

# Regulation Impact Statement

*Unlawful activity – changes to the governance standards for registered charities*

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## Introduction

This Regulation Impact Statement (RIS) examines the case for action by the Australian Government to implement the Government's response to recommendation 20 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (ACNC Review), applying the principles of Australia's regulatory impact analysis framework as outlined in the Australian Government Guide to Regulatory Impact Analysis<sup>1</sup>. Recommendation 20 of the ACNC Review states that test case funding should be made available to develop the law in matters of public interest, including disqualifying purposes. In response to this recommendation, the Government stated it would explore legislative options to address uncertainty in the law.

### 1. What is the policy problem you are trying to solve?

Duties for registered charities, and indirectly for responsible persons, are set out in the *Australian Charities and Not-for-profits Commission Regulation 2013* (the ACNC Regulations). These governance standards require a charity to remain charitable, operate lawfully, and be run in an accountable and responsible way. The governance standards help maintain public trust and confidence that a registered charity is being governed in a way that ensures its on-going operations and the safety of its assets.<sup>2</sup>

Compliance with the governance standards is a condition of registration as a charity.<sup>3</sup> Where a registered charity fails to comply with the governance standards, this may result in use of the ACNC Commissioner's enforcement powers (such as warnings or directions being issued to the charity, or revocation of a charity's registration). Deregistration results in the charity losing access to certain government funding, exemptions, concessions and benefits.

Governance standard three requires charities to comply with Australian laws. Acting lawfully protects a charity's assets, reputation, and the people it works with. This standard does not impose a new burden on charities as they are already required to follow Australian laws. Rather the intent of the standard is to allow the ACNC to investigate serious breaches of the law and take enforcement action if required.

To this end, governance standard three as drafted in the ACNC Regulations provides that registered charities must not engage in conduct that may be dealt with as an indictable offence or a breach of law that has a civil penalty of 60 penalty units or more. In drafting the law the policy intent was to enable the ACNC Commissioner to take enforcement action with respect to serious criminal offences but carve out less serious offences that do not concern the proper governance of a registered charity (such as traffic infringements).

However, the framing of governance standard three in terms of indictable offences has led to inconsistent outcomes for certain unlawful conduct which is contrary to the policy intent of governance standard three. This is because, under Australia's federalist system of government, the States and Territories determine whether unlawful activities are indictable or summary offences. As illustrated in Table 1, this has resulted in potentially serious offences, such as trespass, vandalism, theft, assault and threatening harm to persons being defined as summary offences in some jurisdictions. Consequently, the ACNC is unable to investigate serious breaches of the law by a

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<sup>1</sup> Available at: <https://www.pmc.gov.au/sites/default/files/publications/australian-government-guide-to-regulatory-impact-analysis.pdf>

<sup>2</sup> ACNC Regulations

<sup>3</sup> With the exception of basic religious charities

charity even where action is warranted to protect the charity’s assets, the people it serves, and more broadly, the public trust and confidence in the charity sector more broadly.

**Table 1**

Jurisdiction	Entering or remaining on property (trespass)	Destroying or damaging property (vandalism)	Appropriating property (theft)	Causing harm to persons (assault)	Risk or threat of causing harm to persons (threatening harm)	Directing or encouraging a criminal offence (incitement)
New South Wales	✓ (partially)	✗	✗	✗	✗	✓ (partially)
Victoria	✓ (partially)	✓ (partially)	✗	✓	✓	✓
Queensland	✓ (partially)	✗	✗	✓	✓	✗
Western Australia	✗	✓ (partially)	✓ (partially)	✗	✓ (partially)	✓ (partially)
South Australia	✓ (partially)	✗	✗	✓ (partially)	✓	✓ (partially)
Tasmania	✓ (partially)	✓ (partially)	✗	✗	✗	✓ (partially)
Australian Capital Territory	✗	✗	✓ (partially)	✓ (partially)	✓	✓ (partially)
Northern Territory	✓ (partially)	✗	✗	✗	✗	✓ (partially)

**Legend**

✓	The activity is captured under existing governance standard three (i.e. the activity is an indictable offence or incurs a penalty of 60 units or more)
✓ (partially)	The activity is only partly captured (i.e. the activity may only be captured in some cases; aspects of the activity is a summary offence)
✗	The activity is not captured under existing law (for example, where the activity is considered a summary offence) or it is not clear if the activity attracts a criminal offence that would be captured under existing governance standard three

In addition, the framing of governance standard three in terms of indictable offences under an Australian law means that the scope of unlawful activities prohibited under governance standard three is not clear. This creates uncertainty and complexity for charities and the community more generally.

