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

Justice Connect appreciates the opportunity to respond to the exposure draft of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (the Regulations)*.

### Our work

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our community thrive.

We work to ensure people and organisations can access the right legal help at the right time, to avoid the negative impacts on their wellbeing or organisational health due to legal problems. We believe in a fair and just world, where communities are supported to engage with and fully participate in our legal system.

We have been serving the community for more than 25 years. We are a registered charity, operating nationally.

### Our expertise – our Not-for-profit Law service

This submission draws on the experience of our specialist Not-for-profit Law service which provides free and low-cost legal assistance to not-for-profit community organisations and social enterprises, many of whom are registered charities.

**In the 2019/2020 financial year, we assisted more than 1,600 not-for-profit groups.** We help those involved in running not-for-profits and social enterprises navigate the full range of

legal issues that arise during the lifecycle of their organisation, including gaining and maintaining charity registration.

The focus of our legal advice service (delivered by in-house lawyers and via pro bono referrals) is on **small volunteer-run charities** that would not otherwise be able to access this help. Many of these charities are in regional, rural or remote communities.

We also deliver training, with governance being our most popular module – in the last financial year we **delivered 123 sessions to 5,441 people**.

Many of our staff hold volunteer board and committee positions so have firsthand experience of the challenges of keeping up with compliance in resource constrained organisations.

### Our submission

Our submission focusses primarily on the impact for small-medium charities. In addition to this submission, we have participated in a consultation forum convened by Treasury.

Our submission does not cover all the areas of concern (such as the constitutional law issues). Rather than repeating them we have **endorsed the ‘Hands Off Our Charities’ Joint Submission and also endorse the more detailed submission of the Law Council of Australia** (we are a member of the Law Council’s Charities and Not-profit-profits Legal Practice Committee and have contributed in that way).

### Overarching comments

1. At the core of our work is the purpose of helping charities to understand and comply with their legal and regulatory obligation; to comply with the law, not to engage in illegal activities. Our significant experience working with the full breadth of charities for more than 12 years is concordant with the belief that underpins the Australian Charities and Not-for-profits Commission (**ACNC**) regulatory approach statement:

*The ACNC understands that most people involved in charities are honest, act in good faith and try to do the right thing. If mistakes are made, they are usually honest mistakes, or due to a lack of knowledge, expertise or capacity.*<sup>1</sup>

2. No data has been provided about the extent of illegal activities by charities. There are already Australian laws (summary and indictable offences with civil and criminal penalties) that deal with the range of activities such as theft, vandalism, trespass and assault, which seem to be the specific concerns behind the Regulations.<sup>2</sup>

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<sup>1</sup> Para 30, <https://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement>

<sup>2</sup> <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/protecting-workers-illegal-activity>

## Our recommendation

### **We submit that the Regulations should not proceed.**

We note there is (rare) unanimity about this recommendation between all the advisers, charities, and professional bodies in our extensive network.

## Our concerns and reasoning

### a. Creating uncertainty

Our experience bears out common sense – the greater the complexity and uncertainty about what the laws are, the harder it is to explain them and the harder it is for charities to comply, especially when the majority are small and heavily reliant on volunteers.

The current ACNC Governance Standard 3 (the **Standard**) does not create uncertainty – it is very specific. The Regulations will, in contrast create enormous uncertainty and confusion. You do not remove uncertainty by expanding the categories and adding obligations that require the charity and each of its responsible persons to have a ‘general knowledge of’ (and therefore also keep up to date with) hundreds of thousands Commonwealth, state and territory summary offences.

### b. Increased and unreasonable compliance burden

The Regulations place a new compliance burden on charities that is beyond what is reasonable expected, and beyond what is expected of other sectors – government does not supervise its employees in this way yet it also bears a public responsibility akin to the responsibility charities have in serving the public interest (in the board sense).

The specific requirements contained in the proposed paragraphs 45.15(3)-(4) add to the compliance and, therefore, administrative costs for all charities without any evidence of the prevalence of the activities of concern.

As well as knowing about summary offences, all charities will be required to:

- have ‘processes’ and ‘safeguards’ to ensure compliance, and
- conduct ‘regular reviews and audits’<sup>3</sup> into compliance

by their employees and for how their ‘resources’ are used. The attempt to narrow the types of summary offences to the more serious ones associated with the concepts of theft vandalism, trespass and assault has not been successful.

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<sup>3</sup> Taken from the wording on page 5 of the Attachment to Exposure Draft of the Regulations

### Example: fundraising laws

The new paragraph 45.15 (2)(a) includes summary offences against 'personal property of any description, whether tangible or intangible'.

