

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Competition, Charities and Treasury

Australian Charities and Not-for-profits Commission Act 2012

Australian Charities and Not-for-profits Commission Regulations 2022

The *Australian Charities and Not-for-profits Commission Act 2012* (the Act) provides for the registration and regulation of charities by the Australian Charities and Not-for-profits Commission (ACNC).

Section 200-5 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Australian Charities and Not-for-profits Commission Regulations 2022* (the Regulations) is to remake the *Australian Charities and Not-for-profits Commission Regulation 2013* (the former Regulations) before they sunset. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, progressively sunset according to the timetable set out in section 50 of the *Legislation Act 2003*. Sunsetting legislative instruments generally cease to have effect after ten years and further action is required to continue their operation, such as remaking the instrument.

The former Regulations were due to sunset on 1 April 2023. The Regulations remake the former Regulations with revisions to update and remove redundant provisions.

The language, format and numbering of the former Regulations have largely been maintained in the Regulations as they are used extensively in the ACNC's administrative guidance for the sector.

Sections 45-15 and 50-15 of the Act specify that before the power to make the Regulations may be exercised, the Minister must be satisfied that appropriate consultation has been undertaken with the following entities:

- the NFP sector (such as through entities that represent parts of the sector); and
- entities having expertise in fields relevant to the Regulations; and
- entities likely to be affected by the Regulations; and
- the ACNC Commissioner.

Sections 45-15 and 50-15 of the Act also specify that before the power to make the Regulations may be exercised, the Minister must be satisfied that relevant input received as part of that consultation has been taken into account adequately.

The draft Regulations and explanatory materials were released for a four-week public consultation between 18 July 2022 and 15 August 2022. There were 25 written submissions received in response to the consultation. Feedback received during

consultation generally supported the remaking of the Regulations. The submissions received in response to the consultation will be publicly available on the Treasury website.

Following this process of consultation, the Minister is satisfied that the conditions in section 45-15 and 50-15 of the Act have been met and that those listed entities were consulted appropriately and that the input received as part of that consultation was taken into account appropriately in the preparation of the Regulations.

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 1 April 2023.

The Office of Best Practise Regulation (OBPR) has advised that no Regulation Impact Statement is required as the Regulations are unlikely to have a more than minor regulatory impact and that they remain fit for purpose. The OBPR Reference Number is OBPR22-02384.

A Statement of Compatibility with Human Rights is at Attachment B.

Details of the *Australian Charities and Not-for-profits Commission Regulations 2022*

This attachment sets out further details on the *Australian Charities and Not-for-profits Commission Regulations 2022* (the Regulations). All references are to the Regulations unless otherwise stated. The Regulations make improvements to the former Regulations by reformatting and restructuring provisions to take account of current instrument drafting practice, and removing transitional provisions which are no longer required. The Regulations also simplify and update language in accordance with current drafting practice.

Section 1.1 – Name of Regulations

This section provides that the name of the Regulations is the *Australian Charities and Not-for-profits Commission Regulations 2022*.

Section 1.2 – Commencement

This section provides that the Regulations commence on 1 April 2023.

Section 1.3 – Authority

This section provides that the Regulations are made under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Section 1.4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Section 1.5 – Definitions

This section remakes the interpretation section of the *Australian Charities and Not-for-profits Commission Regulation 2013* (the former Regulations) with the exception of the removal of the definitions of ‘register’, ‘registered entity’ and ‘taxation law’ as they are already defined in the Act. A ‘Note’ to section 1.5 has also been added to indicate a number of expressions which are included in the Regulations but are defined in the Act.

Section 40.10 – Information withheld from Register

This section remakes former subsection 40.10(4) to refer to private ancillary fund guidelines more generally, instead of to ‘guideline 14’. The reference to ‘guideline 14’ has been removed because it relates to a superseded 2009 version of the private ancillary fund guidelines which was in place at the time that the former Regulations were made. This change provides additional flexibility and allows the Regulations to continue to apply despite potential changes to the numbering of the private ancillary fund guidelines in the future.

Section 45.5 – Governance standard 1 – Purposes and not-for-profit nature of a registered entity

This section remakes section 45.5 unchanged, with the exception of the ‘Note’ to subsection 45.5(2), which has been updated to refer to the current website for viewing Australian law.

Section 60.30 – Special purpose financial statements

The section remakes the former section 60.30, with the exception of the numbering, which has been updated. That is, the former subsections 60.30(2A) and 60.30(2B) have been renumbered as subsections 60.30(3) and 60.30(4) respectively.

Division 305 – Application of this instrument as originally made

Division 305 provides that Division 40, section 50.25, Division 60 and Division 205 apply for the 2022-23 financial year and later financial years. Division 305 is necessary to avoid the circumstance where the Regulations and former Regulations would otherwise have both been in operation for part of the 2022-23 financial year because the Regulations commence on 1 April 2023. The amendment is necessary because these provisions apply in respect of financial years.

The effect of Division 305 is that Division 40, section 50.25, Division 60 and Division 205 of the Regulations operate retrospectively with effect from 1 July 2022. However, this retrospective application does not adversely impact or disadvantage affected entities because Division 40, section 50.25, Division 60 and Division 205 are being remade without any changes to their operation. The purpose of Division 305 is to ensure that a single instrument, that is the Regulations, applies for the whole of the 2022-23 financial year.

