

Briefing Paper



About this paper

This briefing paper updates Anglicare Australia Network members on changes being considered by the Federal Government to the regulation of charities. The proposed changes would mean that charities could be deregistered, warned, or have board directors suspended over “summary offences.” These offences could be committed, or presumed to be committed, by staff members, volunteers, or people purporting to represent the charity. Many summary offences would be covered by this change, spanning from those commonly prosecuted in protests, such as trespass or blocking traffic, to fundraising, electoral and work health and safety laws.

If enacted, these changes would target charities in a way unparalleled in the business or private sector. Like everyone else, charities and our staff already face penalties for breaking the law. We also face additional sanctions under existing charities law. Corporations have no equivalent.

Taken together, the proposed changes would:

- restrict legitimate and lawful policy advocacy;
- leave a charity at risk of deregistration if any of its staff commits a minor offence;
- leave a charity at risk of deregistration if the Commissioner thinks they are “likely” to one day breach these rules (even if they haven’t actually done so);
- produce an enormous amount of red tape by requiring charities to keep records of the steps they’ve taken to comply with the law at large, in every State, Territory and federally.

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Overview of proposed changes

Changes to guidelines that regulate charities

The Government is seeking to expand the powers of the Australian Charities and Not-for-profit Commission (ACNC) under the [Australian Charities and Not-for-profit Commission Regulations 2013](#) (the Regulations). The proposed changes would broaden Governance Standard 3, which currently says that a charity must not engage in conduct, or omit to engage in conduct, that can be dealt with as an indictable offence or attract a fine of over \$13,320. This standard was recently the subject of a review, which concluded that existing Governance Standard 3 is not appropriate and should be repealed in its entirety. The Review found that it is not the ACNC's role to investigate offences but rather to focus on charity governance.

The proposed changes expand Governance Standard 3 by adding “summary offences” relating to property or a person.ⁱ Summary offences are usually less serious offences, which can be heard by a judicial officer in the Magistrates' Court rather than by a judge or jury. Examples of summary offences include road traffic offences such as careless or dangerous driving and driving under the influence of alcohol or drugs; minor property damage; disorderly behaviour; and [similar offences](#).

There are a great many summary offences that would be covered by this change, spanning from those commonly prosecuted in protests, such as trespass or blocking traffic, to fundraising, electoral and work health and safety laws.ⁱⁱ These summary offences vary in each State and Territory depending on laws in each jurisdiction.

The changes would also add a new requirement for charities to “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.” This will also apply to indictable and summary offences and offences with fines over \$13,320. Resources could include funds, employees, websites, social media accounts, and other publications.

These changes are important because under section 35-10 of the [Australian Charities and Not-for-profit Commission Act 2012](#), the ACNC Commissioner is empowered to deregister a charity if they believe a charity has not complied with a Governance Standard. Worryingly, the Commissioner can also deregister a charity if they consider it *more likely than not* that the charity will not comply with a Governance Standard. The Commissioner could also decide to exercise other enforcement powers instead of deregistering a charity, such as suspending or removing one or more directors from the charity, appointing new directors to fill their place, or issuing directions to the charity to take an action, or directing them to refrain from an action.ⁱⁱⁱ A decision by the ACNC Commissioner can be appealed to the Administrative Appeals Tribunal.

Changes to financial disclosures on political advocacy

The Government is also considering changes to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act. This stems from the Joint Standing Committee of Electoral Matters' recent *Report on the conduct of the 2019 federal election and matters related thereto*, which recommends lowering the threshold for becoming a political campaigner from \$500,000, to \$100,000 in electoral expenditure. This relates to spending on activities to influence political decisions ahead of elections.

Anglicare Australia's concerns

Charities could be deregistered even if they haven't committed an offence

Under the proposed changes to the ACNC Regulations, charities don't need to have engaged in any unlawful conduct to be deregistered. They may merely fail to take reasonable steps to ensure resources are not used to that end.

It's also enough if the activity concerned "may be dealt with" as a summary offence in the opinion of the Commissioner – that is, no conviction or arrest needs to have taken place.

Charities could be deregistered not because of what they have done, but because of what they one day might do

The Commissioner can revoke registration if they consider it "more likely than not" that a prohibited act will occur in the future. That means deregistration can occur before any action has taken place.

Charities could be deregistered for very minor offences, including for inadvertent acts

Deregistration can occur if employees or officers accidentally or inadvertently commit minor summary offences. There is no need for intent to be established and the act need have no relationship to the charity's activities or purpose.

