



# **Hands Off Our Charities alliance submission to Treasury re the *Australian Charities and Not-for-profits Commission Regulations 2022***

12 August 2022

## **About the Hands Off Our Charities (HOOC) alliance**

Hands Off Our Charities (**HOOC**) is an alliance of over 120 charities, which formed in 2017 in response to a number of bills which would have silenced charities on issues of national and public importance.

The vision of the alliance is of a thriving sector, where charities are empowered to advocate for lasting change in pursuit of their charitable purposes.

Together, the members of HOOC represent millions of Australians concerned with a wide range of issues, including: education; social welfare; human rights; international development; animal welfare; the environment; health; climate change; disability rights and philanthropy. Our organisations, the issues on which we work, and the communities that we represent are diverse, but we all share a fundamental commitment to serve the public interest.

For a full list of member charities please see our website <https://hooc.org.au/about-us>.

The alliance would like to thank the Treasury for the opportunity to provide a submission on the exposure draft of the *Australian Charities and Not-for-profits Commission Regulations 2022* (**proposed regulations**).

## **Summary**

The Hands Off Our Charities alliance recommends that Governance Standard 3 is removed from the remade *Australian Charities and Not-for-profits Commission Regulations 2022* as a redundant provision. This is in line with the recommendation of the 2018 ACNC Legislation Review.

Registered entities already have to comply with all applicable laws. And in recent years Governance Standard 3 – including the proposed amendments in 2021 – has been deliberately used to silence charities from having a voice on important public policy issues.

If the government or external stakeholders identify that there is a clear and legitimate need for a mechanism to allow the ACNC, as part of its purpose of protecting the reputation of the sector, to address genuine and serious misconduct by charities, this should be done through a more



targeted approach that does not risk unduly impacting the ability of a charity to engage in advocacy in pursuit of its charitable purpose.

## Context

The proposed draft regulations largely replicate the existing *Australian Charities and Not-for-profits Commission Regulations 2013*, which expire in April 2023. While the Treasury has indicated a preference to consider substantive changes outside of this current remake of the regulations, the purpose of the sunset provisions is to ensure that the regulations are periodically reviewed.

The short timeframe to remake the regulations presents a challenge because of the difficulty of undertaking adequate consultation on substantive changes. However, significant consultation on the ACNC Regulations has already been undertaken through the 2018 ACNC Legislation Review, where a number of recommendations were put forward, including on the suitability of Governance Standard 3. As such, the remake of the current ACNC Regulations presents an opportunity for the new Government to consider implementing the recommendations of 2018 ACNC Legislation Review.

The HOOC alliance is strongly supportive of the role of the ACNC in protecting and enhancing public trust and confidence in the sector. However, we believe that Governance Standard 3 is too broad and imprecise in its scope, creating an unnecessary threshold for the conduct of charities that is not imposed upon other types of organisations, including corporations. As a result, Governance Standard 3 has a silencing effect on legitimate and lawful advocacy by charities. It is our view that the serious misconduct for which Governance Standard 3 was created can be more effectively addressed through other means.

Governance Standard 3 stipulates 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.

Under s.35-10 of the Act, the Australian Charities and Not-for-profits Commissioner (**ACNC Commissioner**) is empowered to deregister a charity if they reasonably believe:

- i. a charity has not complied with a governance standard; or
- ii. it is more likely than not that the charity will not comply with a governance standard.

The ACNC Commissioner may decide to exercise other enforcement powers instead of deregistering a charity, which includes: issuing a warning; issuing directions to do an act or



refrain from doing an act;<sup>1</sup> and suspending or removing one or more directors.

## Concerns

The HOOC alliance has a number of concerns with Governance Standard 3.

### 1. It provides the Commissioner an inappropriate amount of discretion to take enforcement action

Currently, the ACNC Commissioner can revoke a charity's registration if they reasonably believe a charity "is more likely than not" to breach a governance standard at some future time.<sup>2</sup>

What's more, Governance Standard 3 is written in a way that means there doesn't even need to be a conviction for the Commissioner to take enforcement action, it only needs to be an act that "may be dealt with" as an offence.

This breadth of discretion is inappropriate for a regulator to possess— the current laws place the ACNC Commissioner in the position of a *de facto* enforcement and judicial agency for thousands of offences on the statute book. This is not in line with the purposes of the ACNC as stated in the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)*.

### 2. Charities are already subject to all applicable laws

The consequence of Governance Standard 3 is that charities face serious sanction, including potentially deregistration, in a way neither for-profit corporations nor political parties do. Charities could potentially be deregistered for committing — or being deemed "likely" to commit — an offence of 60 penalty units or more. Charities, just like individuals and other entities, have to comply with the law. These regulations add additional, disproportionate sanctions of deregistration on top of criminal penalties.