For a registered charity to comply with governance standard three, or to determine if a breach has occurred (requiring the charity to notify the ACNC Commissioner<sup>4</sup>), a charity must determine if the offence is an indictable offence in the jurisdictions they operate. It was evident during the public

<sup>4</sup> Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

consultation that this determination can be difficult for charities to discern in the absence of legal advice given the inconsistent treatment for the same offence between jurisdictions.

For example, in the Northern Territory unlawful entry of a building may be considered an indictable offence, but forcibly entering or remaining land is considered a summary offence. The differing treatment of unlawful activities means that the act of trespass on property in the Northern Territory is only partially covered under existing governance standard three. Another example of this complexity is theft of property in Western Australia, whereby theft may be considered an indictable offence if the value of the property stolen is in excess of \$50,000. This means theft of property in Western Australia is only partially covered under existing governance standard three.

There is also uncertainty in the sector about whether a charity actively promoting others to engage in unlawful conduct is a breach of governance standard three and therefore places a charity's registration at risk. This is because directing or inciting the commission of a crime is an indictable offence under some Australian laws (as illustrated in Table 1). For example, incitement to commit a crime (e.g. encouraging another person to commit a criminal offence) is an indictable offence in Victoria. By contrast, in Western Australia, the Australian Capital Territory, Tasmania and the Northern Territory incitement attracts an equal, similar or lesser offence to the offence incited. Given this complexity, it is difficult for charities to discern, in the absence of legal advice, whether certain kinds of activities to incite a crime may breach governance standard three.

To conclude, governance standard three as currently defined in the ACNC Regulations does not enable the ACNC Commissioner to investigate potentially serious breaches of the law by a charity. This is because jurisdictions define criminal offences differently, meaning that serious unlawful conduct may be beyond the scope of governance standard three or only partially captured. This compromises the ACNC's ability to be an effective regulator, potentially undermining public trust and confidence in the charity sector.

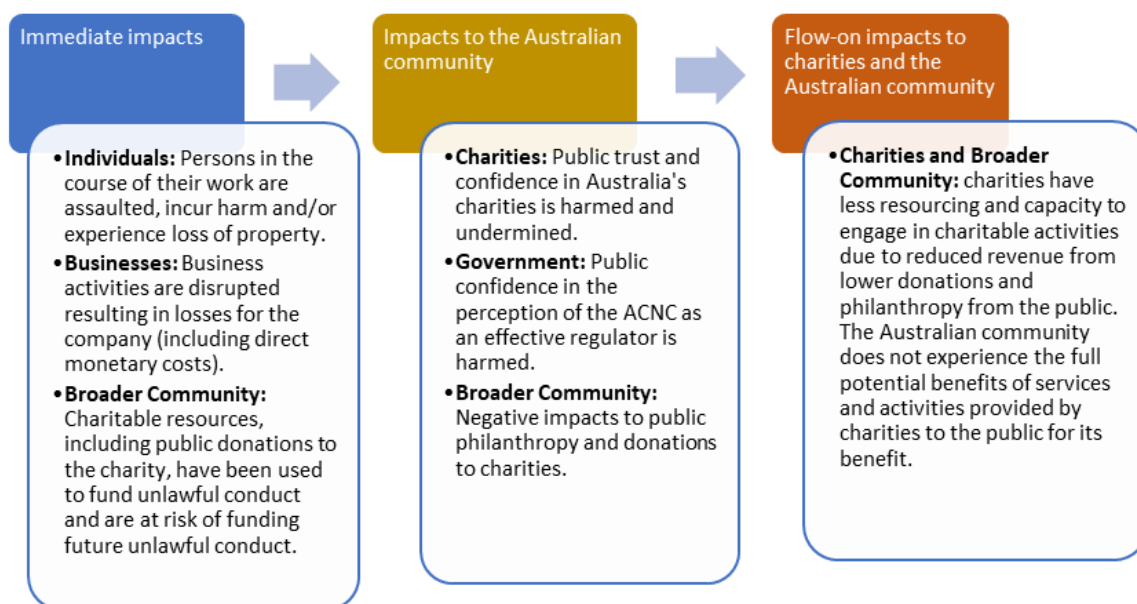
Further, governance standard three creates uncertainty and complexity because it is difficult for the charity sector, and the community more broadly, to discern the scope of unlawful activities prohibited in the jurisdictions they operate. This imposes an unreasonable administrative burden on charities because to be confident they are complying with their obligations under the ACNC Act, many charities may need to engage legal advisers to help them navigate the scope of governance standard three. Consultations demonstrated this is particularly a problem for large charities that operate across multiple jurisdictions. Ultimately, resources spent on legal advisers and compliance with the governance standards diverts charitable funding away from charitable purposes, resulting in less funding being allocated for activities and services that benefit the Australian community.