**This definition seems to us as broad enough to cover seeking donations from the public via an online 'donate' button on a charity's website. Therefore, where the charity has not obtained a fundraising licence in every state and territory (even if they only operate in a small local area), they would breach the Regulations as this would be a summary offence related to personal property.<sup>4</sup>**

We do not believe that the ACNC Commissioner should have the power to de-register a charity (effectively shutting the charity down) for what is a common place and understandable breach of laws that are so outdated that they don't even anticipate the internet.<sup>5</sup>

### c. Disproportionate penalty – lack of regulatory options for non-federally regulated entities

Following on from the example above, because the broader range of enforcement actions the ACNC Commissioner can use (issuing warnings or requiring an enforceable undertaking, for example) only apply to 'federally regulated entities'<sup>6</sup> there is greater risk for many (typically) smaller charities.

There is no easy way for a charity to be sure they are a 'federally regulated entity' – most cannot afford specialist legal advice, and even then it is a grey area. Because of this the most practical risk management advice is just not to breach the ACNC Act (ie, best not to test what the enforcement powers are), but with the breadth introduced by the Regulations it becomes almost an impossible task to even advise what the ACNC Act requirements mean.

We submit that de-registration for a breach of a summary offence is an extreme consequence such that it is hard to conceive of when it could be the appropriate regulatory response (compared with the breach of an indictable offence). It is even more extreme with the change of wording (section 45.15(2)) to allow a single act to suffice – when the (possible) commission of a single summary offence could warrant charity deregistration.

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<sup>4</sup> Under the *Collections Act 1966 (QLD)*, a 'donate' button on a charity website is an 'appeal for support' (section 5), and an appeal for support made for the purposes of a charity requires the charity to be registered (section 10). Any person who contravenes a provision of the *Collections Act 1966 (QLD)* is guilty of an offence (section 40(1)) and any offence that is not indictable may be prosecuted summarily by a Magistrate under the *Justices Act 1886 (QLD)*.

<sup>5</sup> The need for the reform of the charitable fundraising laws is well accepted <https://www.nfplaw.org.au/fundraisingreform>

<sup>6</sup> <https://www.acnc.gov.au/tools/topic-guides/federally-regulated-entity>

#### d. Obligation to notify the ACNC

Under the Regulations charities will need to document and assess activities at each of the Commonwealth, state and territory levels to prove reasonable steps were taken to ensure that resources were not used to promote or support illegal activities. This also means charities will have to consider a much broader range of legislation when deciding if they need to notify the ACNC of any 'significant' non-compliance under section 65-5 of the ACNC Act.

In the fundraising example above, would not registering in Queensland even though the charity is based in Tasmania (and was compliant with Tasmanian fundraising law requirements) be a significant breach? If so, there will be tens of thousands of charities facing this question the moment the Regulations are in force.

#### e. Intersection and conflict with other laws

We are concerned about the intersectionality of the Regulations with other laws; privacy, employment, work health and safety, and discrimination to name some.

How can a charity control what its employees do after work hours on their social media accounts or what protest marches they can attend?

What process can a charity introduce to ask, review and then audit the actual or possible commission of summary offences by its employees? Using the description of the types of summary offences in the proposed paragraph 45.12(2)(a) will not make this a narrow and focussed exercise, even if it is a lawful request (which we are not sure it is). Taking that example further, even if an employee is charged, what if the charge does not proceed or, after a lengthy appeals process is dismissed? Would the employee have to be dismissed to show the charity was taking action to keep it on the right side of the Regulations? How would that sit with the employee's employment law rights?

#### f. Discourages volunteer board members

**A key concern for us is the negative impact it will have on the willingness of people to volunteer for charity boards.**

Over the last decade we have trained at least 10,000 volunteer board members from a myriad of small charities on their legal duties. We explain that (at a high level) the duties are common sense standards of ethical behaviour.

Since the ACNC Governance Standards were introduced we have (depending on their legal structure) had to explain where they 'fit' with the Corporations Law (some duties are not 'switched off' by the ACNC Act), the various state and territory association and co-operatives laws, under Indigenous corporations and trust structures, and with the common law (for unincorporated groups). It is already more complex than for business.

Although we agree with recommendation made in the ‘*Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*’<sup>7</sup> that the Standard should be removed (it is unnecessary), it has always been fairly easy to explain as it is so specific. But if we need to explain the Regulations – what summary offences are covered, what ‘reasonable steps to ensure resources are neither used, nor continued to be used, to promote or support acts or omissions by any entity...’ involves – it is likely to overwhelm people to the point that they quickly think they no longer want to continue on their board(s).

g. Lack of policy consistency – basic religious charities exempt

Basic Religious Charities (**BRCs**) are exempt from complying with the ACNC Governance Standards. We have always opposed this exemption, particularly because small charities that are not BRCs have to comply with the standards and yet some of the BRCs are large, but, because of their charitable purpose, do not have to comply. As stated, we work to improve the good governance of all charities and support sensible governance standards applying to all charities.

The exemption for BRCs from the Regulations has no sound policy basis. If it is too great a burden for a BRC to comply with the Regulations then it is certainly too great of a burden for small-medium charities.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signature redacted).

Yours sincerely,



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<sup>7</sup> The Panel found: ‘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.’ Page 47 *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*, Final Report (2018)