



16 JULY 2021

## LEGISLATION SCRUTINY BODY “CONCERNED” ABOUT MORRISON GOVERNMENT LAWS THAT SILENCE CHARITIES

Liberal Senator Concetta Fierravanti-Wells has written to Assistant Treasurer Michael Sukkar on behalf of the Senate Committee for the Scrutiny of Delegated Legislation to express its concerns about the Morrison Government’s proposed changes to charities regulations.

The amendments hand the Charities Commissioner far-reaching powers to deregister charities for the most minor of offences – such as blocking a footpath at a vigil – or if he believes a minor offence may occur in the future.

Senator Fierravanti-Wells chairs the Committee, which assesses laws against a set of scrutiny principles, including compliance with statutory requirements and the protection of individual rights and liberties.

In her letter (attached) to Assistant Treasurer Sukkar, who is sponsoring changes to Governance Standard 3 of the Australian Charities and Not-for-profits Commission (ACNC) Regulations, **Senator Fierravanti-Wells notes that the Government:** "does not provide sufficient detail as to the scope of [the Charities Commissioner’s] discretionary powers, their necessity, or any relevant limitations", and asks why it is appropriate and necessary to expand the Commissioner’s discretion.

The **Charities Commissioner, Gary Johns**, has himself said under questioning in Senate Estimates that he has seen no evidence to support the changes to the regulations being necessary.

**Senator Fierravanti-Wells further notes that the Government** has failed to answer serious questions about the constitutionality of the regulations, and that the regulations may "infringe the implied freedom of political communication" in the Constitution.

The Committee’s concerns reflect those of the [Law Council of Australia](#), which says the laws “inhibit legitimate public dialogue by registered charities to the detriment of Australian representative democracy”, and others including top-tier law firm [Arnold Bloch Leibler](#), which says that the regulations are “unconstitutional”, “unjustified” and “fundamentally inconsistent with our democratic system of government.”

An alliance of more than **30 of Australia's most well-established and respected charities** has today welcomed Senator Fierravante-Wells' letter on behalf of the Committee. The alliance includes Amnesty International Australia, Baptist Care Australia, UnitingCare Australia, The Fred Hollows Foundation, Oxfam Australia, Save the Children Australia, WWF-Australia, Community Council for Australia, Community Broadcasting Association Australia, Asylum Seeker Resource Centre, Australian Marine Conservation Society, Alliance for Gambling Reform, YWCA, Environment Victoria, Volunteering Australia, Grata Fund, Australian Forests and Climate Alliance, Koala Action Inc, Adult Learning Australia, Australian Pro Bono Centre, Australian Youth Climate Coalition, Asylum Seekers Centre NSW, National Justice Project, Australian Council for International Development, Australian Council of Social Service, SA Council of Social Services, TAS Council of Social Services, Lock the Gate, Friends of the Earth, Australian Religious Response to Climate Change and the Australian Conservation Foundation.

**The Reverend Tim Costello AO, chair of the Community Council for Australia and former CEO of World Vision Australia**, said, "These anti-democratic regulations will silence legitimate advocacy by charities and the voices of the millions of people they represent, including the most vulnerable, undermining our freedom of speech.

"They have no parallel in business or any other sector of society. Giving the Charity Commissioner power to shutter a charity for a minor offence by a member is the equivalent of the Electoral Commissioner having discretion to deregister the Liberal Party because a party member damages someone's lawn when putting up a sign.

"It is heartening to see that this important Committee shares the concerns of charities from across the sector, which have formed a broad alliance to condemn these egregious regulations. The Committee's intervention is a clear signal that these laws are unprecedented and an unjustified regulatory overreach.

"The Government's own expert review panel found in 2018 that ACNC Governance Standard 3 should be abandoned. The charity sector is speaking with one voice: these new laws must be scrapped."

**Dr Cassandra Goldie, CEO of the Australian Council of Social Service** said: "These laws are an attack on charities and our democracy. Charities exist for the public benefit. We have worked tirelessly including through this pandemic to support people and to help keep communities safe. Throughout history, and today, we have also pushed for change when our communities need it.