## **2. Why is Government action needed?**

In recent years a small number of registered charities have engaged in serious unlawful conduct or used their resources to actively promote serious unlawful conduct such as trespass, vandalism, theft, assault and threatening harm to persons. This is evidenced by media coverage in recent years in relation to protests on forestry, mining and farming lands. This does not represent the behaviour of the majority of registered charities, but rather a small minority within the sector. Nevertheless, a failure by a registered charity to comply with an Australian law compromises public trust and confidence in the sector as a whole, adversely impacting public philanthropy, reducing funding available for charitable purposes.

Figure 1 illustrates this risk by describing the immediate and flow-on impacts to the Australian community of serious unlawful conduct, through using the example of a charity participating in trespass, vandalism and common assault upon a business' property and staff.

Figure 1



Government action is therefore needed to ensure the ACNC Commissioner is enabled under law to investigate and take enforcement action, if appropriate, in situations where a registered charity participates or actively promotes offences of trespass, vandalism, theft, assault and threatening harm. This will give the public trust and confidence that a registered charity is governed in a way that complies with Australian laws.

Government action is also needed to clarify uncertainty about the scope of unlawful activities prohibited under governance standard three and resolve the complexity of the law to make it easier and less costly for registered charities to understand their obligations under the governance standard. Reduced compliance costs will provide charities with the ability to allocate more of their resources toward charitable activities in line with their purpose.

During consultations a large charity that operates in multiple jurisdictions indicated to Treasury that the existing regulatory burden of complying with governance standard three (in terms of ensuring all the charity's operations and staff are aware of their obligations and compliant with the current standard) is significant due to the charity's size and activities. Whilst it is evident that this compliance cost exists, Treasury is unable to reliably quantify this cost due to insufficient information and data.

### 3. What policy options are you considering?

#### ***Option 1 – Maintain the status quo***

Maintain the status quo, whereby governance standard three does not enable the ACNC Commissioner to investigate and take appropriate enforcement action in all serious breaches of the law by a registered charity (refer Table 1). This means that potentially serious unlawful conduct undertaken by a registered charity (now or in future) will continue to undermine public trust and confidence, and put charitable assets at risk (refer Figure 1).

Further, maintaining the status quo will also mean that registered charities continue to incur the administrative burden of discerning the scope of unlawful activities prohibited under governance standard three due to uncertainty and complexity in the law.

### ***Option 2 – Voluntary education***

This option involves undertaking further education with registered charities. Education and guidance material would be provided by the ACNC to ensure registered charities are aware of their obligations under existing governance standard three. Guidance material will assist in reducing the uncertainty in the law by identifying which unlawful activities fall within the scope of governance standard three and therefore could be the subject of investigation and enforcement action by the ACNC Commissioner. As this option involves voluntary education, registered charities would determine whether they need to engage with the education and guidance material.

However, Option 2 does not enable the ACNC Commissioner to investigate and take appropriate enforcement action if a registered charity operating in certain jurisdictions participates or actively promotes offences of trespass, vandalism, theft, assault and threatening harm.

