



care DIGNITY
respect
change HOPE

**Submission on proposed
changes to the
governance standards for
registered charities**

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www.anglicare.asn.au

About Anglicare Australia

Anglicare Australia is a network of independent local, state, national and international organisations that are linked to the Anglican Church and are joined by values of service, innovation, leadership and the Christian faith that every individual has intrinsic value. Our services are delivered in partnership with people, the communities in which they live, and other like-minded organisations in those areas. With a combined income of over \$1.94 billion, a workforce of over 11,000 staff and 6,000 volunteers, the Network delivers more than 50 service areas in the Australian community. Our services are delivered to over 474,00 people and reach close to 1.37 million Australians in total. In all, Anglicare services reach over 1 in every 19 Australians.

As part of its mission the Anglicare Australia Network “partners with people, families and communities to provide services and advocacy and build resilience, inclusion and justice.” Our first strategic goal charges us with reaching this by influencing “social and economic policy across Australia with a strong prophetic voice; informed by research and the practical experience of the Network.”

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Introduction

Anglicare Australia welcomes the opportunity to provide a submission to the consultation on *unlawful activity - changes to the governance standards for registered charities*.

Anglicare Australia supports transparency and good governance for the sector, and as such we have been a strong supporter of the Australian Charities and Not-for-profits Commission (ACNC) since its inception. We note that the Productivity Commission has previously found that the sector is well-governed and enjoys a very high level of trust throughout the community.ⁱ This trust does not seem to be reflected in the proposed changes, or in the assumptions that underlie them.

The stated purpose of these changes is to target unlawful activity. However, most of the proposed changes do not relate to unlawful activity. The substantive changes 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, particularly considering Productivity Commission findings which show widespread compliance across the charity sector.ⁱⁱ Instead they will create uncertainty and impose a large administrative burden on charities. They are also likely to be unlawful, and will be vulnerable to legal challenge.

It is particularly telling that proposals which would deliver complex, far reaching changes to the regulation of Australian civil society have not been subject to a full regulatory impact statement. It seems that it is government accountability, rather than sector accountability, that should be under question.

Anglicare Australia believes that the proposed regulations are too flawed to be resolved by amendments. We recommend they be withdrawn in their entirety.

Our concerns

The proposed amendments will broaden governance standard 3 in the Australian Charities and Not-for-profit Commission Regulations. Governance standard 3 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. Such conduct could attract a fine. This standard was recently the subject of a government-commissioned review, undertaken by Patrick McClure AO in 2018. That review concluded that existing governance standard 3 is not appropriate and should be repealed in its entirety,ⁱⁱⁱ because it is not the ACNC's role to investigate offences but rather to focus on charity governance.

Instead of acting on the McClure review and abolishing this standard, these changes would expand it. The proposed amendments would add "summary offences" relating to property or a person. Many summary offences would be covered by this regulation, spanning from those commonly prosecuted in protests, such as trespass or blocking traffic, to fundraising, electoral and work health and safety laws.

The amendments 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 the Australian Charities and Not-for-profit Commission Act, the ACNC Commissioner is empowered to deregister a charity if they believe a charity has not complied with a governance standard; or it is "more likely than not" that the charity will not comply with a governance standard. This is already an extremely high bar. Under the proposed changes, the Commissioner need only hold suspicions to be empowered to suspend or remove directors from a charity, and appoint new directors, or deregister a charity entirely.

Taken together, Anglicare Australia believes that the proposed changes would:

- restrict legitimate and lawful policy advocacy;
- leave a charity at risk of deregistration if any one of its staff commits a minor offence;
- leave a charity at risk of deregistration if the ACNC 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.

If enacted, these changes would unfairly 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.

Anglicare Australia outlines our concerns in each of these areas in greater detail in the following section. Our overriding concern is that charities are being targeted with regulations that are both vague and sweeping, and which move away from charity law's current focus on *charitable purpose* to a charity's *activities*.

A charity's purpose vs a charity's activities

Under Australian charity law, it is the *purpose* of an organisation, not its *activities*, which is relevant to determining its eligibility for registration as a charity. Anglicare Australia is concerned that the proposed changes are part of a trend to conflate the activities of charities with their purpose. The amendments would stymie activity in service of our charitable purpose by instilling fear of falling foul of these vague, and in some cases hypothetical, judgements.

This is part of a trend that can be observed in recent government-initiated inquiries, such as the Treasury's 2017 consultation on Tax Deductible Gift Recipient Reform Opportunities and the House of Representatives Standing Committee on the Environment's 2016 Inquiry into the Register of Environmental Organisations. Like this consultation, those inquiries were premised specifically on the activities of charities, rather than their purpose.

For example, a 2017 Treasury discussion paper on DGR reform said that "Scrutiny of an organisation's continued eligibility is appropriate as the scope of activities undertaken by an organisation can change over time, potentially making them ineligible for DGR status." ^{iv} This is simply incorrect, as was noted by several submissions and legal analyses. It is a *change in purpose* that would lead to ineligibility.