A healthy democracy is one where communities and their charities are free to speak up and act in the interests of the people they represent and serve. It is the government's role to support us. These regulations do exactly the opposite and they must be stopped. These regulations amount to an attack on our ability to perform our vital role in Australian society. We welcome the Committee raising its concerns, and the intervention by its Chair, Senator Fierravanti-Wells, at this time."

**AVAILABLE FOR INTERVIEW:**

Amnesty National Director Sam Klintworth, or Tim O'Connor | Dan Veldre 0413028191

The Fred Hollows Foundation CEO, Ian Wishart | Esther Au 0423375562

Oxfam Australia Chief Executive, Lyn Morgain | Amanda Banks 0411 449 653

WWF-Australia CEO, Dermot O'Gorman or Rachel Lowry, CCO | Paul Fahy 0455528161

Save the Children Australia CEO, Paul Ronalds | Jane Gardner 0438130905

Asylum Seeker Resource Centre CEO Kon Karapanagiotidis | Jana Favero 0438 829 651

Australian Council of Social Service CEO Cassandra Goldie | Media 0419 626 155

**NOTES TO EDS:**

Proposed amendments to ACNC Regulations **likely to be tabled in the Senate in August** give the Charities Commissioner discretion to deregister a charity for the most minor of offences – for example, if a staff member blocks a footpath at a public vigil, even if the offence is unintentional.

The new laws also give the regulator extraordinary powers to arbitrarily shut down a charity if he believes it's likely that a minor offence may occur in the future, or if he believes that something that could be dealt with as a minor offence has occurred, even if no charge has been made.

The Commissioner may also deregister a charity preemptively if he believes that it lacks "internal control procedures" to demonstrate its compliance with the laws, or that it has not adequately documented these procedures.

To prove compliance, charities' time and donations will be tied up in unprecedented red tape and legal fees, depriving communities of vital support.

Explainer [here](#).

More on the Hands off Our Charities Alliance [here](#).

Enquiries after 11am: Annemarie Jonson 0428 278 880

//ENDS//



AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation

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15 July 2021

The Hon Michael Sukkar MP  
Assistant Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [Michael.Sukkar.MP@aph.gov.au](mailto:Michael.Sukkar.MP@aph.gov.au)  
CC: [dlosukkar@treasury.gov.au](mailto:dlosukkar@treasury.gov.au)

Dear Assistant Treasurer,

**Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Conferral of discretionary powers***

***Clarity of drafting***

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers on a person. In addition, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

The instrument amends the Australian Charities and Not-for-profits Commission Regulation 2013 (principal instrument) to alter governance standards relating to charities' engagement in, or promotion of, certain unlawful activities. Registered entities must comply with the standards in order to qualify for certain exemptions, benefits and concessions under the *Australian Charities and Not-for-profits Commission Act 2021* (ACNC Act). Failure to comply with the governance standards may result in revocation of the entity's registration under section 35-10 of the ACNC Act and the exercise of certain enforcement powers under Part 4-2 of the ACNC Act.

The amendments made by the instrument appear to enable the Australian Charities and Not-for-profits Commission (ACNC) Commissioner to exercise a range of discretionary powers in determining whether a registered entity has failed to comply with the governance standards through engaging in, or promoting, unlawful conduct. For example, the instrument inserts new paragraph 45.15(2)(aa) into the principal instrument. This paragraph provides that registered entities must not engage in conduct, or omit to engage in conduct, if that conduct may be dealt with as a summary offence under Australian law and the offence relates to certain types of actions. While

the explanatory statement to the instrument provides some examples as to the type of offences to which this provision may apply, it is unclear what the full scope of the offences may be. In this regard, it appears that the ACNC Commissioner may exercise some discretion in determining what summary offences may be covered by paragraph 45.15(2)(aa). It is unclear why the specific offences are not set out on the face of the instrument, or whether there are any limitations on, or guidance in relation to, the exercise of this discretion.