### 3. Governance standard 3 undermines the Charities Act 2013 by turning the purpose test into an activities test

Charities, by law, exist to serve the public interest and to pursue our charitable purposes. Under existing law, we cannot operate for the disqualifying purpose of engaging in or promoting activities that are unlawful or against public policy.

To be consistent with the *Charities Act 2013 (Cth)* (**Charities Act**), charities should not be deregistered for committing an offence unless that offence demonstrates the charity's

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<sup>1</sup> Failure to comply with directions is a further offence: s. 85—30 of the *Australian Charities and Not-for-profit Commission Act 2012 (Cth)*.

<sup>2</sup> Subsection 35-10(1)(c)(ii) *Australian Charities and Not-for-profits Commission Act 2012 (Cth)*.



**purpose** is unlawful. As much is made clear on the ACNC's website:<sup>3</sup>

In order to determine the 'purpose' of a charity, the ACNC will look at the charity's governing rules, its activities, any material published by the charity, and any other relevant matter. A 'one-off' activity is unlikely to demonstrate a purpose of promoting or engaging in that activity.

The inclusion of Governance Standard 3 in the regulations, by exposing charities to deregistration for a single unlawful act, further undermines the standard set by the *Charities Act*.

#### **4. It has a silencing effect on legitimate advocacy, which is not conducive to a healthy democracy**

Charities provide a vital means for ordinary Australians to be heard in national public policy debates. Every year, millions of Australians choose to make their voices heard on issues they care about by joining, donating to, or otherwise supporting, charities. In addition, charities that work on the frontlines, for example, of climate change, domestic violence and homelessness, offer a wealth of expertise in public debate and policy development. Charities, through articulating the views of their supporters, make a critical contribution to effective democratic government in Australia.

Sometimes, our advocacy may include supporting public actions to draw attention to pressing societal issues, whether it be marching against the death of Aboriginal and Torres Strait Islander people in custody, or rallying to demand the end of gender-based violence in Australian politics.

Recently passed laws criminalising peaceful protest in NSW<sup>4</sup> and Victoria<sup>5</sup>, and similar proposed laws in Tasmania<sup>6</sup>, mean that charities could contravene Governance Standard 3 by engaging in protest-related advocacy in pursuit of their purpose as these laws or proposed laws include penalties of 60 penalty units or more.

The regulations disproportionately impact charities that represent people who are locked out of traditional mechanisms for advocacy such as media and lobbying, and are often forced to rely on protest to communicate their views on national policy issues.

Last year changes were proposed to Governance Standard 3 by the previous government, changes that would have further limited the ability of charities to speak up and advocate on the

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<sup>3</sup> <https://www.acnc.gov.au/charity-advocacy>

<sup>4</sup> <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3963>

<sup>5</sup> <https://www.legislation.vic.gov.au/bills/sustainable-forests-timber-amendment-timber-harvesting-safety-zones-bill-2022>

<sup>6</sup> [https://www.parliament.tas.gov.au/Bills/current/15\\_of\\_2022.html](https://www.parliament.tas.gov.au/Bills/current/15_of_2022.html)



issues on which they work.<sup>7</sup> We believe Governance Standard 3 should be removed so that future governments cannot use it as a means to silence charitable advocacy.

**5. The Governance Standard is not needed to protect and enhance public trust in the sector. If the ACNC needs further mechanisms to address serious misconduct then the Treasury should develop more targeted mechanisms in consultation with the sector.**

Many of the issues that Governance Standard 3 purportedly deals with could be dealt with using the other Standards. For example, if a charity has systematic issues that are leading to serious misconduct and law breaking, that could be dealt with by Governance Standard 5. If minor amendments to Governance Standard 5 are needed to make clearer that compliance with Australian laws is related to the duties of Responsible Persons, then this should be considered as part of the review.

## Conclusion

Governance Standard 3 has had a chilling effect on vital advocacy by the charity sector. As stated by the 2018 ACNC Legislative Review Panel,

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.<sup>8</sup>

The remake of the ACNC Regulations provides an opportunity to address the impact of this Standard on charitable advocacy by adopting the recommendation from the 2018 ACNC Legislation Review and repealing Governance Standard 3. There is no need for any further delay in removing a provision that unreasonably fetters public policy debate in our democracy.

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<sup>7</sup><https://theconversation.com/the-government-is-clamping-down-on-charities-and-it-could-have-a-chilling-effect-on-peaceful-protest-163493>

<sup>8</sup> <https://treasury.gov.au/publication/p2018-t318031>