

19 March 2021

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

**Email:** [charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Sir/Madam

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

Australian Red Cross (**Red Cross**) welcomes the opportunity to make a submission in respect of the Exposure Draft *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (Exposure Draft)*.

Red Cross opposes the amendments contained in the Exposure Draft on the basis that:

- **(administrative burden)** the amendments will impose a significant compliance burden on Red Cross, which may affect its ability to carry out its charitable purpose;
- **(severe penalties)** the penalty of 'deregistration' in the event that the Red Cross fails to "*take reasonable steps to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions*" that may be dealt with as a summary offence is draconian and disproportionate;
- **(inappropriate oversight body)** the ACNC is not the appropriate body to monitor the compliance of charities with the criminal law and sanction those charities in the event of breaches; and
- **(reduction in advocacy activities within the sector)** the proposed changes restrict legitimate and lawful policy advocacy and may reduce the vibrancy of debate by the charitable sector.

**Overview of Red Cross' activities**

Red Cross is one of 192 national societies globally, which along with the International Federation of Red Cross and Red Crescent Societies and the International Committee of Red Cross form the Red Cross Red Crescent Movement. In Australia, Red Cross has an extremely significant footprint with almost 30,000 staff, members and volunteers. Recent activations, including both our 19/20 Bushfire response and our COVID-19 programs, have seen Red Cross respond at a scale not seen since World War II and we expect this to continue.

A key focus of Red Cross relates to disasters and emergencies. In this respect, Red Cross' operations within Australia and internationally involve:

- supporting communities to prepare for, respond to and recover from natural disasters and other emergencies; and
- acting as an auxiliary to public authorities in the humanitarian field to support disaster and emergency agencies in their responses to crises.

More specifically, Red Cross' disaster and emergency related work within Australia includes:

- providing support through mandated roles under formal disaster and emergency response arrangements in all States and Territories, focusing particularly on psychological first aid and evacuee registrations, with some additional roles in individual jurisdictions; and
- launching emergency appeals in response to some large disasters to provide recovery support and/or direct relief; and
- providing long term recovery support following larger disasters, driven by the needs of impacted communities.

Red Cross also provides a large range of other humanitarian services and programmes such as:

- international humanitarian law advocacy (including our recent advocacy on banning nuclear weapons which culminated in an historic international treaty)
- migration support
- NDIS supports;
- support for trafficked people
- immigration detention monitoring
- supporting people in the justice system
- aged care
- disability services
- support for people experiencing homelessness
- support for young parents and families including in relation to domestic violence
- community programs with Aboriginal and Torres Strait Islander peoples

In addition, a critical role of Red Cross is in regard to the collection and distribution of blood and other life-saving biological products through its' Lifeblood division.

### ***Unnecessary administrative burden***

#### **Key point**

*The costly administrative burden that the proposed amendments will cause Red Cross to incur will have a material adverse effect on Red Cross' ability to provide charitable services.*

Section 3 of the Exposure Draft provides that registered entities, such as Red Cross, “*must take reasonable steps to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions*” that may be dealt with as a summary offence (**Regulation**). A registered entity's resources include: (a) its funds; and (b) its responsible entities, and employees, when acting in that capacity; and (c) its websites, social media accounts and other publications; but does not include any of its volunteers who are not one of its responsible entities.

Given the severe penalties that may be imposed on Red Cross if it contravenes this Regulation, and Red Cross' strong commitment to compliance with its legal obligations, the proposed amendments will mean that Red Cross will have to implement significant compliance measures to ensure that it does not contravene this Regulation. In the Red Cross' view, the cost of these compliance measures will be material.

Summary offences differ in each state, and although the Exposure Draft limits the kinds of summary offences that apply to offences that relate to property or injury or impairment to an individual, the range of summary offences that would apply is broad. Red Cross will have to obtain advice in relation to summary offences in each state and develop policies and procedures to ensure that (or at least minimize the risk that) its resources are not directed in a way that promotes or supports the commission of summary offences. This is a particularly onerous task for a large humanitarian charity such as Red Cross which engages in a great diversity of activities.

