



Law Council
OF AUSTRALIA

Legal Practice Section

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Jacky Rowbotham
Manager
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Treasury
Langton Crescent
PARKES ACT 2600

By email: dgr@treasury.gov.au

Dear Ms Rowbotham

INCENTIVISING CHARITIES TO JOIN THE NATIONAL REDRESS SCHEME

1. The Charities & Not for Profits Committee (**the Committee**)¹ of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to Treasury in relation to the Exposure Draft Bill relating to the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 1) Regulations 2021 (Regulation)*.
2. The Committee opposes the Regulation for the following reasons:
 - (a) the Regulation is out of step with the principle-based intention of the Governance Standards;
 - (b) the Regulation may not achieve the desired outcome; and
 - (c) its regulatory burden outweighs the issue the Regulation seeks to address.

Principle-based regulation

3. The Governance Standards are intended to be a set of high-level principles, not precise rules.² The Governance Standards were introduced in 2012 with the intention of '*specifying the outcome to be achieved, rather than detailing how an entity must meet the standards, in its particular situation.*'³ Instead of being principle-based, the Regulation is a very specific rule that only applies to a small group of registered charities.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

² <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards>.

³ See paragraph 5.23 of the Explanatory Statement to the *Australian Charities and Not-for-profits Commission Bill 2012*.

4. The purported object of the Regulation is to ensure registered charities are governed in a way that enables them to be accountable for past conduct relating to institutional child sexual abuse. To be true to the principle-based nature of the Governance Standards, this should not be limited to institutional child sexual abuse or the National Redress Scheme for Institutional Child Sexual Abuse (**Redress Scheme**) but could be more generally phrased as taking reasonable steps to be accountable for wrongs against vulnerable people. This would tie in with the External Conduct Standards relating to vulnerable people and not limit it to the past only. Taking this broader approach also recognises that joining the Redress Scheme may not be the only action that charities should be taking to be accountable for their actions or omissions in relation to dealings with vulnerable people.
5. The Regulation refers to a charity that is or *'is likely'* to be identified in the abuse of a person. The assessment of whether a charity *'is likely'* to be identified in the abuse of a person imposes a heavy regulatory burden on charities that have not previously been named by a claimant or by the Royal Commission. Further, how this works in relation to entities that are applying for registration as a charity is unclear. For example, would a new entity working with children be expected to sign up to the Redress Scheme on the basis of a future risk that they will be identified in the abuse of a person?
6. The Regulation appears to be reactionary and runs the risk of setting a precedent that the Governance Standards will be amended in response to particular events, and distort charity law in the process. Further, there does not appear to be a clear rationale for amending the Governance Standards in this instance, when there have been several Royal Commissions that have shone a light on past conduct and practices by charities that is unacceptable.

Purpose of the Regulation

7. The purpose of the Regulation as expressed in the media releases and statements is to penalise relevant institutions that fail to join the Redress Scheme. This is also reflected in Note 1 in the Regulation which suggests reasonable steps are participation in the Redress Scheme. It is clear from all the materials that this is the only outcome desired. This appears contrary to the object expressed in the Regulation relating to governance which enables accountability. If the desired outcome is to penalise certain entities that fail to join the Redress Scheme, that ought to be effected by legislation directed to that purpose rather than by an amendment to the ACNC Regulations. The ACNC arrangements were not intended to be used as a punitive regime.⁴
8. The Regulation refers to taking 'reasonable steps' to become a non-government participating institution. Taking 'reasonable steps' is likely to involve charities taking into account the range of duties that they are required by law to balance and may not involve signing up to the Redress Scheme. In some circumstances, the best outcome for both the charity and the claimant may involve relying on insurance to cover a redress payment, given the payments under the Redress Scheme are subject to a cap of \$150,000. That would seem to satisfy the Regulation but not its desired outcome.

⁴ See e.g. paragraphs 1.5-1.14 of the Explanatory Memorandum to the *Australian Charities and Not-for-profits Commission Bill 2012*.

9. The Explanatory Statement to the Exposure Draft for the Regulation refers to the consequence of a failure to comply with the Governance Standards enlivening the ACNC Commissioner's power to consider revocation of the entity's charity registration. Again, reaffirming the desired outcome rather than the object as expressed in the Regulation. This is also not consistent with the ACNC's regulatory approach of providing guidance, education and advice to assist registered charities in understanding and complying with their obligations under the ACNC Act meaning revocation would be the last resort in the ACNC's regulatory powers.
10. As the Governance Standards do not apply to basic religious charities (**BRC**), the government has proposed an amendment to the definition of a BRC to exclude from eligibility religious institutions that have been named in an application but have not joined the Redress Scheme.⁵ This is creating different requirements for charities which will cause confusion and create additional red-tape. It is also clearer in the case of BRCs that the government's desired outcome is to ensure all applicable charities join the Redress Scheme.

