



11 March 2021

The Treasury

RE: Submission on unlawful activity - changes to the governance standards for registered charities

The St Vincent de Paul Society National Council of Australia Inc. ('the Society') welcomes the opportunity to provide a submission to the Federal Treasury on changes to governance standards for registered charities.

What we do

The Society is a lay Catholic charitable organisation that comprises over 50,000 volunteers and members and 6,000 employees who provide on-the-ground assistance across Australia to individuals and families who experience disadvantage and social isolation. The Society has an extensive history of helping those in need in the form offering emergency relief, supported accommodation, community housing and other support services.

The Society's governance and operations are set out in [The Rule](#)ⁱ which also defines Our Vision, Aspiration and Values.

Our Vision is to offer "a hand up" to people in need and to do so by respecting their dignity, sharing our hope, and encouraging them to take control of their own destiny.

Our Aspiration is for an Australia transformed by compassion and built on justice.

Our Values include advocacy, particularly with respect to transforming the causes of poverty and challenging the causes of human injustice.

The importance of advocacy

The Society was established in Australia in 1854 and since that time has been a strong advocate for social justice for all Australians, targeting all levels of government.

Our advocacy work is informed by a National Council Social Justice Advisory Committee and the Vincentian Refugee Network, which include representatives from across the country. Our advocacy is also informed by feedback received from those we assist, as well as our members, volunteers and staff.

Advocating on behalf of those facing adversity often involves taking a strong stand and having the courage of your convictions to voice views that might be unpopular to some. Advocacy might also involve conducting or participating in protest action, such as holding public gatherings around dates that have symbolic meaning within the Catholic Church e.g. Palm Sunday marches. We believe that this is not only necessary, it is one of the tenets of the Society and a part of our calling. It is also a fundamental democratic right.

Proposed expansion of the scope of Standard 3

The Society considers that the proposed expansion of the scope of Standard 3 overreaches the objects of the Standard and that the Explanatory Statement fails to demonstrate why such an expansion is needed. We also believe that if the revised Standard 3 is introduced, it will potentially stymie the right of our members to freedom of expression and opinion.

We acknowledge that Australia is a party to the International Covenant on Civil and Political Rights,ⁱⁱ where freedom of expression and opinion are the foundation stone of a free and democratic society. Such freedoms extend to citizens taking part in the conduct of public affairs by "exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves." This participation is supported by "ensuring freedom of expression, assembly and association... and includes freedom to debate public affairs, to hold peaceful demonstrations and meetings and to criticize and oppose."ⁱⁱⁱ

The current Regulation states that the object of this governance standard is to "give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets)."

The accompanying Note further states that “compliance with Australian laws sets a minimum benchmark by which all entities should govern themselves.” Governance Standard 3 allows the Commissioner to take a proportionate approach to address public risk when an entity fails to comply with Australian laws.

Currently governance Standard 3 prohibits registered charities from acting in a way that may be dealt with:

- as an indictable offence under Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
- by way of a civil penalty of 60 penalty units or more.^{iv}

The proposed changes to the Regulations place charities at risk of losing their registration if they:

- do an act (or omit to do an act) that may be dealt with as a summary offence under an Australian law relating to real property, personal property or causing personal injury or harm to an individual; or
- fail to take reasonable steps to ensure its resources are not used to promote acts (or omissions) by any entity that may be dealt with as an indictable offence, a relevant summary offence, or a civil penalty of 60 penalty units or more.

The Exposure Draft Explanatory Statement asserts that the existing scope creates uncertainty about what types of unlawful activities may affect an entity’s registration.^v However, clarifying what constitutes unlawful activities should not involve expanding the scope. We contend that the amendment not only increases the type of unlawful activities, it introduces more legal ‘grey areas’ and creates greater uncertainty as to what constitutes unlawful activity that may affect registration. This is demonstrated by the fact that the Explanatory Statement includes examples of summary offences that are covered and those that are not, right down to specifying that “a summary offence such as an employee receiving a traffic infringement in the course of their employment” is excluded.^{vi} The provision of a five-page FAQ document, containing additional information and examples further highlights the unnecessary complexity introduced by this proposed amendment. Further, we do not consider the ACNC to be the appropriate body to determine whether an act is a summary offence for the purposes of governance Standard 3.