To provide just a few examples, if the amendments to the new Exposure Draft are passed, we would need to undertake further research to understand whether the following activities could give rise to a breach:

- providing support to, or advocating on behalf of, people who have arrived in Australia seeking asylum - we help based on needs and vulnerabilities, not visa status;

- providing a bushfire relief grant to a person who then uses those funds for an illegal purpose such as to purchase drugs. (As the ACNC knows from its review into Red Cross' response to the 2019/20 Bushfires, Red Cross does not follow up with grant recipients to confirm the funds were used for their intended purposes as we seek to empower people to assess their own needs after a disaster.);
- one of our immigration detention monitoring employees remaining at an immigration detention centre after their shift has ended so that they can talk to a person in detention who is distressed – with no authority to remain on the premises;
- one of our blood donors later claims they did not provide consent for us to collect their blood;
- one of our NDIS clients later claims they did not provide consent for physical interactions.

Red Cross is particularly concerned about the deployment of its resources during its disaster and emergency responses. As Treasury is likely aware, Red Cross' involvement in these responses is important and, as noted above, it often supports government in mandated roles. Red Cross can foresee a variety of situations, in executing this role, that could result in its resources being unintendedly directed to supporting the commission of summary offences. Importantly, in these situations, Red Cross is required to coordinate a response extremely quickly. That, together with the trauma and stress being experienced by people in the midst of disaster, can give rise to volatile situations, meaning that assuring compliance with the proposed Regulation will be particularly burdensome.

Red Cross believes that it is not workable to expect charities to have supervision over all acts or omissions that constitute summary offences (however minor) and that ensuring adequate compliance will be overly burdensome.

Importantly, the Exposure Draft does not set out what constitutes "reasonable steps", meaning that Red Cross will have to formulate its own bespoke compliance framework. For an organization the size of the Red Cross, which undertakes everything from advocacy roles to conducting large and complex disaster relief operations, the cost of these compliance measures will be significant and will inevitably mean that it has less resources to deploy in advancing its charitable purpose.

#### **Specific application to Red Cross**

*Red Cross' preliminary view is that it is likely that it will have to undertake the following compliance activities in the event that amendments contained in the Exposure Draft are passed:*

- *obtain external legal advice in each relevant jurisdiction – pro bono advice may or may not be available to Red Cross in each of these jurisdictions;*
- *conduct training of staff;*
- *employ additional compliance officers to ensure we are able to comply with our expanded compliance obligations;*
- *implement new policies and procedures, or revise existing ones; and*
- *conduct ad hoc risk assessments in relation to its disaster and emergency related work*

#### **Penalty is disproportionate**

##### **Key point**

*The penalty associated with failing to comply with the proposed Regulation is disproportionate: the commission of a minor summary offence (supported or promoted by Red Cross' resources), in circumstances where Red Cross had no intention of supporting or promoting that act, could lead to the ACNC Commissioner revoking its registration as a charity.*

Red Cross submits that the penalty that could be imposed (losing its status as a registered charity) is disproportionate and, if imposed, could threaten the existence of Red Cross given its reliance on the benefits that being a registered charity provide.

In particular, Red Cross is concerned that:

- the commission of minor offences, that do not undermine public trust and confidence in charities, could lead to their deregistration; and
- it is not a necessary pre-condition that persons be convicted of the summary offence or offences in question, it is sufficient that the ACNC Commissioner believes, on reasonable grounds, that it is more likely than not that the charity will not comply with the Governance Standard: s 35-10(1) of the *Australian Charities Not-for-Profits Commission Act 2012* (Cth).

In Red Cross' view, this gives the ACNC Commissioner an inappropriate level of discretion. Essentially, the Commissioner will have the power to deregister a charity in circumstances where the summary offence in question has not been proven beyond reasonable doubt (the standard required under criminal law) and where the summary offences committed (and the conduct of the charity in failing to take reasonable steps to ensure its resources did not promote or support the commission of those offences) are trivial and do not undermine the purpose of the charity or the public's confidence in it.

In our view, existing laws provide a sufficient deterrent to individuals who are considering engaging in unlawful activity and it would be an excessive burden to shift responsibility for the actions of individuals on to charities. Red Cross is comprised of nearly 30,000 staff, volunteers and members operating from hundreds of locations across Australia – to put our charitable status and therefore our very existence at risk because of the actions of an individual is disproportionate and unnecessary.