Anglicare Australia supports the approach to judging eligibility currently enshrined in law, and notes that it has emerged as the best way of determining eligibility for charitable status after multiple reviews. The reason for this is simple – what defines a charity is its mission, and whether it exists to promote a public good. The activities used to advance that mission can and should change over time. Moves to limit a charity's activities would inhibit their ability to advance their purpose.

The Charities Act is clear about which purposes are charitable and which purposes disqualify an entity from being charitable. It is only where the purpose of a charity changes, or if the charity ceases to pursue that purpose, that its eligibility for charitable status should be called into question.

Implications for the Anglicare Australia Network

There are many ways the proposed changes would impact members of the Anglicare Australia Network. The breadth of both the proposed regulation and the ACNC Commissioner's discretion makes it impossible to say definitively which conduct is safe and which will see a charity deregistered. Some of our member agencies are small, operating with a handful of staff. These regulations will place an enormous administrative burden on these already stretched charities in the midst of a pandemic, and a recession. The regulations would also undermine our ability to advocate on issues relating to our charitable purpose, undermining our freedom of expression and, ultimately, our ability to advance our charitable purpose.

We consider a number of these situations below.

The changes grant sweeping, subjective powers to the ACNC Commissioner

Under the proposed changes, the ACNC Commissioner must take account of a number of matters in deciding whether to revoke a charity's registration.^v These include:

- 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
- the welfare of members of the community that receive direct benefits from the registered entity.

Both of these involve a highly subjective assessment, and they may not be related to tangible activities but hypothetical ones. The changes would allow the Commissioner to 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 offence or action has actually taken place.

These changes are of great concern to Anglicare Australia, and are likely to be of concern to many other charities. In recent years, the ACNC Commissioner, Government ministers, and Government parliamentarians have made concerning statements about charities undermining trust in the sector, and disparaging comments about how charities provide 'direct benefits' to their communities. In many cases, these statements have been at odds with the legal framework surrounding charities. If these trends offer an indication of how judgements could be made under the revised standard, then many decisions will be vulnerable to legal challenge. In other cases, charities will simply avoid attracting attention or controversy by removing themselves from public debate altogether.

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

Anglicare Australia is concerned that under proposed amendments, charities could be deregistered or face penalties even if the activity concerned "may be dealt with" as a summary offence — that is, no conviction or arrest needs to have taken place. We are also concerned that charities do not need to have engaged in any unlawful conduct to be deregistered. They may merely fail to take steps to ensure resources are not used to that end.

This means that charities could face deregistration for failing to take steps to stop their resources from being used by others. Any publication constituting promotion or support for relevant acts would be a breach. This is of major concern to the Anglicare Australia Network. Under the proposed changes, Anglicare Australia could be penalised if people attending a protest carry or wear our logo, regardless of whether Anglicare Australia supports that protest or whether our permission was sought.

Indeed, the proposed changes are so broad that they may inhibit our research work. Major research reports and advocacy materials we produce, such as our annual Rental Affordability Snapshot and our Jobs Availability Snapshot, are routinely cited by Government departments, university academics, and other sector agencies in their work. Similarly charities involved in operating government services often conduct research and evaluation to assist in evidence based policy decisions. However, the results may also be used by political and campaigning bodies in the course of their protests and campaign activities. Under the proposed changes, we could be held responsible for how other entities use our material regardless of whether they consulted us beforehand.

This highlights the impossibly broad nature of these changes, leaving charities vulnerable to penalties regardless of wrongdoing. Some charities may simply avoid producing advocacy materials or conducting research and evaluation simply because they have no control over how these materials might be used by others.

Failing to keep adequate records of steps taken

The breadth of the proposed governance standard creates a risk that charities could be penalised for failing to document steps they take to ensure compliance.^{vi} A failure to keep such records can be a basis for deregistration, regardless of whether the charity has been found not to be compliant.

This means that each of Anglicare Australia's members, including small agencies, will need to have systems, and a document trail to prove it 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. This could be an impossibly complicated endeavour, especially in the face of the extremely vague and uncertain terms of the proposed amendments. It also creates enormous amounts of red tape, something the ACNC had intended to limit and something this Government opposes.

Undermining the role of charities in debate

Part of the justification for the proposed changes is the need to promote 'trust' in the charitable sector. Anglicare Australia's view is that the greatest threat to this trust comes not from the conduct of the sector itself, but from recent efforts to undermine charities and their role in public debate.

There is no legal basis for these attacks. In 2010, a landmark High Court judgement involving Aid/Watch found that charities could have a dominant purpose of influencing and engaging in public “‘agitation’ for legislative and political changes.”^{vii} The decision applied the right to freedom of political communication in Australia, which the High Court had previously defined as a constitutional precondition for representative democracy. In the Aid/Watch case, the High Court found that “the generation by lawful means of public debate... itself is a purpose beneficial to the community.”^{viii} The pace, fragmentation and media management of political debate suggests that this role of charities in debate is more important now than when the High Court made that finding.