However, our greatest concern is the potential to limit our right to participate in or organise a protest. “Unlawfully gathering or remaining on land or in a building” is cited as the first example of a summary offence that constitutes unlawful activities that may affect registration.

If the Society was to engage in or support what it considers to be a legitimate protest action according to its charitable purpose, the Commission could take enforcement action for actions such as blocking a public area or failing to move on, or tweeting support through social media.

Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, Report and Recommendations

In December 2017, the Assistant Minister to the Treasurer established a Panel to undertake a review of the Australian Charities and Not-for-profit Commission Acts after the first five years of operation. The Panel’s final report, *Strengthening for Purpose*, made 30 recommendations addressing objects, functions and powers, the regulatory framework and red-tape reduction. The Panel’s consultation was extensive, having received 172 submissions and meeting with 215 stakeholders. In drafting its recommendations, the Panel was “conscious of the need to find a balance between red tape reduction, supporting a vibrant, innovative sector and public expectations of transparency, accountability and good governance.”^{vii}

The Explanatory Statement asserts that “this amendment aims to give the public greater confidence that a registered entity is governed in a way that is consistent with its purposes, and that it protects its assets, reputation and the people it works with.”^{viii} However, the Panel found that the ACNC’s current risk management approach (to misconduct) is appropriate, and that there does not appear to be significant or widespread risks which threaten public trust and confidence in the sector.^{ix}

Governance Standard 3 should be repealed or left as is without amendment

The Explanatory Statement provides no evidence as to why the proposed amendments are required.

In fact, other sources have found that governance Standard 3 should be repealed.

The Panel found that governance Standard 3 is not appropriate as a governance standard, as all registered entities must comply with all applicable laws. They concluded that 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.^x

The Australian Government did not support the Panel's recommendation to repeal governance Standard 3. In doing so, it did not address the points raised by the Panel but simply stated that it supports the ACNC having the power to take action to deregister an entity where serious offences have been committed.^{xi}

Further, no appeal or review process has been included in the amendment, thereby providing the Commissioner with power to deregister an entity should the ACNC consider that the entity has failed to take reasonable steps to ensure its resources have not been used to support acts that may be indictable or summary offences.

The amendment is not needed to manage alleged breaches of law that affect public trust, the assets of charities or the people they serve

The Australian Government's position fails to address the fact that substantial powers already lie with the ACNC and the Commissioner. Criminal law can be used to deal with instances where the law has been broken by a charity. And governance Standard 5, concerning the duties of responsible persons, can also be relied upon.

While the ACNC does not currently investigate every alleged breach of law by a charity, it does investigate serious offences (for example, fraud, money laundering or terrorist financing) that are likely to affect public trust and confidence and where this is necessary to protect the assets of the charity and the people it serves. This approach is sensible as it falls within the remit and skills-set of the ACNC. The ACNC currently does not investigate breaches of law or issues that other regulators or the police are better placed to handle, but it does work with those agencies where appropriate.^{xii}

We believe the Regulations do not require amendment and that the powers of the ACNC and Commissioner are sufficient to enable appropriate action to be taken should an alleged breach of law affect public trust and confidence, the assets of a charity or the public it serves.

The amendment is contrary to reducing red tape

The proposed amendment is also contrary to the Australian Government's priority to "ensuring charities face minimal red tape — freeing them to focus on serving the community."^{xiii}

The FAQ document states that all reasonable steps are to be taken to ensure that resources are not used (nor continued to be used) to promote or support any entity to engage in an unlawful activity where that unlawful activity, if undertaken by the charity itself, would result in a breach of Standard 3.^{xiv} Any entity includes any individual, organisation, group of persons, as well as a charity's volunteers and third parties (such as beneficiaries or donors). Resources include funds, responsible entities and employees acting in that capacity, websites, social media accounts and other publications, noting that this list is not exhaustive and could include other assets and property, such as mailing lists and land owned by the entity.

