

ACNC proposed governance standard 3 explainer

Updated 28 June 2021

What is the core issue?

The Morrison Government's proposed new governance standard 3 could see charities shut down for speaking out.

If made, the regulations would discourage charities from promoting and having a presence at common peaceful protests. It would also make it much harder for charities to share their resources with community groups to support their advocacy. Finally, the regulations could introduce unnecessary red tape for virtually every one of Australia's 59,000 charities, and again, threaten them with deregistration if they fail to comply.

The proposal is disproportionate and punitive, and could see charities shut down by the regulator because of very minor and inadvertent breaches of the law, or for failing to keep documentation proving their compliance. It also exposes them to preemptive punishment if the ACNC Commissioner believes they are likely to breach the regulation in the future.

This treatment is unprecedented. Neither for-profit corporations nor political parties can be deregistered because a staff member commits — or is deemed “likely” to commit — a minor offence.

In the simplest terms, what's been proposed?

The Government [proposed](#) changes to existing governance standard 3 of the *ACNC Regulations 2013* in February this year. They have since issued an [amended version](#) of the proposed regulations, which could see charities deregistered by the ACNC Commissioner if:

- (a) The charity does an act that *may be dealt with* as a minor offence that relates to:
 - (i) entering or remaining on real or personal property; or
 - (ii) destroying or damaging real or personal property; or
 - (iii) appropriating personal property belonging to another entity; or
 - (iv) causing personal injury or “any other kind of impairment” to health, including the risk or threat of injury or impairment.
- (b) The charity fails to maintain “reasonable internal control procedures” to ensure that its resources are not used to actively promote another person's acts that may be dealt with as a relevant minor offence;¹
- (c) The charity fails to keep adequate records to prove the steps they've taken with respect to (a) and (b) (see s. 55-5 of the ACNC Act).

Note that circumstances (a), (b) and (c) do not require a charity or its staff to have committed an offence before triggering the ACNC Commissioner's power to deregister it. In

¹ The obligation to have and document “reasonable internal control procedures” would also pertain to indictable offences and those that attract a civil penalty of \$13,320, as captured in existing governance standard 3.

fact, a charity could be deregistered under these proposed regulations even if *no offence has been committed by anyone*, because:

- (a) The ACNC Commissioner may deregister a charity on the basis that they think the charity is *likely* to do an act (see s. 35-10 ACNC Act); and
- (b) The regulation would not require the ACNC Commissioner to conclude that the charity, its staff or another entity have committed an offence, only that they have done acts that *may be dealt with* as an offence.²
- (c) The Commissioner may deregister a charity if they consider that the charity does not have “reasonable internal control procedures” in place, or its documentation of them is insufficient.

In concrete terms, what would this mean?

If these regulations were made in their current form, charities could be deregistered for:

- a. Lawful activity, like promoting a rally where people are peacefully blocking the entrance to a business;
- b. Setting up an email group for a local community group which (without the charity’s knowledge) uses it to plan a peaceful protest involving a minor trespass, like a sit-in at an MP’s office; and
- c. Failing to implement, or document, policies and procedures that control how staff and volunteers may behave.

What’s happened so far, and what’s the process from here?

Treasury provided a draft of the regulations in February 2021. Around 50 charities made submissions opposing the proposal, and 40 signed onto the joint Hands Off Our Charities submission. In addition, major law firm Arnold Bloch Leibler, the Law Council of Australia and the Australian Institute of Company Directors made submissions opposing the proposed regulations.

To date, no submissions have been published. Treasury has not provided a response to the policy and legal concerns raised. The Government is proceeding with a proposal that, while somewhat narrower than initially proposed, is still unacceptably broad and punitive. We understand that the Government will introduce the proposed regulations in the Senate in the August sitting period. If that happens, we have just 15 sitting days to get a disallowance motion passed in the Senate, or the proposed regulations will become law.

What is the sector’s ask?

The Minister appears determined to press on with these unnecessary and burdensome changes. Our ask now is for the Senate crossbench to vote with the Greens and the ALP in favour of a disallowance motion.

² A note in the proposed regulations states that the ACNC Commissioner “may” consult with a law enforcement agency, but they are not required to. It is entirely possible under this proposal, that the ACNC Commissioner deregisters a charity, but afterwards police drop an investigation into that charity for lack of evidence, or because a defence is substantiated.

Some more arguments against the proposal:

- 1. The regulations would impose a huge administrative burden on charities, forcing them to divert resources away from frontline service delivery and into unnecessary paperwork.** Ensuring compliance with the multitude of (Federal, State and Territory) summary offences, indictable offences and civil penalty provisions which would be covered by the new regulations' obligation to maintain internal control procedures would presumably require charities to seek expensive legal advice, and invest significant time and cost in unnecessary policy writing and implementation. It will also discourage people from volunteering as directors on boards of local charities, because the risk profile and regulatory box-ticking will increase (without any benefit to a charity's operations).
- 2. The Government is seeking to significantly broaden the scope of a governance standard that its own review recommended be abolished.** To justify the changes, the Government has relied on a review that, in fact, recommended the existing governance standard 3 be abolished altogether because it's already too broad and charities already need to comply with applicable laws.³
- 3. The Government has not made a case for why this regulation is necessary.** In Senate Estimates in June, ACNC Commissioner Gary Johns confirmed that charities breaking the law in an activist context was not a widespread problem, and confirmed only 2 charities (out of a total of 59,000) have been deregistered for such conduct under the existing governance standard 3 in his time as Commissioner.
- 4. The regulations subject charities to the risk of deregistration on the basis of poorly defined and highly subjective criteria.** For instance, the Commissioner must determine what it means to "actively promote an act or omission" and whether a charity has maintained "reasonable internal control procedures"; as well as the "nature and significance" of the breach and the extent to which the actions may have harmed "public trust" (see subs 35-10(2) of the *ACNC Act 2012*).
- 5. The regulations are, in their current form, likely unlawful.** By punishing charities for speaking out in support of protest movements, the proposed regulations likely conflict with subsection 45-10(6) of the *ACNC Act*, which states that regulations must not outlaw lawful advocacy conducted in furtherance of a charitable purpose. The regulations are also susceptible to being struck down for inconsistency with the Commonwealth Constitution's implied freedom of political communication.

