

Unnecessary red tape aimed at silencing charities

Frank Brennan | 17 August 2021

Last Wednesday, the Senate Standing Committee for the Scrutiny of Delegated Legislation chaired by the Government's Senator Concetta Fierravanti-Wells tabled a report highlighting problems with a proposed new regulation affecting charities.



There are 59,000 registered charities in Australia. They are the backbone of the voluntary sector assisting citizens in all manner of situations,

particularly in times of emergency and particularly in situations of ongoing economic deprivation. Think only of Vinnies and the Salvos. Charities enjoy various benefits from government, including the capacity to offer tax deductibility for donations. The Australian Charities and Not-for-profits Commission (ACNC) has the job of overseeing charities.

The Morrison government has a strong commitment to reducing government red tape. But at the same time, it has moved to tighten the supervision of charities. The Australian Charities and Not-for-profits Commission Regulation 2013 sets down governance standards for charities. At the moment, governance standard 3 prohibits a registered charity from acting in a way that may be an indictable offence or an offence carrying a serious penalty.

The proposed new regulation would place a charity at risk of losing its registration if one of its staff or volunteers were to do an act (or omit to do an act) that may be dealt with as a summary offence under an Australian law relating to real property, personal property or causing personal injury or harm to an individual. The charity could also face deregistration if it failed to take reasonable steps to ensure its resources were not being used to promote acts (or omissions) by any entity that may be dealt with as a summary offence. Summary offences are lesser offences which are dealt with by a magistrate. Indictable offences are more serious offences which usually come before a judge and jury.

Toby oConnor the CEO of Vinnies has given an example of the operation of the proposed change. There are over 50,000 Vinnies members who volunteer around Australia. Every year on Palm Sunday, there are protest rallies against the government's refugee and asylum policy. Under the present law, if a Vinnies member were to disobey a police direction at one of these protests, that would be a matter between the member and the police. It would have nothing to do with Vinnies, and could not impact on the ongoing registration of Vinnies as a charity. If the Senate were not to disallow the new regulation, the ACNC commissioner could instigate an inquiry, requiring Vinnies to waste precious resources justifying its ongoing registration. The actions of the Vinnies protester could threaten the Vinnies charity registration.

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Here is the problem. Dr Gary Johns is the ACNC Commissioner. When questioned about the new regulation, he pointed out that in his 4 years as commissioner, the ACNC has deregistered only 45 out of 59,000 charities, mainly for misuse of funds. At the Senate Economics Legislation Committee on 2 June 2021, Senator Anthony Chisholm put it to Dr Johns: 'But it's not as if there has been a widespread problem that needs to be addressed through amendment to government standard No. 3.' Johns replied, 'Not on our figures, but I can't speak for the government on its desire to introduce regulations.' He told the committee: 'There is, in regulation now, a discretion that I have ... to look at responsible persons—that's a committee

member—who may or may not have committed a crime. The government is looking at a different set of crimes, as I understand it. But my discretion to take into account the behaviour of individuals has not changed and, as I understand it, will not change; I could do those things now. The discretion has not ever been used, I might say. We have to understand here that we regulate charities, so the behaviour of an individual may or may not be an indication that the charity, if you like, is undertaking activities that are not permissible.’ So why the need for the change? Dr Johns was not able to enlighten the Senate committee. He was not seeking the change.

The Senate Standing Committee for the Scrutiny of Delegated Legislation has now reported. This committee works in a bipartisan fashion, with equal numbers of Government and Opposition senators. It is chaired by a government senator who is an experienced lawyer and a previous minister. The committee was very unimpressed with the drafting of the proposed new regulation, noting ‘it is unclear what the full scope of the offences may be’ and that ‘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.’ Also ‘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 noted that it had received ‘considerable correspondence’ from a wide range of charities which ‘served to heighten the committee’s scrutiny concerns about the potential impact the instrument may have on registered charities.’

As is customary, the committee sought clarification from the responsible minister, in this case the Assistant Treasurer, Michael Sukkar. ‘However, while acknowledging the Assistant Treasurer’s advice, the committee retains some significant concerns regarding aspects of this instrument.’ In particular, the committee has requested ‘the Assistant Treasurer’s more detailed advice as to how the instrument as a whole...does not impermissibly restrict the implied freedom of political communication.’

If the Morrison Government is going to add another level of red tape to the operation of charities, it needs to provide the Senate and the charities with a coherent, transparent explanation about what it is up to. When asked on ABC Radio Breakfast why the government was persisting with this amendment not sought by Dr Johns and not explained adequately by Minister Sukkar, Tim Costello replied: ‘The government can’t find time to put in a Federal ICAC. This is where we scratch our heads. They can find time to do this, which is unprecedented and goes way beyond any other group in society when they need it. I think it has all got to do with that sense that we don’t want charities doing advocacy. That’s why they want to do it. And charities absolutely – charity coming from the old English word for love – they give, they serve, but they also say we wouldn’t need to give in service much if there were some policy changes.

So, they do advocacy. That's what the government doesn't like. That's what absolutely this is about.'

This is a bad law, an excessive piece of red tape, and a patronising disincentive to public protest by people who care passionately about injustices because they are touched by the lives of those suffering those injustices. Government already has more than enough armoury to police charities which abuse their special tax status. The cross-benchers should join with Labor in disallowing this unnecessary regulation.



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Main image: The Palm Sunday Rally for Refugees