### ***Option 3 – Changes to governance standard three***

This option involves amendments to the ACNC Regulations, to establish two changes to governance standard three:

1. A requirement that registered charities must not directly engage in certain kinds of unlawful conduct that may be dealt with as a summary offence or an indictable offence under an Australian law. The offences in scope relate to the following conduct:
  - entering or remaining on real or personal property (commonly known as trespass);
  - destroying or damaging real or personal property (i.e. vandalism);
  - appropriating personal property belonging to another entity (i.e. theft);
  - causing personal injury to an individual or any other kind of impairment of an individual's health, including the risk or threat of such (i.e. assault or threatening harm).
2. A requirement that registered charities must not actively promote unlawful activities captured under governance standard three.
  - 2.1. The term 'actively promote' has its ordinary meaning and requires a direct link to the unlawful activity. For example, a registered charity organises an event to trespass onto the property of an Australian company.
  - 2.2. A registered charity will also be required to maintain reasonable internal control procedures to ensure that its resources are not used in way that contravenes governance standard three. For the avoidance of doubt, a charity's resources will include its employees, online presence, and communications materials (e.g. websites, social media accounts and mailing lists).

These amendments will enable the ACNC Commissioner to investigate and take enforcement action, if appropriate, where a registered charity engages in the listed unlawful conduct in circumstances where it is a summary offence or an indictable offence under an Australian law.

Reasonable internal control procedures are to be determined objectively by a registered charity and will depend on the specific circumstances of the charity, including its size, purpose, and activities. Examples of internal controls could include: controlling who can access and use the charity's funds,

office and social media accounts; relevant training for responsible persons and employees to ensure they understand their obligations under governance standard three; and addressing the improper use of the charity's resources promptly (for example, removing unauthorised posts on the entity's social media accounts that actively promotes unlawful activities).

It would be reasonable for a small charity to take a light touch approach to internal controls where the charity has a basic IT system, minimal social media presence and does not involve itself or its employees in promoting or attending protests. In contrast, a large charity operating across multiple jurisdictions with a significant social media presence and large workforce would be expected to have more sophisticated internal controls in line with modern business practices.

Charities are not expected to keep extensive written records to comply with option 3. The requirement to maintain reasonable internal control procedures is consistent with the application of similar requirements for registered charities (such as the existing requirement for registered charities to maintain reasonable internal control procedures under the external conduct standards<sup>5</sup> in the ACNC Regulations).

The revised governance standard will be administered by the ACNC, as per its ordinary regulatory functions. The ACNC will provide guidance and education to registered charities to help them understand and comply with option 3. Where a registered charity fails to comply with the governance standards, the ACNC may take appropriate enforcement action (for example, the ACNC Commissioner could in certain circumstances issue formal warnings or give directions to comply with the provisions, or could consider revocation of a charity's registration).

#### ***Option 4 – Amendments to the Charities Act 2013***

This option involves amendments to the *Charities Act 2013* to provide additional clarity around the meaning of and circumstances where a registered charity may have a disqualifying purpose of 'engaging in, or promoting, activities that are unlawful or contrary to public policy'.<sup>6</sup> The amendments could include examples of activities that are in scope and out of scope (including those described in Option 3) in terms of what may contribute to a charity being at risk of having a disqualifying purpose, as well as clarification around what constitutes 'promoting' unlawful activities.

## **4. What is the likely net benefit of each option?**

### ***Option 1 – Maintain the status quo***

By its nature, this option would have no regulatory or compliance costs for registered charities, with the existing governance standard continuing unchanged.

However, in the absence of a change in Australian Government policy the ACNC Commissioner would be unable to investigate and take appropriate enforcement action in potentially serious breaches of the law by a registered charity in certain jurisdictions. Continued and unaddressed serious unlawful conduct by some charities compromises public perception of the ACNC as an effective regulator, potentially undermining public trust and confidence in the charity sector.

As illustrated in Figure 1, serious unlawful conduct can impose physical and economic harm on individuals or businesses targeted by the charity. Stakeholder feedback (by a forestry industry

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<sup>5</sup> The External Conduct Standards (Division 50 of the ACNC Regulations) are a set of standards that govern how a registered charity must manage its activities and resources outside Australia.

<sup>6</sup> Section 11 of the *Charities Act 2013*.



association) indicated that when registered charities have engaged in unlawful activities (such as trespass on private property, vandalism or theft ), it has directly cost the industry millions of dollars a year in disruptions to operations, and caused considerable distress to workers who are often subject to intimidation and harassment. Further, serious unlawful conduct can also result in reputational costs and damage to the broader charity sector (including members, employees, volunteers and beneficiaries).

