

11/3/21

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

By email: charitiesconsultation@treasury.gov.au

Dear Sir/Madam

Submission regarding the draft legislative instrument and explanatory materials for changes to governance standard three in the *Australian Charities and Not-for-profits Commission Regulation 2013*

We refer to Treasury's recent publication of draft documents in relation to proposed amendments to ACNC Governance Standard 3 (**GS3**) and the invitation to make a submission. Thank you for making that opportunity available.

A. EXECUTIVE SUMMARY OF SUBMISSION

For the reasons set out below, we submit that:

1. It is inappropriate to extend the reach of GS3 to allow potential loss of charitable status for one-off acts which:
 - (a) are minor;
 - (b) do not require a conviction; and
 - (c) the ACNC Commissioner need only reasonably believe it is more likely than not may occur in the future.
2. The compliance burden placed on a charity in having to take "reasonable steps" to prevent its resources being used to promote or support acts which could be dealt with as summary offences is overly burdensome.

B. ABOUT CMA

CMA is a charitable not-for-profit organisation that seeks to help the Christian sector in Australia become more effective ([about CMA](#)). It does this by offering resources, training, and networking across a range of areas such as:

- Governance
- Fundraising
- Staff & volunteer management
- Financial management
- Leadership

CMA Standards Council

A ministry of Christian Ministry Advancement, ABN 63 157 713 534

A PO Box 16210, Collins St West, Melbourne VIC 8007 **P** 1300 262 300

www.cmasc.net.au

- Marketplace ministry
- Mission & strategy
- Legal & compliance
- Risk management

CMA has over 1,400 members and engages with between 300 and 400 Christian organisations.

CMA also has a separate division, called the CMA Standards Council, which publicly accredits Christian organisations which meet its 54 Principles and Standards of Good Governance, Transparency and Accountability ([CMA Standards Council](#)). The ACNC has recognised and endorsed the accreditation provided by the CMA Standards Council ([ACNC and CMA Standards Council Standards](#)). The overarching purpose of the CMA Standards Council is to help build faith and trust in Christian organisations in order for them to achieve more effective outcomes. In particular, the CMA Standards Council assists its accredited Partners by reviewing policies and procedures intended to meet the ACNC's Governance Standards.

C. REASONS SUPPORTING THE CMA SUBMISSION

1. *It is inappropriate to extend the reach of GS3 to allow potential loss of charitable status for acts which are minor and do not require a conviction, when the ACNC Commissioner need only reasonably believe it is more likely than not that they may occur in the future*

Prior to the enactment of the Charities Act 2013 (**Charities Act**), under the common law the key factor which determined whether an organisation was a charity, and thus was entitled to available tax benefits, was whether or not it had a charitable purpose. This approach was continued in the definition of "charity" in s 5 of the Charities Act.

An organisation's right to be registered as a charity and access associated tax benefits is determined under the Australian Charities and Not-for-profits Commission Act 2012 (**ACNC Act**). The principal determinant under s 25 of the ACNC Act for entitlement to registration is whether the organisation is a charity as defined in the Charities Act. In other words, whether an organisation should be registered as a charity is dependent on its purpose.

We submit that this is the correct approach.

A charity's right to keep its charitable status primarily depends on it complying with the ACNC Governance Standards and External Conduct Standards. In a general sense, these Standards are designed to ensure that the charity is governed so as to achieve its purpose, and to focus on its compliance with certain specific and/or serious laws.

There are two Standards which specifically deal with compliance with laws – External Conduct Standard 1 (**ECS1**), and GS3.

ECS1 requires charities to take reasonable steps to prevent their resources being used to breach Australian laws overseas, such as anti-money laundering, anti-terrorism, sexual offences against children, modern slavery etc.

GS3, the subject of this submission, currently requires a charity not to engage in conduct which may be dealt with as an indictable offence, or give rise to a civil penalty of (currently) \$13,320 or more. In other words, the unlawful conduct leading to an offence must be serious.

We note that a breach of the current GS3 does not require a conviction or a court decision, only that the conduct “may be dealt with” as an offence. We also note that under the ACNC Act a possible consequence of a breach of GS3 (or a breach of ECS1) is deregistration as a charity at the ACNC Commissioner’s option (and thus loss of tax benefits) and that under s 35-10 of the ACNC Act this consequence may be enlivened if the Commissioner reasonably holds the view that “it is more likely than not that the registered entity will not comply with” GS3 or ECS1. In other words, the conduct need not even have been engaged in for deregistration to occur.

We would submit that as a general proposition it is not appropriate to punish a person or entity if they have not been convicted by a Court, and certainly not for conduct which he or it has not even yet engaged in. To be clear, deregistration of a charity and loss of the associated tax benefits is not a minor consequence. The reality is that ninety-nine times out of a hundred this would put the charity out of existence.

On its face, the current form of GS3 would offend this proposition. However, there is currently a control on the operation of GS3, in that *a breach can only occur if the conduct or offence (or anticipated conduct or offence) relates to something serious.*

We submit that this is a very important control.