Regulatory burden outweighs purpose of Regulation

11. The Australian Government Guide to Regulatory Impact Analysis sets the bar for regulations as '*practical solutions [that are] well-designed, well-targeted and fit-for-purpose*'.⁶ In our view, the net benefits of the Regulation substantially impede its usefulness as a policy instrument. It is telling that the Joint Select Committee did not make a specific recommendation concerning the removal of Commonwealth taxation concessions, but rather a general recommendation being:⁷

...that Commonwealth, state, and territory governments place and maintain pressure on all relevant institutions to join the redress scheme as soon as practicable.

12. This was despite receiving specific submissions for the Commonwealth to remove Commonwealth taxation concessions. The submissions for removal of Commonwealth taxation concessions for charities upon closer examination are not persuasive because:
 - (a) loss of council rates and land tax concessions were cited as change levers, but this is outside the ability of the Commonwealth government, requiring state and municipal regulation changes;⁸ and
 - (b) given the common law doctrine of mutual income, ability for charities to structure their financial affairs to legitimately minimise taxable income or offset it with taxable deductions and create alternative tax entities for their operations, the loss of Commonwealth tax concessions, although inconvenient, is not as significant as forecast.

⁵ Schedule 3 to the *Treasury Laws Amendment (2020 Measures No. 6) Bill 2020*.

⁶ The Australian Government Guide to Regulatory Impact Analysis, March 2020, second edition, available at

⁷ Recommendation 2 in the Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, *Getting the National Redress Scheme right: An overdue step towards justice April 2019*, at p ix, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Royal_Commission_into_Institutional_Responses_to_Child_Sexual_Abuse/RoyalCommissionChildAbuse/Report. (**Joint Select Committee Report**).

⁸ Joint Select Committee Report, para 4.8.

It is doubtful, in our opinion, that the statement *'you would get closer to 100 per cent involvement in the scheme'*⁹ would be realised by the introduction of the Regulation. The Committee also notes that the Explanatory Statement and recommendation 3 of the Joint Select Committee report erroneously refer to the 'suspension' of tax concessions and charitable status, when tax concessions and charitable status are revoked and not suspended.

13. There were a number of policy considerations put before the Joint Select Committee Inquiry for pressuring institutions to join the Redress Scheme, including:
 - (a) *...appropriateness of government funding, contracts or financial concessions being provided to non-government institutions that are delivering child-related services, but do not participate in the Scheme'*; and
 - (b) *having participation in the Redress Scheme 'be part of any decision-making matrix of whether an organisation is a child-safe organisation.'*¹⁰
14. The Committee submits it is sufficiently effective for the government to revise its direct funding guidelines to exclude those not engaging in the Redress Scheme for achieving its desired outcome and no further action is required.
15. The Regulation is likely to create confusion for the vast majority of registered and prospective charities to which the Redress Scheme does not apply, and may create additional red tape in relation to time spent understanding whether and how this Governance Standard applies to them. Given the deadline for some charities to join the Redress Scheme is 31 December 2020,¹¹ it is unclear what 'reasonable steps' a charity that has been named can take after the deadline has already passed. The information publicly available to institutions who have not been named is inadequate and therefore the Regulation will cause confusion and concern.
16. We understand that only an extremely small number of charities who have been or may be named have not in fact joined the Redress Scheme. We also understand that the process of joining the Redress Scheme requires a significant amount of time and resources. The negative impact of introducing the Regulation will be that many charities will not only spend time and resources trying to determine whether they should join the Redress Scheme, but in order to avoid any possibility of breaching the Regulation, they will commit the resources to joining the Redress Scheme when it is not relevant to them.

Consultation period

17. The Committee submits that the timing of the consultation over the Christmas and New Year is unfortunate. Treasury has a long history of similar timings for sector consultations. These actions breach the spirit of the *Government's Regulatory Impact Statement Guidance Note: Community Organisations* that recommends:

You will need to tailor your consultations when a proposal has impacts on community organisations. In comparison to corporates, many community organisations may require a longer time to respond, and staff (or in some cases volunteers) may not have expertise in commenting on regulatory

⁹ Joint Select Committee Report, para 4.8.

¹⁰ Joint Select Committee Report, para 4.11.

¹¹ See s 115(4)(b) *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) and s 56A *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018* (Cth).

impacts. Additional time may also be required because many community organisations will be required to seek agreement of their board before finalising their submission.

18. Those impacted by the Regulation and their advisors are further hampered in properly responding to the consultation due to the period coinciding with the highest demand for some charitable services dealing with poverty, homelessness, crisis counselling, fire and flood disasters. It is also the traditional holiday break for some charity staff and their advisors and has the most public holidays of any period in the year. Treasury is strongly encouraged to avoid consultation during this period or extend the consultation period significantly.
19. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Charities & Not for Profits Committee Chair, Jennifer Batrouney AM QC on jennifer_batrouney@vicbar.com.au.

Yours sincerely



Michael Tidball
Chief Executive Officer