The Explanatory Statement either misunderstands the complexity or is down-playing the work involved when it states that "registered entities can meet this standard by adopting a common sense approach".

The Society's size and structure are complex, with a federated model that operates according to the principles of subsidiarity. This means that decisions are often made at various levels including by regional, central, state/territory and national councils. To implement processes that monitor all activities at all levels would be a significant impost and would absorb resources that could be used to assist those we serve.

Charity advocacy

The Society satisfies the *Charities Act 2013* definition of charitable purpose by 'advancing public debate' when working towards achieving our charitable purposes. In doing so, we can promote or oppose a change to any matter of law, policy or practice, as long as this advocacy furthers or aids another charitable purpose. We do not:

- engage in or promote activities that are unlawful
- engage in or promote activities that are contrary to public policy, or
- promote or oppose a political party or candidate for political office.

As a registered charity, we are bound by these requirements.^{xv} We do not agree that the amendment ensures that governance Standard 3 is more consistent with the disqualifying purposes set out in the *Charities Act 2013*.

Thank you for this opportunity to provide this submission. Please do not hesitate to contact me if you require further information.

Yours sincerely



Mr Toby O'Connor
Chief Executive Officer

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- ⁱ St Vincent de Paul Society. *The Rule. 7th Edition 2012*. Australia. Amended May 2014. Accessed at https://www.vinnies.org.au/icms_docs/168122_The_Rule.pdf
- ⁱⁱ Attorney-General's Department. International Human Rights System. Accessed at: <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>
- ⁱⁱⁱ Australian Human Rights Commission. Freedom of information, opinion and expression. With reference to the Human Rights Committee, UN General Assembly. Accessed at: <https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-information-opinion-and-expression#:~:text=The%20Australian%20Constitution%20does%20not,government%20created%20by%20the%20Constitution.>
- ^{iv} Australian Charities and Not for profits Commission. Regulation 2013 Select Legislative Instrument No. 22, 2013. Compilation No. 6. Para. Sub-division 45 B Governance Standards. 45.15 Governance standard 3— Compliance with Australian laws. Accessed at <https://www.legislation.gov.au/>
- ^v Exposure Draft Explanatory Statement. Australian Charities and Not-for-profits Commission Act 2012. Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021. p.1. Accessed at: <https://treasury.gov.au/consultation/c2021-149084>
- ^{vi} Exposure Draft Explanatory Statement. *ibid.* p.4
- ^{vii} Commonwealth of Australia. 2018. *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review. Report and Recommendations.* p.8. Accessed at: <https://treasury.gov.au/publication/p2018-t318031>
- ^{viii} Exposure Draft Explanatory Statement. *op. cit.* p.4
- ^{ix} Commonwealth of Australia. 2018. *op.cit.* p.47.
- ^x Commonwealth of Australia. 2018. *ibid.*
- ^{xi} Australian Government. 6 March 2020. *Government Response to the Australian Charities and Not For Profits Commission Legislation Review 2018.* Accessed at: <https://treasury.gov.au/publication/p2020-61958>
- ^{xii} Australian Government. ACNC. Governance standard 3: compliance with Australian laws. Accessed at: <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/3-compliance-australian-laws>
- ^{xiii} Australian Government. 6 March 2020. *op. cit.* p.5.
- ^{xiv} Australian Government. Unlawful activity — changes to the governance standards for charities FAQs. pp.3-4. Accessed at <https://treasury.gov.au/consultation/c2021-149084>
- ^{xv} Australian Government. ACNC. Charity advocacy. Accessed at: <https://www.acnc.gov.au/advocacy-charities>