Additionally, in the absence of the Government clarifying the existing uncertainty and complexity in the law, charities (particularly those that operate across multiple jurisdictions) will continue to incur the administrative burden and expense of discerning the scope of unlawful activities prohibited under governance standard three.

### ***Option 2 – Voluntary education***

This option would have little or no regulatory or compliance costs for registered charities as the sector would engage with the guidance material on a voluntary basis and the existing governance standard would remain unchanged.

The provision of guidance and education will provide some benefit to the sector as it would clarify that some serious offences related to trespass, vandalism, theft, assault, threatening harm, and inciting another person to commit an offence are indictable offences in some Australian jurisdictions. In this sense, this option will provide clarity to charities where there is uncertainty about the scope of unlawful activities prohibited under governance standard three.

However, option 2, like option 1, does not allow the ACNC to investigate some serious breaches of the law by a charity even where action is warranted to protect the charity's assets, the people it serves, and more broadly, public trust and confidence in the charity sector. The cost of such inaction is illustrated in Figure 1 and is supported by a written submission from a forestry industry association that such serious breaches of the law are costing the sector millions of dollars per year in lost production.

### ***Option 3 – Changes to governance standard three***

Option 3 is estimated to have a one-off regulatory cost of \$1.4 million for large charities operating across multiple jurisdictions<sup>7</sup>. This regulatory cost will be offset by long term reductions in the administrative burden for all registered charities who will no longer need to discern the scope of unlawful activities prohibited under governance standard three.

#### *Existing regulatory burden*

The revised governance standard does not impose a new burden on charities as they are already required to follow Australian laws. Acting lawfully protects a charity's assets, reputation, and the people it works with. Therefore, registered charities already should have governance processes in place to ensure they do not engage in such activities, including:

- internal controls, policies and procedures to ensure the proper use of the charity's resources (e.g. access controls for who can use the charity's funds, office and social media accounts);
- staff training;

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<sup>7</sup> This is based on a total estimate where it is assumed that around 9,500 large charities undertake a one-off 2-hour review of their internal control procedures at a labour cost of \$73.05 per hour (based on the Regulatory Burden Measurement Framework).

- ad hoc risk assessments on an on-going basis; and
- procedures to address misuse promptly where a charity's resources have been improperly used.

Further, in addition to the current obligations under governance standard three, governance standard five requires responsible persons of charities (i.e. directors) to ensure a charity's financial affairs are managed in a responsible manner. This means charities should have governance processes, internal controls and safeguards in place to ensure good, safe and responsible governance of their financial affairs and assets. For example, a registered charity may have access controls in place to ensure only authorised persons can access and use the registered charity's bank account and premises.

Additionally, a registered charity is required to notify the ACNC Commissioner of any fact or circumstance that may affect their entitlement to registration, including if the charity does not comply with a governance standard or external conduct standard.<sup>8</sup> Under the ACNC Act a registered charity must notify the ACNC within 28 days of becoming aware that it may have contravened the new provisions.

Accordingly, all registered charities will have some established governance processes in place to meet their existing obligations under Australian laws and the ACNC Act. However, the extent of the internal controls implemented by a registered charity will inevitably depend on its particular circumstances. For example, a small charity that does not have a social media presence and does not involve itself in protest-based advocacy activities would only be expected to have simple governance processes in place.

#### *Regulatory burden associated with the change*

Given the existing regulatory burden to comply with current obligations under Australian laws and the ACNC Act, this option is not expected to create additional ongoing regulatory costs for registered charities.

However, it is expected that some registered charities may initiate a one-off review of their existing internal control procedures to ensure that they are compliant with existing requirements as well as the revised governance standard three. Specifically, charities would need to ensure their internal control procedures appropriately and reasonably protect their resources from being used to actively promote unlawful activities.

The requirement to maintain reasonable internal control procedures needs to be determined objectively and take into consideration the specific circumstances of the registered charity (including its size, purpose, and activities). The vast majority of registered charities are small in size, with only around half maintaining an online presence. These charities could be expected to have simple internal control arrangements which may not require being reviewed as a result of the change. In contrast, large charities operating across multiple jurisdictions will have established more sophisticated internal procedures which may need to be reviewed.