A particular concern of Red Cross is that we, like many charities, employ staff, and engage volunteers, with lived experience. Employing people with lived experience enables us to ensure our services are relevant and targeted. Further, under one of our custodial programs we actively encourage volunteering with Red Cross while in custody and post-release. This means that some of our workers have been through the justice system and may “slip up” from time to time. We are extremely concerned that under the proposed changes our entire organisation would be at risk of de-registration because of a minor offence by one of our workers.

The disproportionate nature of the proposed discretion (and penalty) is compounded by the fact that there are no strong appeal rights to challenge the discretionary decision of the Commissioner to revoke the registration of a registered entity under s 35-10(1).<sup>1</sup>

---

<sup>1</sup> See *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*, 37.

### Specific application to Red Cross

*During the coordination of a disaster response, Red Cross may inadvertently or unintentionally promote or support the commission of:*

- *a summary offence in relation to property – such as trespass. For example, in the midst of a disaster Red Cross workers may gather evacuated people together on vacant land without the owner's permission; or*
- *a summary offence in relation to injury to an individual – such as common assault. For example, in the heat of a volatile disaster situation a Red Cross worker could physically strike someone, without causing any, or significant, injury, in order to stop them hurting another person.*

*This could occur in Red Cross' response to disasters, such as the 2019/20 Summer Bushfires, where Red Cross:*

- *supported approximately 50,000 people affected by 44 fires across 5 of the impacted States and Territories;*
- *registered approximately 65,000 people through the Register.Find.Reunite service (which reconnects families who have been separated during a disaster);*
- *worked at 176 relief and recovery centres;*
- *engaged approximately 2,000 Red Cross staff and volunteers to assist people and communities impacted by the Black Summer Bushfires; and*
- *spent or disbursed over \$200 million to support people affected by the bushfires – including through the provision of financial grants.*

*If, in responding to a disaster such as the 2019/20 Summer Bushfires, the ACNC Commissioner determines that Red Cross has promoted or supported acts that may be dealt with as summary offences (such as trespass or common assault), then the Commissioner has the power to revoke the registration of the Red Cross – regardless of whether the summary offence in question was trivial or whether the Red Cross' involvement involved little or no culpability.*

*Given Red Cross' and its donors' reliance on the tax benefits associated with charitable donations, deregistration would threaten Red Cross' viability as a charity.*

### **Inappropriate oversight**

Red Cross believes that the ACNC is not the appropriate body to monitor the compliance of charities with the criminal law and sanction those charities in the event of breaches.

The ACNC itself notes that:

*“We will generally only investigate serious breaches that are likely to affect public trust and confidence in charities. This includes fraud, money laundering or terrorist financing offences.*

*We generally will not investigate breaches of law or issues that other regulators or the police are in a better position to investigate.”<sup>2</sup>*

Further, the government-commissioned review of the ACNC legislation undertaken by Patrick McClure AO in 2018 concluded that:

*“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)...”<sup>3</sup>*

<sup>2</sup> <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/facts-about-acnc-governance>

<sup>3</sup> *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018.*

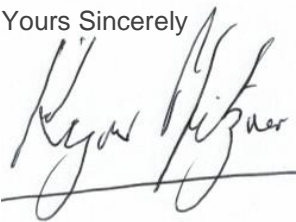
In light of the ACNC's position, that (under the current Governance Standard 3) it will only investigate "serious" breaches that are likely to affect "public trust and confidence in charities", and the findings of Patrick McClure's report, Red Cross believes that expanding the ACNC's oversight to ensuring that charities to take reasonable steps to ensure that their resources are neither used, nor continued to be used, to promote or support acts or omissions that may be dealt with as a summary offence is anomalous and inappropriate.

***Reduction in advocacy activities within the sector***

Finally, we also wish to express our concern that the proposed changes will erode charities' ability to advocate and have a chilling effect on free speech. As history shows, social change regularly involves advocacy and protest as a normal part of civil action in a democracy. Holding a protest rally is part of the nature and process of social change to build public awareness for an issue.

The proposed changes set out in the Exposure Draft are effectively asking charities to be responsible for the behaviour of every individual who is connected to their organisation. We believe the proposed changes would therefore see a reduction in the vibrancy of free speech and advocacy activities undertaken by the charitable sector which would be to the detriment of our democracy.

Yours Sincerely



**Kym Pfitzner**  
**Chief Executive Officer**