aid of, the purpose of the entity; and*
 - (b) the comment or advocacy is lawful.*

It is arguable that any protest or advocacy action in support of the purpose of the charity cannot be deemed to have breached a governance standard, unless it can be demonstrated to be unlawful. The key tests here are not about whether there is a potential summary offence, but whether the charity is pursuing its purpose. Provided the charity does not break the law (there needs to be evidence of law breaking) or directly advocate for people to vote for a particular candidate or political party, charities are legally entitled to pursue a charitable purpose through advocacy activities, including protests.

The test here is whether the charity is pursuing its purpose. Offering support for one action that may involve the potential for a summary offence should not be the reference point for enforcement action by the ACNC against a charity.

6. Introduces costly administrative requirements that provide no regulatory benefit

Governments are rightly focused on reducing unnecessary administrative burdens on business and the broader community. If we want a productive nation, we need to spend less time in pointless administrative and compliance work that serves no real outcome.

Charities are happy to be accountable, but being accountable for potential law breaking by external groups because staff or others connected to the charity express support or promote the cause of people who may engage in a public protest is a real risk that will have to be mitigated.

Keeping records to show that a charity has not in any way supported actions that may involve the potential for a summary offence charge is going to require new paperwork, new recording processes, new administrative costs. In some cases – say a charitable community radio station – the very purpose of the charity could be called into question because as part of their core activities they provide information about protests or other activities that could potentially involve summary offences.

The proposed changes will involve introducing various kinds of organisational policies that seek to silence commentary or the voicing of opinions from staff and others connected to the charity. These types of policies are more commonly applied in countries where free speech is not permitted.

The proposed changes introduce a new sphere of compliance which charity boards will need to manage. One of the most fundamental obligations for a charity board is to preserve the charitable status of the organisation – effectively the organisation's licence to operate. The introduction of this level of risk to charity boards will and must be taken seriously, adding to the burden of charity directors and creating a minefield of new issues to navigate, e.g. how will organisational monitoring of employees interact with privacy laws and civil liberties and what will be permissible under employment law.

Conclusion

This submission from CCA sets out critical concerns with the proposed expansion of the powers that may be exercised by the ACNC Commissioner. The proposed changes are unnecessary and counterproductive.

CCA is a strong supporter of the need for an independent regulator of charities in Australia. Charities have little tolerance for rogue charities doing the wrong thing, undermining public trust, and damaging the reputation of all charities. Sustaining public confidence in charities is critical to our effectiveness as a sector. CCA has consistently encouraged charities to be accountable and to hold other charities accountable.

The proposed changes to governance standard three are poorly targeted and will not enhance the capacity of the ACNC to take enforcement action against rogue charities. They will introduce greater confusion and uncertainty. CCA believe there is ample scope within existing provisions and laws to prosecute a case against any charity involved in organising events where law breaking occurs or supporting law breaking.

CCA will happily work with the government if there are clearly identified problems with the current regulation of the charities sector, but no such problem has been raised other than by a small minority of powerful vested interests who have publicly said they would like to prevent protests against their activities. CCA would hope public policy for all charities is not being framed and informed by the concerns of this small minority who appear to be focused on the actions of less than 0.1% of the 55,000 registered charities in Australia. The other 99.9% of charities should not have to wear the consequences of these concerns.

The proposed changes are a classic case of regulatory over-reach, something CCA believed the government was seeking to reduce, not increase. They are counter to good regulation, counter to good public policy and will diminish the impact of active and engaged charities working to improve the lives of all Australians.

Emmeline Pankhurst said of the Suffragette protests: *"We are here not because we are law breakers; we are here in our efforts to become law-makers."*

Threatening increased enforcement action against charities that support public campaigns and protest action is not going to make government stronger, quite the contrary.

The proposed changes to the ACNC governance standards will diminish our democracy. They will silence some charities by creating fear about potential repercussions. They will impose new limitations on staff and others involved in charities and their capacity to express a view. They will impose significant new regulatory burdens on many charities. They will not achieve their policy purpose. They will diminish the capacity of our communities to voice their concerns.

CCA is strongly opposed to the changes.

Current Membership – Community Council for Australia *Attachment A*

Adult Learning Australia

Alcohol, Tobacco and Other Drugs Association ACT

Arab Council Australia

Australian Conservation Foundation

Australian Council for International Development, Marc Purcell, CEO (CCA Board Director)

Australian Environmental Grantmakers Network

Australian Scholarships Foundation

Australians Investing in Women

Barnardos Australia

Beacon Foundation

Brotherhood of St Laurence, Conny Lenneberg, CEO (CCA Board Director)

Camp Quality

Carers Australia

Centre for Social Impact, Prof Kristy Muir, CEO (CCA Board Director)

Chain Reaction Foundation

Christians Against Poverty

Churches of Christ Vic/Tas

Community Bridging Services (CBS)

Community Broadcasting Association of Australia

Community Colleges Australia

Connecting Up

Drug Arm Australia, Jody Wright, CEO (CCA Board Director)

Endeavour Foundation

Ethical Jobs

Everyman

Exodus Foundation

Feanix Foundation

Fitted for Work

Foundation for Alcohol Research and Education

Foundation for Young Australians

Fragile X Association of Australia

Good Samaritan Foundation

Good2Give

Hammondcare

Hillsong Church, George Aghajanian, CEO (CCA Board Director)

InfoXchange

Justice Connect

Kilfinan Australia

Learning Links

Life Without Barriers, Claire Robbs, CEO (CCA Board Director)

Lock the Gate

Mater Foundation

McGrath Foundation

Menslink

Mission Australia

Missions Interlink

Non Profit Alliance

Our Community

OzHarvest

Painaustralia

Philanthropy Australia

Pro Bono Australia

Queensland Water & Land Carers

Relationships Australia NSW

Ronald McDonald House Charities

RSPCA Australia, Richard Mussell, CEO (CCA Board Director)

Saba Rose Button Foundation

SANE

SARRAH

Save the Children, Paul Ronalds, CEO (CCA Board Director)

Settlement Services International

Smith Family

Social Ventures Australia, Suzie Riddell, CEO (CCA Board Director)

St John Ambulance

Social Leadership Foundation

Starlight Foundation, Louise Baxter, CEO (CCA Board Director)

Sydney Children's Hospital Foundation

Ted Noffs Foundation

The Centre for Volunteering

The Shepherd Centre

Volunteering Australia

Wesley Mission

Workplace Giving Australia

World Vision Australia

World Wide Fund for Nature Australia

YMCA Australia