Based on ACNC data, it is estimated that around 50,000 registered charities would be required to comply with the revised governance standard. This estimate does not include Basic Religious Charities which do not have to comply with the governance standards<sup>9</sup>. Of these registered charities, around 9,500 are large charities, that is, they have revenue of \$1 million or more per annum. Assuming that all large registered charities undertake a one-off two-hour review of their internal

<sup>8</sup> Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

<sup>9</sup> Section 45-10(5) of the *Australian Charities and Not-for-profits Commission Act 2012*.

control procedures, this would impose a one-off regulatory cost of \$1.4 million for large charities (refer Table 2)<sup>10</sup>.

**Table 2 one-off regulatory burden estimate**

<b>One-off regulatory cost (from business as usual)</b>				
Change in costs (\$ million)	Business	Registered charities	Individuals	Total change in cost (\$ million)
Total, by sector	nil	(\$1.4)	nil	(\$1.4)

In addition, a handful of activist charities who engage in unlawful protest action will need to review their internal controls and potentially curb their activities where their conduct is unlawful. Due to the small number of such charities the additional regulatory burden is expected to be immaterial both with respect to transitional and on-going costs.

Several stakeholders have submitted that the proposed changes will introduce new uncertainty and may require charities to obtain additional legal advice. Option three will provide greater clarity and a consistent approach for certain serious offences, however, where charities continue to experience some uncertainty education and guidance material will be provided by the ACNC. This material is expected to minimise the burden on registered charities and assist them in understanding the range of unlawful activities falling within the scope of the revised governance standard three.

*Benefits of option 3*

The benefit of this option is that it enables the ACNC Commissioner to investigate and take appropriate enforcement action in cases where a registered charity engages in serious unlawful conduct, namely trespass, vandalism, theft, assault, and threatening harm. This amendment addresses the existing complexity in the law, particularly where the unlawful conduct in question is only partially considered an indictable offence or where it is defined as a summary offence in an Australian jurisdiction. This means that the ACNC Commissioner can take appropriate regulatory action to protect the registered charity’s assets, reputation and the people it serves where a charity’s unlawful conduct places these at risk, consistent with the original policy intent of governance standard three.

Additionally, option 3 is expected to reduce the existing administrative burden and expense for registered charities in discerning the scope of unlawful activities prohibited under governance standard three in the long term. Table 3 below illustrates how the uncertainty has been resolved by ensuring comprehensive coverage of serious breaches of Australian law.

**Table 3**

Jurisdiction	Entering or remaining on property (trespass)	Destroying or damaging property (vandalism)	Appropriating property (theft)	Causing harm to persons (assault)	Risk or threat of causing harm to persons (threatening harm)
New South Wales	✓	✓	✓	✓	✓
Victoria	✓	✓	✓	✓	✓

<sup>10</sup> This estimate is based upon a labour cost of \$73.05 in accordance with the Regulatory Burden Measurement Framework.

Jurisdiction	Entering or remaining on property (trespass)	Destroying or damaging property (vandalism)	Appropriating property (theft)	Causing harm to persons (assault)	Risk or threat of causing harm to persons (threatening harm)
Queensland	✓	✓	✓	✓	✓
Western Australia	✓	✓	✓	✓	✓
South Australia	✓	✓	✓	✓	✓
Tasmania	✓	✓	✓	✓	✓
Australian Capital Territory	✓	✓	✓	✓	✓
Northern Territory	✓	✓	✓	✓	✓

The amendments ensure that registered charities and the ACNC will no longer be required to determine whether the targeted conduct is prescribed as an indictable offence under the law of the jurisdiction in which the conduct took place. Additionally, the amendments clarify, in line with community expectations, that registered charities should govern the use of their resources responsibly and ensure that their resources are not used to actively promote others to engage in unlawful activities.

#### **Option 4 – Amendments to the Charities Act 2013**

The *Charities Act 2013* could be amended to provide additional clarity around the circumstances in which a registered charity may have a disqualifying purpose of “engaging in or promoting activities that are unlawful or contrary to public policy”. Contraventions of the disqualifying purpose rules result in revocation of a charity’s registration meaning the charity loses access to certain government funding and charitable tax concessions.

Amendments to the *Charities Act 2013* would effectively remove the possibility for the ACNC to adopt other regulatory action (such as issuing formal warnings and giving directions) according to the ACNC Commissioner’s enforcement powers established under the ACNC Act. Accordingly, option 4 is a blunt instrument to address the policy problem the Government is seeking to resolve.

