

12 March 2021

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via email: charitiesconsultation@treasury.gov.au

Attention: Michael Atfield

Dear Senior Advisor

Unlawful activity - changes to the governance standards for registered charities

Thank you for the opportunity to make a submission on the draft legislative instrument and explanatory materials for changes to Governance standard 3 (the standard) in the Australian Charities and Not-for-profits Commission Regulation 2013.

UnitingCare Australia is the national body for the Uniting Church's community services network and is an agency of the Assembly of the Uniting Church in Australia. We give voice to the Uniting Church's commitment to social justice through advocacy and by strengthening community service provision. Our commitment to the principles of social justice is grounded in our Christian faith and guided by the principles of fairness under the law.

We are one of the largest networks of social service providers in Australia, supporting 1.4 million people every year across urban, rural and remote communities. We focus on articulating and meeting the needs of people at all stages of life and those that are most vulnerable.

We believe that the proposed amendments to the standard as set out in the exposure draft represent significant regulatory overreach and recommend that these amendments be withdrawn.

Currently Governance Standard 3 - Compliance with Australian laws, states that a registered entity must not engage in conduct, or omit to engage in conduct, if the conduct or omission may be dealt with:

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

The object of this 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.

The exposure draft explanatory statement, states that the purpose of the proposed amendments is to “*address uncertainty about when engaging in or promoting certain kinds of **unlawful activity** [emphasis added] may affect an entity’s entitlement to registration under the Act.*”

Prior to examining the proposed amendments, it is worth noting that in the report *Strengthening for Purpose: The Australian Charities and Not-for-profits Commission Legislation Review*¹ the panel concluded that Governance standard 3 should be repealed, stating:

“Governance standard 3 is not appropriate as a governance standard... 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.

Given the definitive position of the panel on the problems with the operation of the standard it is curious that the Government would see fit to expand its reach. Further, given the significant implications of the proposed amendments on the broader charity sector we believe that the exposure draft should outline a stronger justification for these changes, including the nature of the mischief being addressed by the proposed amendments.

The proposed changes outlined in the exposure draft add to, rather than clarify, the regulatory uncertainty surrounding the operation of the standard. They extend the powers of the ACNC Commissioner to deregister a charity and, in our view, have the potential to capture charities who carryout legitimate advocacy activities.

Schedule 1 of the Exposure Draft Amendments (subsection 45.15(2)) seeks to amend the current wording within the standard by substituting “*engage in conduct*”, with “*do an act*”. We view this proposed change as significant and material to the threshold test of whether a charity has breached the standard, notwithstanding that the proposed amendment seeks to reflect *Division 300-5 of the ACNC Act 2012*.

We regard the expression “engage in conduct” to be more than a single action or activity and to include a pattern of activities or actions. Such an interpretation would be consistent with the law as it applies to disqualifying purposes as defined in the *Charities Act 2013*, (Division 3, Section 11 (a)) which states that disqualifying purpose means:

*the purpose of engaging in, or promoting, **activities** [emphasis added] that are unlawful or contrary to public policy*

Applying a “single act/omission” test for summary offenses which could lead to the revocation of an entity’s charitable status is, in our view, regulatory overreach. This is overreach if further compounded by the powers provided to the Commissioner under Section 35 (10) of the *ACNC Act 2012*. Under this provision:

*The Commissioner may revoke the registration of a registered entity if the **Commissioner reasonably believes** [emphasis added] that any of the following conditions are met:*

¹ *Strengthening for Purpose: The Australian Charities and Not-for-profits Commission Legislation Review*, The Treasury, May 2018 p56

(c) (iii) the registered entity has not complied with a governance standard or external conduct standard, or it is more likely than not that the registered entity will not comply with such a standard;

In our view it is unreasonable for the Commissioner to have the power to revoke the charity status of an entity based on a single act or omission. We believe that there must be a pattern of activities or conduct which demonstrates that the entity's purpose has changed to that of engaging in, or promoting, activities that are unlawful or contrary to public policy before its charitable status is revoked.

We remain similarly concerned with the proposed amendment at section 45.15(3) where:

A registered entity must take reasonable steps to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions by any entity that may be dealt with as described in paragraph (2)(a), (aa) or (b).

The explanatory memorandum states that an entity will generally meet this standard by adopting a "common sense approach". These words seek to offer some assurance that compliance with the standard is relatively straightforward. The broad scope and nature of the activities undertaken across the charities sector, together with its mix of professional and volunteer management structures will make the test of what are "reasonable steps" difficult to administer and cause further uncertainty for the sector. Such a test in the context of the significant concerns with the standard itself (as outlined in the *Strengthening for Purpose: The Australian Charities and Not-for-profits Commission Legislation Review*) together with the effects of the other amendments outlined in the exposure draft creates further uncertainty.

Finally, we are concerned that the construction of the amendments to the standard creates vicarious responsibility for the entity for an act or omission by others. That is, should the charity fail to take reasonable steps to ensure that its resources are not used to promote or support the proscribed acts, it will be attributed the faults of those other entities.

We have significant reservations about the amendments outlined in the exposure draft with regard their application and impact on charities such as UnitingCare Australia, the Uniting Church and its other agencies. Such changes are a further step away from judging a charity's purpose toward judging charities for discrete actions by individual employees or officers. We believe the proposed changes outlined in the exposure draft are bad law and should be withdrawn.

Your sincerely



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