³ The Explanatory Memorandum to the proposed regulation states that the changes to the regulations address uncertainty and implement the Government's response to recommendation 20 of the Strengthening For Purpose: Australian Charities and Not-For-Profits Commission Legislation Review of 2018. In fact, that recommendation has nothing to do with governance standard 3, and elsewhere in the report the Review recommends removing governance standard 3 altogether because it "is not appropriate" to have the ACNC Commission to perform a policing function.

FaQ and examples

In its FaQ, the Government claims that the regulations place no additional burden on charities. Is this true?

No. Charities are not currently required to have “internal control procedures” of the kind these regulations specify. Note that this obligation will extend not only to the minor offences outlined above, but all indictable (serious) offences, and offences that attract a civil penalty of over \$13,320. Charities will firstly need to get legal advice on what this actually means and decide what the necessary steps are. They will then need to take those steps and document them in order to prove the procedures were in place. All 59,000 charities will need to do this.

What are “internal control procedures”?

The proposed regulations do not define “internal control procedures”, but a note in the regulations states that they could, for example, deal with:

- a. who can access or use the entity’s funds, premises or social media accounts; or
- b. when using the entity’s resources is improper; or
- c. relevant training for its responsible entities and employees.”

The Explanatory Memorandum also indicates that social media accounts should be regularly reviewed for content that actively promotes acts that could be dealt with as a minor offence. Other resources, like Slack accounts and email groups, could also be caught.

What’s meant by a charity’s “resources”?

The proposed regulations define a charity’s resources as including its funds, employees, responsible entities (such as a director or trustee), websites, social media accounts and other publications. This list is not exhaustive — the Explanatory Memorandum states that other assets, including mailing lists and land, are resources. Volunteers are not regarded to be charity’s resources for the purposes of this subregulation, but see the next question below.

Example: A charity encourages staff to attend, during work hours, a public protest against Government inaction on allegations of sexual assaults in Australian Parliament House. The first half of the protest, which involved public speeches in a park, had been authorised by police that morning. Unbeknownst to the charity and the employee however, the second half of the protest, which involved marching down the main street to Parliament House, had not been authorised by police. The charity would not be in breach of the regulations if the employee attended only the first half of protest, but could be in breach if the employee participated in the second, as blocking traffic could be dealt with as a minor offence relating to remaining on real property.

Could my charity be deregistered for what volunteers do?

In some situations, yes. If a volunteer commits a relevant minor offence (for instance at a public event), the offence will not be attributed to the charity. However, if the volunteer uses the charity’s resources:

- (a) in committing a minor offences, or

(b) to actively promote another person's acts that may be dealt with as one of the above minor offences;
and the charity did not have sufficient, reasonable internal control procedures to prevent it, then the charity could be deregistered under this proposed regulation.

Example 1: Volunteers in an environmental charity's local chapter are permitted to create a Twitter account or Facebook page which includes the charity's name and logo, to promote local community events that oppose fracking. A volunteer uses the social media accounts to post the details of an event that has not been authorised by police, and will involve temporarily blocking a road. The charity did not tell volunteers to check with protest organisers whether a protest was authorised by police before posting about it on social media, and did not review the posts of the local chapter that week. This could be grounds for deregistration.

Example 2: Members of a church congregation are permitted to use rooms in the church building to run community meetings. Members of the church book a room to plan a sit-in in a Minister's office, following the Minister's decision to detain asylum seeker children offshore. The charity had not said to the congregation that the rooms were not to be used to plan peaceful, but unlawful, protests. This could be grounds for deregistration.

Example 3: A charity prints stickers and posters with the slogan "Raise the Rate" as part of a campaign to raise JobSeeker, and gives them to volunteers to hand out in their community. Some volunteers stick them to stop signs and light poles. The charity had not encouraged such use of the stickers and posters, but had not specifically told volunteers not to use them in this way either. This could be grounds for deregistration.

Do the amended regulations capture inadvertent or unintentional acts?

Yes. As indicated above, a charity may unintentionally and inadvertently fail to maintain reasonable internal control procedures which satisfy the Commissioner (noting the vagueness of what they are). It may also unintentionally and inadvertently fail to keep adequate documentation that demonstrates the internal control procedures in place. Finally, a charity may engage in an activity or encourage others to engage in an activity, unaware that the act may be dealt with as a minor offence, for instance erecting a sign on public land which accidentally causes damage, or setting up a temporary food outlet without planning approval.

Example: A charity promotes a march down Bourke St to Parliament of Victoria to its email list. Just prior, and without the charity's knowledge, police had revoked authorisation for the march because crowd sizes exceeded initial expectations, meaning people who attend are likely to be committing a relevant minor offence. The charity may have, inadvertently, actively promoted others to do acts that could be dealt with as a minor offence (e.g. blocking traffic) that "relates to remaining on real property".