The ACNC Commissioner has broad discretion in deciding whether to deregister a charity

In deciding whether to revoke a charity's registration, the ACNC Commissioner must take account of a number of matters,^{iv} including the:

- a. nature, significance and persistence of the non-compliance;
- b. the extent to which the charity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector; and
- c. the welfare of members of the community that receive direct benefits from the registered entity.

Each of these involves a highly subjective assessment.

The Commissioner will be required to investigate and make decisions on summary offences and then decide on punishment under the Act.

Charities could be deregistered for failing to keep adequate records about their compliance with Governance Standard 3

The breadth of the proposed Governance Standard 3 creates a significant risk that a charity could be penalised for failing to document steps taken to ensure compliance with Governance Standard 3.^v A failure to keep such records can be a basis for deregistration.

Charities could be penalised for not notifying the ACNC Commissioner of “significant” non-compliance with Governance Standard 3

Charities are required to notify the ACNC Commissioner of “significant” non-compliance with a Governance Standard under section 65-5 of the ACNC Act. It will be very difficult for charities to assess whether non-compliance with such a broad standard is sufficiently “significant” to be brought to the ACNC Commissioner’s attention. There are thousands of summary offence provisions in legislation across Australia.

What this means for Anglicare Australia Network members

The breadth of both the proposed changes and the ACNC Commissioner's discretion makes it impossible to say definitively what conduct is safe and what will see your organisation liable to be deregistered.

We consider a number of situations below where charities could be deregistered by the Commissioner. It is important to remember that in each of these examples, it is not necessary for charges to be laid or legal action to be taken – it is enough that the activity *could* be dealt with as a summary offence. Many of these are taken from real-life examples.

Supporting or promoting a protest

These changes would mean your agency could expose itself to deregistration every time you speak in support of, or promote, a protest, panel, or even an event that's attended by activists. This is particularly the case for "unauthorised protests", where there is no legal protection from arrest for minor offences like blocking a footpath or road. Even at authorised protests there is a risk someone may enter private property (trespass).

Example: The CEO of an Anglicare Australia member agency speaks at an event in front of the Aboriginal Tent Embassy highlighting the high rate of removal of Aboriginal and Torres Strait Islander children from their families. Some attendees stand in the way of the entrance to the Old Parliament House building site. In a further breach, a member of the agency's staff Tweets in support of the event.

Deregistration based on subjective judgements

The Commissioner can revoke registration if they consider it "more likely than not" that a prohibited act will occur in the future. Alternatively the Commissioner could issue a warning to your organisation, or stand down members of your board and appoint replacement directors.

Example: After the event at the Aboriginal Tent Embassy featuring one member agency, other Anglicare Australia members are considered "more likely than not" to engage in similar offences in future.

Failing to take reasonable steps to stop your resources being used to promote or support a minor offence

Your organisation could also face deregistration for failing to take steps to stop your resources from being used in a protest. Any publication constituting promotion or support for relevant acts would be a breach.

Example: GetUp! and the Australian Unemployed Workers Union use Anglicare Australia's Jobs Availability Snapshot when promoting a protest to abolish JobActive.

In addition, there is a positive obligation to ensure resources are not used to promote or support acts that *may* be dealt with as a minor offence. You can fall foul of this even if no offence occurs.

Example: Your staff create a Slack channel bringing together other organisations and anti-poverty advocates to raise the rate of JobSeeker. Some group members discuss a campaign tactic to gather protesters inside a Centrelink office on the Slack channel.

Inadvertent breaches of summary offences, or crimes committed by employees

Your organisation could be deregistered if an employee inadvertently commits a summary offence, even if entirely unrelated to the charity's purpose.

Example: A member of your organisation's staff, wearing your organisation's uniform, attends a local protest and obstructs traffic.

Supporting or promoting protesters, whistleblowers and journalists who find themselves on the wrong side of the law

Charities may not be able to provide helpful advice on rights and responsibilities to those who engage in civil disobedience or to whistleblowers.

Example: A member of your team provides assistance to a journalist and a whistleblower who are involved in exposing the conduct of private debt collectors working on behalf of Centrelink.

Failing to keep adequate records of steps taken

Your organisation will need to have systems, and a document trail, to **prove** your charity has taken "reasonable steps to ensure" resources are not used to "promote or support" a wide range of acts and omissions. Every State and Territory has legislation setting out summary offences, and your resources could be used in **any** jurisdiction regardless of where you are based.