One effect of the proposed amendments to GS3 is to remove this control, by extending the reach of GS3 to include summary offences relating to property or personal injury. We submit that the potential consequences for breach of GS3 are too severe for them to be enlivened by conduct (or anticipated conduct) which may be dealt with as a minor offence. The penalty of effectively killing off a charity which is otherwise carrying out its charitable purpose is out of proportion to the risk of minor breach of property laws or minor personal injury. After all, an individual or a commercial business would not lose its right to access a government subsidy or allowance (eg an accelerated deduction for investment for a business, or a family allowance for an individual) if the business or individual breached a law (let alone a minor law). Why should a charity be treated differently?

We note that it may be said that charities should not be free from consequences for any unlawful conduct, even if it is minor. We make two points in reply:

- (a) by only proposing to extend GS3 to summary offences relating to property or personal injury, there is a logical concession that summary offences not related to property or personal injury do not deserve such consequences; and
- (b) in any event, an organisation which commits any offence (indictable or summary) may be prosecuted for a breach of that offence in the ordinary course – the organisation does not get off scot free.

We also contrast the position with ECS1, which relates to serious offences such as money laundering, terrorism, sexual offences against children, modern slavery etc, rather than relatively trivial conduct.

Accordingly, we submit that the extension of GS3 to cover conduct which may be dealt with as a summary offence relating to property or personal injury is bad policy in light of the severity of the potential consequences. Either the extension should not occur, or curbs should be applied for

summary offences, such as requiring a conviction, and less draconian consequences such as multiple breaches before deregistration could occur.

2. *The compliance burden placed on a charity in having to take reasonable steps to prevent its resources being used to promote or support acts which could be dealt with as summary offences is overly burdensome.*

The proposed extension to GS3 requires a registered charity to take reasonable steps to prevent its resources being used to promote or support acts which could be dealt with as summary offences. In particular, the proposed extension includes a definition of “resources” which includes its funds, its responsible entities, its employees, its websites, social media accounts and other publications. The draft Explanatory Statement adds mailing lists to the definition of resources, and the draft FAQs add land, property and other assets.

It is interesting to contrast this position with ECS1, which also requires charities to take reasonable steps to prevent its resources being used wrongly. We note that there is no definition of “resources” applied for ECS1, which could lead to confusion.

The draft Explanatory Statement recommends charities adopt a “common sense approach” to meet these requirements. It also suggests that charities could:

- have appropriate processes, safeguards and controls in place about who can access and use the entity’s funds, office and social media accounts;
- undertake regular reviews and audits of the entity’s outgoing payments;
- ensure responsible entities and employees have a general knowledge of any relevant legal obligations; and
- address the improper use of the entity’s resources promptly (for example, by taking down any unauthorised publications as soon as practicable).

We submit that several such steps would be too expensive and time consuming for a small charity to undertake. For example, a “small” charity does not have to prepare and submit accounts, yet you suggest regular reviews and audits of outgoing payments. By listing such matters in the Explanatory Statement it would be difficult for a charity to later argue that such steps were unreasonable, so a small charity is virtually forced to undertake them.

We also submit that in the context of minor offences against property laws and personal injury, the scope of actions a charity would need to adopt is far too broad and vague. For example, what steps should the charity have undertaken if two of its employees had conspired over morning tea in the lunchroom to do some shoplifting at the local newsagency? What should it have done to stop an employee having a minor collision when driving a company car to a work appointment for which he was late? What should it do to stop an employee copying by hand a list of phone numbers from a company database of donors so that the employee could approach them for donations to fund a demonstration? What should it do to prevent a volunteer copying the charity’s logo and badges and falsely representing herself as associated with the charity to seek donations door-to-door?

The contrast with the sorts of laws to which ECS1 applies is stark. They are serious and specific, which at least gives the responsible entities of a charity the chance to focus their efforts in education and training. Trying to prevent resources being used in minor offences against property and personal injury is so broad as to be impossible.

We also note again the Commissioner's power to deregister a charity if he or she reasonably holds the view that "it is more likely than not that the registered entity will not comply with" GS3. This would provide a very broad scope to a zealous Commissioner who wished to apply the law to a particular charity to form the view that the charity's actions to prevent a misuse of resources were likely to be inadequate to prevent resources being used to support an arbitrarily chosen specific summary offence and then deregister the charity. As mentioned above, this is likely to have the effect of putting the charity out of existence.

It could be argued that the requirement only to take *reasonable* steps answers this vice. However, experience shows that when a misuse of resources has actually occurred, in hindsight it is always easy to say how the misuse could have been avoided, and from there it is but a short step to say that this is something which the charity should have done since it was so easy.

Finally, we point out that if the proposed extension to GS3 were not to occur, charities would still be liable for promoting serious crimes by reason of existing laws against aiding and abetting an offence.

Accordingly, we submit that the obligation to take reasonable steps to prevent resources being misused either:

- (a) should not proceed; or
- (b) should be limited to the existing foci of GS3, namely indictable offences and offences with a civil penalty over 60 penalty units.

We would be happy to expand on our submissions at any time if it would assist you.

Yours Faithfully,



Stephen Kerr

Executive Director

CMA Standards Council

steve@cmasc.net.au