

18 March 2021

By email: charitiesconsultation@treasury.gov.au

Dear Colleague

Submission to Treasury re the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021*

Thank you for the opportunity to provide input into the consultation on the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (**proposed regulations**). Meaningful consultation on the proposed regulations is vital, given that they will have a profound impact on virtually every single one of Australia's 58,000 charities.

We are concerned that the proposed regulations:

- i. do not serve their stated purposes and directly contradict findings from the Government's independent review of charities law;
- ii. would stifle legitimate policy advocacy by charities in pursuit of their charitable purpose;
- iii. would broaden the Australian Charities and Not-for-profits (ACNC) Commissioner's highly subjective powers to deregister charities, including when a charity has not broken the law;
- iv. are so significant in their overreach that they are likely to be unlawful.

The proposed regulations should not proceed in any form.

- i. The proposed regulations do not serve their stated purposes and directly contradict findings from the Government's independent review of charities law**

The stated purpose of the proposed regulations is, according to the exposure draft of the Explanatory Memorandum, to act on an independent review's recommendation to clarify the current law, and to "ensure that governance standard three is more consistent with the disqualifying purposes set out in the *Charities Act 2013*". In reality, the proposed regulations achieve neither aim.

Recommendation 20 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018 (2018 Review)* suggested funding be provided to the ACNC to litigate in order to clarify the law around the limits of advocacy by charities. It had nothing to do with charities committing summary offences. In fact, the Government's response disregards the recommendation by the 2018 Review to completely repeal governance standard 3, on the basis that it confers an inappropriate role on the ACNC to police compliance with laws that go well beyond those pertaining to the ACNC's regulatory obligations. The proposed regulations significantly expand the very governance standard that the 2018 Review recommended be completely abolished.

Nor do the proposed regulations "clarify the law", or make existing governance standard 3 more consistent with the *Charities Act 2013* (Cth) (**Charities Act**). On the contrary, the proposed regulations would introduce new vague phrases, extending acts that "may be dealt with" as a summary

offence that “relates to” property or personal injury; and taking “reasonable steps” to “promote or support” the aforementioned acts. The proposed regulations are also inconsistent with the Charities Act insofar as they expose charities to deregistration not on the basis of their *purpose*, as contemplated by the Charities Act, but for single acts by a charity or their staff.

ii. The proposed regulations would stifle legitimate policy advocacy by charities in pursuit of their charitable purpose

The right to protest is a vital avenue for people who lack structural power to use other means to give visibility and voice to their issues. At the Human Rights Law Centre, attending and amplifying protests have, in moments, been vital to our work to end the cruel, indefinite detention of refugees and asylum seekers. Similarly, during defining moments of reckoning for our country, including protests to end Aboriginal and Torres Strait Islander deaths in custody, rallies to end gender-based violence or achieve marriage equality, lending our voice and support to grassroots movements has been incredibly important to advancing our charitable purpose.

The proposed regulations are drafted so broadly that any form of support for virtually any protest could create risk to our charitable status. The proposed regulations could potentially see charities sanctioned for tweeting support for a protest at which some people inadvertently breach the law for crossing onto private property or blocking traffic, despite such events being outside the charity’s control. They could also see organisations penalised for providing legal support to protesters facing arrest.

iii. The proposed regulations broaden the Commissioner’s highly subjective powers to deregister charities even when a charity hasn’t broken the law

The Commissioner can currently revoke a charity’s registration if they reasonably believe the charity “is more likely than not” to breach a governance standard at some future time. The notion of pre-emptively punishing charities for possible future conduct is deeply problematic, and it is made even more so by dramatically expanding the categories of anticipated future conduct that would trigger these powers.

If the proposed regulations are made, the Commissioner’s discretion to deregister or use enforcement powers against a charity could extend to situations in which they believe it is more likely than not that:

- a. a charity’s staff member will tweet in support of a peaceful protest at which a minor offence may be committed;
- b. a charity will fail to take reasonable steps to stop a staff member tweeting in support of a peaceful protest at which a minor offence may be committed;
- c. a charity will fail to adequately document the steps it has taken to stop a staff member from tweeting their support of a peaceful protest at which a minor offence may be committed.

This provision will leave the door open for the Commissioner to shut down or use enforcement powers against a charity on very broad and anticipatory grounds. This places charities in a position of untenable uncertainty. Further, however independently the Commissioner exercises their discretion, there is a risk that this broad discretion will create a perception of political bias within the charities regulator.

iv. The proposed regulations may be unlawful

Issues-based advocacy by charities is protected in Australia. It is protected by international human rights law, by the freedom of political communication implied by our Constitution, and by charities law. Specifically, by punishing charities for speaking out in support of protest movements, the proposed regulations appear to conflict with subsection 45-10(6) *Australian Charities and Not-for-profit Commission Act 2012* (Cth), which states:

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“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.”

Further to that, the proposed regulations run the risk of being struck down by a court on the basis that they impermissibly burden the implied freedom of political communication.

In this moment, Australians are experiencing more hardship than we’ve seen in many years, and a huge number of us are relying on charities to provide basic services to keep us afloat, like housing and mental health support. These charities must be allowed to get on with their jobs, and not be forced to divert their attention and resources into obtaining expensive legal advice and unnecessary paperwork. We urge the Government to reconsider its position on this reform, and not proceed with the proposed regulations.

Yours sincerely



Daniel Webb

Legal Director



Alice Drury

Senior Lawyer