Following this, the Charities Act 2013 recognised that charities can advance their purpose by engaging in public debate about public policies. Systemic advocacy is clearly recognised and protected under this definition.^{ix} And while campaigning for or any party or candidate is rightly barred, charitable organisations are permitted to compare or rank the policies of both parties and candidates.^x

At the heart of this existing legal framework is a recognition that advocacy is an essential, and often the most effective, means of achieving charitable purposes and a legitimate part of a civil society’s debate. For agencies in the Anglicare Australia Network, tackling poverty and inequality entails not only providing services to assist people at coalface of these issues, but also advocating for policy and legislative change to address the root causes. Our own experience is that our donors, supporters, and clients *expect* charities to undertake advocacy on these issues. Indeed the Five Marks of Mission of the Anglican church call on us to “challenge unjust structures” in addition to “offering loving service.”

In recent years, and particularly since the 2016 federal election, a number of politicians have commented negatively on the participation of charities in public debate. They have frequently argued that civil society organisations and charities have a lesser ‘right’ to participate in debate than political parties and candidates.

This growing disdain for charity advocacy has garnered international attention. In 2016 the United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst, conducted an official visit to Australia. He concluded his visit by expressing concerns about laws and policies that muzzle civil society, including charities:

“These laws have not only accentuated the disparity between Government’s declared commitments at international forums and their implementation within the country, but they have also aggravated the situation after the drastic defunding of peak bodies by the Government, following their advocacy or litigation on such topical issues as immigration, security, environment and land rights protection.”^{xi}

The hostility to charity advocacy is both harmful and wrong in seeking to deny the right of the public to participate in civic debate. It also ignores the role of self-interested advocacy by far more powerful players in politics. Charities play a critical role in promoting the former, and counter-acting the latter. Anglicare Australia’s view is that this is the most valuable role performed by charities, and the one

that ought to attract the most support. If charities did not play this role, and simply supplanted the work of government in providing services, the experiences of the most marginalised people would be lost from policy development.

By prohibiting the preparation of materials which *could* be used in hypothetical protests by other groups, these amendments would limit Anglicare Australia's ability to produce research, policy work, and other advocacy materials. Many other charities will find themselves in a similar position.

The changes must be withdrawn

Anglicare Australia notes that these changes directly contradict the findings of the government-commissioned review of the ACNC legislation undertaken by Patrick McClure AO in 2018. That review concluded that 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.”^{xii} In short, 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.

Anglicare Australia shares this view. 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 other entities.

Finally, Anglicare Australia notes that these regulations could be weaponised against charities that challenge Government actions or decisions. The breadth of the ACNC Commissioner's discretion raises significant concerns that decisions to effectively shut down charities will be — or could be perceived to be — about silencing unwelcome viewpoints.

Conclusion

Anglicare Australia notes that no evidence has been provided to show widespread unlawful activity, or even non-compliance, among charities. Indeed, recent reviews have pointed to a culture of compliance, good governance, and trust.^{xiii}

Regardless of the stated purpose, most the proposed changes do not relate to unlawful activity. Instead they focus on hypothetical future activity, staff and volunteer protest, and worse still, subjective judgements about whether a charity *might* engage in unlawful activity in the future. If enacted, they will create uncertainty and impose a large administrative burden on charities. They are also likely to be unlawful, and will be vulnerable to legal challenge from the sector.

By prohibiting the preparation of materials which *could* be used in hypothetical protests or cited by other groups, these proposed amendments would limit the ability of Anglicare Australia and similar charities to produce research, policy work, and other advocacy materials. This is an infringement on our legal right as a charity to pursue our purpose, and deepens the confusion surrounding charitable activities and purposes.

Ultimately, these regulations unfairly target charities and impose regulations that would be unthinkable for businesses. They are too flawed to be resolved with amendments. We recommend they be withdrawn.

ⁱ Productivity Commission (2010) Contribution of the Not-for-Profit Sector.

ⁱⁱ Ibid.

ⁱⁱⁱ The Treasury (2018) Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018.

^{iv} The Treasury (2017) Tax Deductible Gift Recipient Reform Opportunities: Discussion Paper.

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

^{vi} Section 55-5 of the Australian Charities and Not-for-profit Commission Act 2012.

^{vii} Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42

^{viii} Ibid.

^{ix} Maddison, S. and Carson, A. (2017) Civil Voices. University of Melbourne.

^x Ibid.

^{xi} Office of the United Nations High Commissioner for Human Rights (2016) Australian Government must rebuild trust of civil society – UN human rights expert.

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

^{xiii} Op cit Productivity Commission.