Schedule 1 – Repeals

This Schedule repeals the former Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Australian Charities and Not-for-profits Commission Regulations 2022

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Australian Charities and Not-for-profits Commission Regulations 2022* (the Regulations) is to remake the *Australian Charities and Not-for-profits Commission Regulation 2013* (the former Regulations) with limited changes. The Regulations make improvements to the former Regulations by reformatting and restructuring provisions to take account of current instrument drafting practice and removing transitional provisions which are no longer required. The Regulations also simplify and update language in accordance with current drafting practice.

Human rights implications

Human rights do not apply to registered entities, only individuals. The Regulations do not directly restrict individuals – it places limitations at the entity level. Human rights are only engaged to the extent that the Regulations impact on individuals involved with registered entities.

The Legislative Instrument engages the following human rights:

- the right to protection from arbitrary or unlawful interference with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR);
- the rights of children to protection and care from the State as is necessary to ensure their well-being in Article 3(2) of the Convention on the Rights of the Child (CRC);
- the rights of disabled persons to protection and care from the State from all forms of exploitation, violence and abuse in Article 16(1) of the Convention on the Rights of Persons with Disabilities (CRPD); and
- the right to state-supported recovery for child victims of abuse under Article 39 of the Convention on the Rights of the Child.

The right to protection from arbitrary or unlawful interference with privacy

The right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR, may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The *Australian Charities and Not-for-profits Commission Act 2012* (the Act) establishes the Australian Charities and Not-for-profits Register (the Register) as a single source of easily accessible public information on the not-for-profits sector. The Register is maintained electronically by the Australian Charities and Not-for-profits Commissioner (the Commissioner) and includes specified information about each registered, and each formerly registered, entity. The Register aims to increase transparency and enable registered entities to demonstrate appropriate levels of accountability and governance.

Section 40.1 of the Regulations specifies certain additional information that the Commissioner must include on the Register. Section 40.1 engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR because the publication of certain types of information on the Register, especially about private ancillary funds, may adversely impact the privacy of individual donors.

However, any information shared on the Register is subject to Subdivision 40-B of the Regulations which specifies circumstances in which the Commissioner should not include certain information on the Register or must remove certain information from the Register. This is intended to protect the privacy of individual donors and philanthropists, consistent with the right to privacy under Article 17, while still ensuring appropriate levels of transparency and accountability of registered entities.

Section 60.17 of the Regulations allows the Federal or office of the relevant State or Territory Auditor-General to undertake audits or reviews of the annual financial reports of medium or large registered entities. This provision aligns the auditing of medium or large entities under the Act with how similarly sized entities are currently audited. This process involves access and use of information which may contain personal information as defined in the *Privacy Act 1988*, thereby engaging the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the ICCPR. However, the interference is reasonable and proportionate to ensuring transparency in the sector, especially as the relevant Auditor-General would continue to be subject to all relevant privacy obligations, including obligations under the *Privacy Act 1988*, and would only undertake audits or reviews with the consent of the medium or large registered entity.

Protection of rights of children and disabled persons

External conduct standard 4 in Division 50 of the Regulations prescribes that a registered entity is required, while operating overseas, or dealing with third parties operating overseas, to take reasonable steps to ensure the safety of vulnerable individuals (a vulnerable individual is defined in the Regulations as a ‘child’ or an

individual who is unable to take care of themselves or is unable to protect themselves against harm or exploitation, including disabled persons) to the extent that they are employed or engaged by the registered entity or being provided with services or accessing benefits from the registered entity.

The external conduct standard positively engages:

- the rights of children to protection and care from the State as is necessary to ensure their well-being in Article 3(2) of the CRC; and
- the rights of disabled persons to protection and care from the State from all forms of exploitation, violence and abuse in Article 16(1) of the CRPD.

Where an entity fails to take reasonable steps to promote the safety of vulnerable persons in the way required, a range of actions may be taken against the registered entity, including deregistration. This positively engages with the rights of children and the rights of disabled persons as it ensures that, to the extent the registered entity engages with individuals in pursuit of its charitable purposes, that they are required to take reasonable steps to ensure the safety of vulnerable persons.

The right to state-supported recovery for child victims of neglect, exploitation and abuse

Governance standard 6 in Division 45 of the Regulations requires registered entities to take reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme) if the entity is, or is likely to be, identified as being involved in the sexual abuse of an applicant for redress under the Redress Scheme. This promotes the right to state-supported recovery for child victims of neglect, exploitation and abuse under Article 39 of the CRC.

Exchanges of information, including personal information within the meaning of the *Privacy Act 1988*, may be required to allow governance standard 6 to operate effectively, thereby engaging the right to protection from arbitrary or unlawful interference with privacy in Article 17 of the ICCPR. For example, the disclosure of information from officers of the Redress Scheme to the Commissioner ensures the Commissioner can assess whether a registered entity is meeting the new governance standard. To the extent Governance Standard 6 interferes with privacy, that interference is reasonable and proportionate to the legitimate objective of encouraging registered entities that may be responsible for past institutional child sexual abuse to join the Redress Scheme.

Conclusion

The Regulations are compatible with human rights because they promote the protection of human rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the legitimate objectives of the relevant provisions.

