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## **Introduction**

The University of Sydney Students' Representative Council (SRC) is the peak representative body for undergraduate students at the University of Sydney. As a registered charity, our purpose includes the provision of services and changes to matters of policy relating to University students. The SRC provides free services to undergraduate students. Specifically, we offer a free legal service that represents students in most matters, and a casework service that provides advice to students on matters of University policy. We also engage in activism and advocacy for students – organising protests, providing commentary and engaging in lobbying to change policy that we deem disadvantageous to our members. This submission outlines our reservations to the proposed changes to the *ACNC Governance Standard 3*.

### **Indeterminate and Unreasonable Compliance Burden**

The Regulations impose indeterminate and onerous standards which the SRC does not have the resources to ensure compliance with. Several Regulations requirements are too broad for organisations to be able to adopt processes, safeguards and controls to prevent and monitor infractions.

The Regulations capture an indeterminately wide scope of activity. They require organisations to monitor all use of their resources by any entities, even when they are not employees, volunteers or affiliates. This may include activities and entities which the organisation has no control over and no capacity to predict. Indeed, it also captures activities which bear no relationship to the organisation's own activities or purpose. The SRC's resources, especially its websites, social media accounts and publications, are intended for use by all University of Sydney students, who number upwards of 70,000. Many of these students travel overseas or interstate on a regular basis. Students engage with the SRC through a wide variety of social media forums, including Facebook groups where students have the capacity to make their own posts and comments. As a diverse and changing group, students are involved in a variety of political and social activity which the SRC does not have a mandate, or resources, to monitor.

This is further complicated by the unpredictability of when certain activity will be declared unlawful. Police have wide discretion in enforcing the law during protests and even rigorous attempts to comply with relevant restrictions are often unsuccessful. In September 2020, socially distanced groups of less than 20 students were

the subject of Public Health Order-related fines and arrests despite previous assurances by police that the planned demonstrations complied with the Order. At a demonstration in October 2020, students were issued fines for not complying with a move on order which they did not hear being issued. The volatile nature of protest policing means that there are no reasonable steps the SRC can take to ensure the legality of demonstrations promoted through its resources.

The indeterminate liability created by the Regulations imposes an unfair and unrealistic burden on organisations seeking to comply with the notification requirements related to Governance Standard 3. Charities are required to notify the ACNC Commissioner of ‘significant non-compliance’ under s65-5 of the Act. The SRC does not have the resources to monitor the wide scope of potential activity described above in order to capture potential non-compliance. Neither does it have a means of determining when ‘significant non-compliance’ requiring Commissioner notification has occurred. No guidance regarding the meaning of ‘significant non-compliance’ has been provided by the ACNC. The variety of activities students engage in and their geographical spread means that there are potentially thousands of summary offences which the SRC would have to include in its monitoring processes in order to fulfil the requirement.

*Case study:* A student posts in one of the SRC Collective Facebook groups to promote an upcoming non-SRC-affiliated demonstration they are attending in Victoria. At the demonstration, an unclear move on order is issued, and the police arrest some participants for failing to obey the move on order. The protestors’ activity may be dealt with as a summary offence related to unlawfully remaining on land. The SRC is potentially in breach of the Regulation for not removing the initial post or for failing to notify the Commissioner about the incident.

### **Advocacy and the Charitable Purpose**

The Regulations also compromise the ability of the SRC to fulfil its charitable purpose, as an organisation that advocates on behalf of all Undergraduate students at the University of Sydney, but also students as a social group. In the media release accompanying the draft bill, the Assistant Minister for Charities signalled his intention to curtail the activities of “activist organisations masquerading as charities”. From the point of view of the SRC, the distinction between activist organisations and charities is a spurious one.

The *Charities Act 2013* defines a broad set of activities that can constitute a charitable purpose. Notably s 12(1) explicitly allows “promoting or opposing a change to any matter established by law, policy or practice” (j) as a charitable purpose, alongside more ‘traditional’ charitable purposes such as health (a), education (b) and religion (d). Therefore, at the level of statute, the distinction between a legitimate charity and an activist organisation is

already dubious. In practice, the distinction is even harder to make. The SRC is a symptomatic case of a charity whose provision of services and whose charitable work is directly complemented by activist and advocacy work. The SRC provides assistance to struggling students by providing a free casework service and a free legal service. In many cases, the issues that students face are systemic, and solutions to these issues require protest and the mobilisation of students. As an example, a student is unable to meet their study requirements because they are evicted from their home for rental arrears. The casework service may assist the student through special considerations; however the source of the problem lies in their eviction. Thus, the SRC may hold a demonstration calling for greater rental assistance or changes to tenancy law.