Amendments to the disqualifying purpose rules within the *Charities Act 2013* would apply to all 58,000 registered charities. The higher risk of revocation for potentially accidental or inadvertent contraventions to the *Charities Act 2013* could lead to registered charities operating in a more risk averse way, scaling back their operations to the detriment of the Australian public. In contrast, under option 3, regulatory action will only be taken if the ACNC Commissioner reasonably believes that a registered charity has not complied with option 3, or it is more likely than not that it will not comply with this option.

Under option 4, a handful of activist charities that regularly engage in unlawful protest action could be deregistered as a consequence of amendments to the disqualifying purpose rules if they continue to engage in unlawful activities. A reliable estimate of the costs associated with the loss of charitable tax concessions cannot be quantified given any cost will be contingent on the nature of the charity’s tax affairs, the types of tax concession that the charity is eligible for and any flow effects to the level of donations and other revenue streams.

## 5. Who did you consult and how did you incorporate their feedback?

Treasury released exposure draft regulation, explanatory statement and FAQs for public consultation on the Treasury website between 16 February 2021 and 14 March 2021. Treasury also conducted two targeted roundtable sessions with representatives from charities and law firms advising the charity sector. The roundtable sessions took place during the public consultation period and involved discussion on the consultation materials broadly consistent with option 3. While the policy intention of option 3 has remained unchanged the drafting has evolved and refined to better reflect the policy intention following public feedback (see below).

Treasury received 65 written submissions in total from charity groups, charity law firms, individuals and organisations including businesses. While some stakeholders were supportive of the changes, the majority of stakeholders opposed the changes consulted upon. The group that generally supported the changes included some charities as well as other organisations.

A summary of key concerns and issues raised by stakeholders over the course of the consultation period are summarised below.

1. The summary offences captured are too broad, leading to uncertainty and an increased regulatory burden as some charities may be required to obtain additional legal advice. Stakeholders asserted that the breadth of summary offences captured may include very minor or obscure summary offences, particularly in relation to real and personal property. The breadth of potential offences captured creates uncertainty for charities about what offences are captured.
2. The steps a charity must take to protect its resources from misuse (in terms of ‘promoting or supporting’ unlawful activities) are not practical or reasonable. Stakeholders expressed concern about the meaning of ‘reasonable steps’ and the regulatory burden this may impose on charities. Charities stated that they may need to keep extensive written records, conduct training of staff, employ additional compliance officers, risk management plans, insure assets, and in some cases seek legal advice to ensure compliance with the new rules in all their activities and operations.
3. Uncertainty about the meaning and practical threshold of what can be considered ‘supporting or promoting’ unlawful conduct. Some stakeholders said that without further guidance the effect of this provision is that it may deter charities from advertising, reporting on or commenting on lawful protest action altogether. There was also concern that the regulations would have a chilling effect and deter charities from lawful advocacy activities.
4. General concerns about the administration of the revised governance standard in practice, including the ACNC Commissioner’s discretion and pre-emptive enforcement powers. Some stakeholders stated that more clarity was needed in situations of inadvertent contraventions (An example being where a charity deploys its resources during disaster and emergency responses, such as evacuating a group of people and gathering on a property).

Treasury incorporated feedback from stakeholders by revising the draft regulations as follows:

1. Refining the scope of summary offences relating to property to key offences intended to be captured under the changes (i.e. trespass, vandalism, theft of property, assault and threatening harm).

2. Refining the provision to require charities to maintain ‘reasonable internal control procedures’ rather than taking ‘reasonable steps’ to ensure their resources are not used in contravention of the revised governance standard three.

Maintaining appropriate safeguards and internal controls over a charity’s resources is the original intent of the requirement. Charities are not expected to keep extensive written records or seek legal advice to comply with the new rules. This change will clarify in the regulations what charities are practically required to do in order to comply with the new rules.

3. Raising the threshold for enlivening the provision from ‘promote or support’ to ‘actively promote’ by a registered charity.

Raising the threshold to ‘actively promote’ reduces the risk of inadvertent, passive or unintentional breaches. This aligns with the policy intent of the changes which is to capture deliberate and active undertakings by charities to promote unlawful activities.