Additionally, the instrument inserts a note to subsection 45.15(2) to the principal instrument. This note states that the ACNC Commissioner may consult with a law enforcement agency or other relevant entity in forming a reasonable belief about compliance with the governance standards under subsection 35-10(1) of ACNC Act. The explanatory statement explains that this is intended to 'address general concerns from stakeholders about the ACNC Commissioner's discretion and enforcement powers'. However, it does not provide guidance as to the scope of this discretion, such as the circumstances in which the ACNC Commissioner may seek such advice, or indicate which entities may be contacted.

Further, the instrument inserts new subsection 45.15(3) into the principal instrument. This provision requires registered entities to maintain reasonable internal control procedures to ensure that its resources are neither used nor continued to be used to actively promote another entity's acts or omissions that may be dealt with under paragraphs 45.15(2)(a), (aa) or (b). Some examples of the types of internal procedures that a registered entity may maintain are set out on the face of the instrument. The explanatory statement further notes that 'whether internal control procedures are reasonable in any particular case is to be determined objectively and will depend on the specific circumstances of the registered entity, including its size, purpose and activities'. It also explains that this is consistent with the requirements for external conduct standards. However, in the absence of further information in the explanatory statement, it is unclear what objective test will be applied in determining whether a registered entity has complied with the requirements in subsection 45.15(3).

The committee generally considers that instruments that confer discretionary powers on a person should clearly address the purpose and scope the discretion and why it is considered necessary in the explanatory statement. Additionally, the committee expects that the explanatory statement should explain the factors that must be considered in exercising the discretion, and the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy. In this instance, the committee considers that the explanatory statement does not provide sufficient detail as to the scope of these discretionary powers, their necessity, or any relevant limitations. The committee considers that such information is important to enable charities to clearly understand their obligations under the governance standards. The committee concerns are particularly amplified noting that the discretionary powers to be exercised by the Commissioner may relate to the determination of whether a criminal law has been breached.

**In light of the matters outline above, the committee requests your detailed advice as to:**

- **why it is considered necessary and appropriate to expand the discretion that the ACNC Commissioner may exercise in determining whether a registered charity complies with the governance standards under section 45.15 of the principal instrument;**
- **the scope of the powers that the ACNC Commissioner may exercise under the instrument, including:**
  - **what specific summary offences that registered entities may not engage in under new paragraph 45.15(2)(aa);**
  - **the factors that the ACNC Commissioner must consider when determining when to seek advice from law enforcement agencies or other relevant entities in forming a**

reasonable belief about compliance with the governance standards under section 35-10 of the ACNC Act;

- what objective test is applied to determine whether a registered entity has complied with the requirements of subsection 45.15(3); and
- the nature and source of any limitations or safeguards on the exercise of the ACNC Commissioner's discretionary powers under section 45.15, including whether they are set out in law or policy.

***Implied freedom of political communication***

Senate standing order 23(3)(b) requires the committee to scrutinise each legislative instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid. This includes whether an instrument may restrict the implied freedom of political communication.

As outlined above, the instrument has the effect of preventing registered entities from engaging in or actively promoting certain kinds of unlawful activity as this may affect an entity's entitlement to registration under the Act.

In the absence of contrary information in the explanatory statement to the instrument, it is unclear whether the instrument may limit registered entities' implied freedom of political communication, by preventing them from engaging in, or supporting certain activities. This may include limiting their ability to engage in, or support, certain types of political protest.

The committee makes no judgement on the permissibility of limitations on the implied freedom, or on the constitutionality of the instrument, more broadly. However, from a scrutiny perspective, the committee generally expects that instruments which may have the potential to infringe the implied freedom of political communication should include an explanation of how the instrument does not impermissibly restrict the implied freedom in the explanatory statement.

**The committee therefore requests your advice as to how the instrument is compliant with the implied freedom of political communication, and whether the explanatory statement can be amended to include this analysis.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **28 July 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**