As has been outlined in the previous section, the Regulations expose the SRC to potentially indeterminate liability and impose compliance requirements that could not reasonably be fulfilled. The consequence of this unreasonable compliance burden would be twofold. In the first instance, it would deter the SRC, its staff, officers and volunteers from engaging in any advocacy involving protest, due to the fear that an unpredictable summary offence would be committed and therefore liability would accrue to the SRC. Indeed, the SRC Legal Service often provides information and assistance to protestors, including information relating to protest law and rights with police. If this were to be construed by the commissioner as a “failure to take reasonable steps”, it may prevent the SRC Legal Service from providing this information to students in the first place. Secondly, and in the instance that the SRC did engage in protest and advocacy, the Regulations would place an unreasonable cost (both financially and in terms of labour) to ensure that the SRC was compliant. In both instances, the charitable purpose of the SRC is impeded. In the first instance, our advocacy efforts are hampered. In the second instance, resources are directed away from our provision of services.

The proposed Regulation will also have detrimental impacts for the SRC’s freedom of speech and freedom of political communication. With respect to freedom of speech, the SRC publishes *Honi Soit*, the only weekly student newspaper in Australia. The Regulation would require Honi to refrain from publishing anything supporting or promoting demonstrations at which illegal conduct may occur, otherwise the SRC could be deemed to have failed to take reasonable steps. Moreover, the SRC itself would be restricted from promoting or endorsing protests that align with its advocacy, thereby preventing an exercise of the freedom of political communication.

Case study: The University announces major cuts to faculty funding which will impact the quality of education and support students receive. A group of students organise a protest, at which some of them occupy a University building for a period of two weeks. During the occupation, Honi Soit publishes articles from several students discussing the protest, with some students stating their support of the protestors’ actions. The SRC is potentially in breach of the proposed Regulation for publishing material that supports an unlawful occupation of land.

### **Procedural fairness and inappropriate discretion**

In the SRC's judgement, in conjunction with the Commissioner's existing enforcement powers, the proposed amendment to Governance Standard 3 grants to the Commissioner an inappropriate degree of discretion to revoke a charity's registration on the basis of unduly subjective assessments. The Commissioner has the power to revoke charity registration if they believe it is 'more likely than not' that the registered entity will not comply with Governance Standard 3. Under the proposed amendments, the Commissioner can exercise this power in respect of any act that 'may be dealt with' as a summary offence relating to property or personal injury. Together, these create an unacceptably low threshold for the exercise of the Commissioner's deregistration power.

Noting the indeterminacy of liability elaborated on above (and especially the infeasibility of Charities predicting their resources would be used in the commission of a relevant summary offence) charities will be denied procedural fairness in the exercise of the Commissioner's existing enforcement powers in regard to the proposed amendments to Governance Standard 3. This is because a fair hearing could not practically be given to charities that are made to show cause as there would be no practical way for them to answer to a suspicion that it is 'more likely than not' the charity will not comply with Governance Standard 3 in the future if they themselves are unable to determine the likelihood of such an occurrence.

In particular, the SRC is concerned that its strong focus on and continual involvement in advocacy could mean that the Commissioner could decide it would 'more likely than not' breach Governance Standard 3, without evidence of an actual breach (or, potentially, with evidence of previous events that may have been considered by the Commissioner but were not found to have resulted in a breach). This presents a problem of indeterminate and disproportionate liability for the SRC and other charities.

Likewise, in acting on a belief that a charity will fail to prevent its resources being used in the commission of a summary offence in the future, the Commissioner would be making a highly subjective assessment on an inherently speculative matter. This is especially the case given the enforcement power requires the lowest possible standard of probability ('more likely than not'). In the SRC's view, the guarantee in the Explanatory Statement that charities would "generally have the opportunity to present their case, consistent with the rules of procedural fairness and current practice," before the Commissioner decides to exercise their enforcement powers, does not alleviate the subjectivity of the criteria used to make that decision.

Case study: At the blockade of a proposed coal mine, a protestor (who is not a student) locks onto the mining equipment to prevent the operation from continuing. The USyd Environment Collective publishes resources and statements about the importance of stopping coal mining and references the blockade as an example of direct action to achieve this goal. The Commissioner may determine that it is more likely than not that the Environment Collective will not comply with Governance Standard 3, as discussion of direct action is key to the environmental movement and such discussion supports acts that may be dealt with as summary offences.

### **Acknowledgements**

This submission was made possible due to the efforts and contributions of the following people and organisations: Anastasia Radievska, Roisin Young Murphy, Max Vishney, Priya Gupta, Jeffrey Khoo, Elinor Stephenson, George Woodhouse, Simon Rice, the Human Rights Law Centre and the National Justice Project.