4. Including a note in the regulations that the ACNC Commissioner may consult relevant law enforcement authorities when forming a reasonable belief about whether or not a charity has engaged in an act which is a serious breach of Australian law.

This note is intended to address general concerns from stakeholders about the ACNC Commissioner’s discretion and enforcement powers.

These revisions were accompanied by corresponding revisions to the explanatory statement, as well as the following additional points in the explanatory statement:

- Clarification of the term ‘engage in conduct’ by reference to the definition in the ACNC Act. The term means to do an act or omit to perform an act. This change is intended to address a common misconception that was identified by Treasury during consultations with stakeholders, where stakeholders understood the term ‘conduct’ referred to a series of acts rather than a single act.
- Clarification that a charity’s non-compliance with the revised governance standard depends upon any fault elements (such as intent to cause damage to or deprive an individual of property) and defences (such as the defence of sudden or extraordinary emergency) that exist under the relevant offences. This clarification is intended to address concerns about inadvertent contraventions to the revised governance standard (i.e. where a charity trespasses on property but for the purpose of evacuating people from a disaster event).
- Examples to illustrate situations that may or may not contravene the revised governance standard. These examples are intended to assist stakeholders in understanding certain aspects of the provisions.
- Where relevant, clarification that the regulations are consistent with the requirements in the ACNC Act and the objects of governance standard three.
- A brief summary of review rights available to entities.

## **6. What is the best option from those you have considered?**

Treasury considers that option 3 is the best option from those considered. This option is the only option that will comprehensively address the policy problem by ensuring the ACNC Commissioner is enabled under law to investigate and take enforcement action, if appropriate, in situations where a registered charity (i) participates in offences of trespass, vandalism, theft, assault and threatening harm or (ii) actively promotes others to engage in unlawful conduct captured under governance

standard three. The option also clarifies to charities what types of unlawful activities are not to be engaged in or actively promoted and makes it easier for registered charities to understand their obligations under governance standard three.

The regulatory benefit of this option is that it will provide clarity to charities about their obligations and how they are to comply with governance standard three. Additionally, this option may reduce the risks of material and immaterial costs associated with situations where registered charities may engage in unlawful activities. These include the costs incurred by a charity's members (such as donors and beneficiaries) as well as individuals or businesses adversely impacted by unlawful activities from charities. The changes may also enhance public trust and confidence in Australia's charity sector and the ACNC by providing assurance to the public about the expected standards by which charities should be governed.

These benefits are appropriately weighed against the regulatory burden under the option, namely that charities should consider reviewing their existing internal control procedures to ensure they are compliant with current requirements and revised governance standard three. Given that charities should already have governance processes, internal controls, and safeguards in place to meet current requirements, this option is not expected to create any additional regulatory costs for the majority of registered charities.

Following consultation on the proposed changes to governance standard three, Treasury has incorporated feedback received from stakeholders to address concerns from the sector. The revisions to the draft regulations are intended to provide registered charities with further certainty whilst meeting the Government's policy objectives.

### **Status of the RIS at major decision making points**

The Government was required to undertake a review of the ACNC Act after the first five years of operation. The review evaluated the performance of the legislative framework and regulation of the sector, with an aim to identifying improvements that could be made. A final report was tabled in Parliament on 22 August 2018.

On 6 March 2020, the Government released its response to the ACNC Review, agreeing recommendations that supported an effective regulator, reduced red tape, and strengthened trust. Consistent with the Government's RIS requirements, the ACNC Review was certified by the Department of the Treasury as meeting the requirements of a RIS.

This RIS relates to the Government's response to recommendation 20 of the ACNC Review whereby the Government stated it would explore legislative options to address uncertainty in the law.

The relevant Minister previously supported development of option 3 prior to this RIS being prepared, noting public consultation with the sector was required under the ACNC Act to seek the views of relevant stakeholders before a regulation is made. This RIS was prepared following public consultation outlined above.

## **7. How will you implement and evaluate your chosen option?**

The proposed regulations will come into effect subject to the Parliamentary process for regulations.

Consistent with the ACNC's usual compliance processes, the ACNC will work with registered charities to ensure they understand their obligations under the expanded governance standard. The ACNC

will provide guidance and education to registered charities to help them understand and comply with the new provisions.