You will need to develop policies and procedures, including a document trail, which can be relied upon to prove it has taken reasonable steps to ensure it does not promote or support relevant acts. This work has to be done in the face of the extremely vague and uncertain terms of the proposed amendments.

Expanding powers that should be abolished altogether

The proposed changes directly contradict the findings of the Government's recent review of the ACNC legislation undertaken by Patrick McClure AO in 2018. That review concluded that the existing Governance Standard 3 is not appropriate and should be repealed in its entirety, because 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."^{vi}

In short, the review found that the ACNC Commissioner should be focused on the governance of charities, rather than investigating hypothetical, future offences by charities' employees. The Commissioner should regulate charity law, and the police should investigate criminal laws.

Rather than acting on McClure's recommendation to abolish these powers, the proposed changes are a sweeping expansion.

Possible changes to electoral financial disclosures

In addition to the ACNC Regulations, the Government is also considering changes to electoral financial disclosures. This will mean that some charities will be labelled 'political campaigners' by the Australian Electoral Commission, casting their advocacy work in a partisan light. It is very unlikely that these changes will affect Anglicare Australia members, but it is not inconceivable – especially in light of current expenditure on campaigns to make aged care and housing election issues.

Example: An Anglicare Australia member agency spends \$90,000 on the Australian Aged Care Collaboration campaign; \$5,000 on the Everybody's Home campaign; and another \$5,000 on scorecards rating housing election policies. This puts them above the \$100,000 electoral expenditure threshold, and they are forced to become a 'political campaigner' by the Australian Electoral Commission.

Anglicare Australia's position and next steps

In our submission on the ACNC Regulations, Anglicare Australia argued that the changes would undermine our ability to advocate on issues relating to our charitable purpose, and ultimately, hurt our ability to advance our mission. They unfairly target charities and impose regulations that would be unthinkable for businesses.

The stated aim of these changes is to target unlawful activity. However, in Anglicare Australia's view, most of the proposed changes do not relate to unlawful activity. The proposals largely relate to hypothetical future offences, staff and volunteer protest, and worse still, subjective judgements about whether a charity might engage in unlawful activity in the future.

It is our view that the proposed changes serve no useful purpose, with all reviews of the charity sector in the past fifteen years showing widespread compliance. Instead they will create uncertainty and impose a large administrative burden on charities.

If passed, all charities will need to comply with the ACNC Regulations, regardless of how politically unlikely it is at present that they will be used to target the Anglicare Australia Network. Members will need to seek legal advice on an enormous number of summary offences across each State, Territory and federally, and ensure that the issues raised by the Regulations are discussed at the board-level.

We are particularly concerned about the impact of these changes on small members. They will place an enormous administrative burden on these already stretched organisations, who will need to take the same steps to comply as larger organisations.

In our submission, Anglicare Australia called on the Government to withdraw these proposals in their entirety. Our view is that charities should only be deregistered for committing offences which demonstrate that the charity's *purpose* is unlawful. Other offences can be appropriately handled through other aspects of the legal system, as is the case for businesses and other entities.

Anglicare Australia is also calling for electoral disclosure thresholds to remain unchanged, and for the 'political campaigners' category to be renamed 'large third-parties.' Given the recent tendency to cast charity advocacy as electioneering, formally labelling charities as 'political campaigners' would be particularly harmful.

We are advancing all of these issues individually and through the Hands Off Our Charities alliance. We will notify members of the status of the proposed changes and if necessary, provide members with advice on steps they can take to comply.

ⁱ Note that the FAQs published by the Government are misleading in terms of how the summary offences are confined. The actual wording is very broad and vague in its ambit.

ⁱⁱ There is currently a note below subr. 45.15(2) of the *Australian Charities and Not-for-profit Commission Regulations 2013* which indicates that “serious” offences could lead to enforcement action under the Act. The status and impact of this note is currently unclear, and will appear redundant should these amendments be made.

ⁱⁱⁱ Failure to comply with directions is an offence under the Act: s. 85-30 of the *Australian Charities and Not-for-profit Commission Act 2012*.

^{iv} Subsection 35-10(2) of the *Australian Charities and Not-for-profit Commission Act 2012*.

^v Section 55-5 of the *Australian Charities and Not-for-profit Commission Act 2012*.

^{vi} The Treasury (2018) Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018.