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Director  
Not-for-profit Unit  
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Dear Director

Anglicare Australia welcomes the opportunity to provide a submission on the exposure draft of the Australian Charities and Not-for-profits Commission (ACNC) Regulations 2022 (the regulations).

Anglicare Australia supports transparency and good governance for the sector, and as such we have been a strong supporter of the ACNC since its inception. We also support the full implementation of the ACNC Legislation Review 2018 (the Review). Our hope is that this remake of the regulations is used as an opportunity for the new Government to enact the recommendations of the Review.

The focus of our submission is on Governance Standard 3. Governance Standard 3 states that a charity must not engage in conduct, or omit to engage in conduct, that can be dealt with as an indictable offence. The Review concluded that Governance Standard 3 is not appropriate and should be repealed in its entirety,<sup>1</sup> because it is not the ACNC's role to investigate offences but rather to focus on charity governance.

In line with this finding, Anglicare Australia recommends that Governance Standard 3 is removed from the remade regulations.

Registered entities already have to comply with all applicable laws. In recent years Governance Standard 3, including proposed amendments in 2021, has been deliberately used to silence charities from having a voice on important public policy issues. If there is a need to allow the ACNC to address genuine and serious misconduct as part of its purpose, this should be done through a more targeted approach that does not risk impacting charities' ability to engage in advocacy in pursuit of its charitable purpose.

Anglicare Australia's concerns with Governance Standard 3 are outlined in greater detail below.

### **Governance Standard 3 undermines the Charities Act**

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

To be consistent with the Charities Act, charities should not be deregistered for committing an offence unless that offence relates to the charity's purpose. As much is made clear on the ACNC's website:

*"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 further undermine the standard set by the Charities Act by exposing charities to deregistration for a single unlawful act. This was a key concern of the Review, which concluded that:

*"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."*

In short, the ACNC Commissioner should be focused on the governance of charities, rather than investigating hypothetical, future offences by charities and their employees. The Commissioner should regulate charity law, and the police should investigate criminal laws. Anglicare Australia agrees with the conclusion of the Review. The ACNC should only be concerned with offences which demonstrate that the charity's *purpose* is unlawful.

### **Charities are already subject to all applicable laws**

Neither for-profit corporations nor political parties can be deregistered for committing, or being deemed "likely" to commit, an offence. Charities, just like everyone else, have to comply with the law.

These regulations add an additional penalty of on top of criminal penalties, and render the ACNC Commissioner 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 under the Australian Charities and Not-for-profits Commission Act.

Anglicare Australia believes that criminal offences should be handled through other aspects of the legal system, as is the case for businesses and other entities.

### **It provides the Commissioner too much discretion over subjective actions**

Currently, the ACNC Commissioner can revoke a charity's registration if they believe a charity "is more likely than not" to breach a governance standard at some future time. Governance Standard 3 is also written in a way that means there doesn't need to be a conviction for the Commissioner to take enforcement action. It only requires an act that "*may* be dealt with" as an offence.

These discretionary powers unfairly target charities in a way unparalleled in the business or private sector. In addition to the penalties that charities and our staff already face for breaking the law, we also face additional sanctions under existing charities law.<sup>ii</sup> Businesses and corporations have no equivalent.

### **It has a silencing effect on advocacy**

Charities provide a vital vehicle for ordinary Australians to be heard in national debates. Charities that work on the frontline of important social and environmental issues play a particularly important role in public debate. At times, our advocacy can include supporting public actions to draw attention to pressing societal issues. Yet recently passed laws criminalising peaceful protest in NSW and Victoria, and proposed laws in Tasmania, mean that charities could fall afoul of Governance Standard 3 by engaging in protest-related advocacy in pursuit of their purpose. This is because all 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 including media and lobbying, and are forced to rely on protest to communicate their calls for change.

### **Governance Standard 3 is not needed**

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 by the Treasury.

If the ACNC needs further mechanisms to address serious misconduct, then Anglicare Australia calls on the Treasury to develop more targeted mechanisms in consultation with the sector.

Our hope is that this remake of the regulations acts on the findings of the Review, and repeals Governance Standard 3. There is no need for any further delay.

We thank you again for the opportunity to contribute to the remake of the regulations. We would welcome the opportunity to discuss the matters raised in this letter, or answer any questions that you may have.

Yours sincerely



Kasy Chambers  
Executive Director

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<sup>i</sup> The Treasury (2018) Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018.

<sup>ii</sup> Ibid.