



A Community Legal Centre

A MERGER OF DAREBIN COMMUNITY LEGAL
CENTRE AND FITZROY LEGAL SERVICE

Reg No. A0105338Y
ABN 13 421 440 211

W: www.fitzroy-legal.org.au
E: enquiries@fls.org.au

**UNLAWFUL ACTIVITY – CHANGES TO THE GOVERNANCE STANDARDS FOR
REGISTERED CHARITIES**

SUBMISSION TO

THE TREASURY, NOT-FOR-PROFITS AND TAX ADMINISTRATION BRANCH

[12 MARCH 2021]

For enquiries related to this submission:

Claudia Fatone

Chief Executive Officer

Email: cfatone@fls.org.au

Mobile: 0403 234 156

We are grateful for the opportunity to make submissions on the exposure draft and how the proposed changes to the governance standards for registered charities may impact our work as well as the work of organisations from the communities we serve.

About Fitzroy Legal Service

Fitzroy Legal Service (FLS) provides legal services (advice, casework, community legal education, court appearances, and systemic advocacy) across a range of areas of law including tenancy, employment, family violence, family law, crime, infringements, victims of crime, and human, civil and political rights.

We have staff conducting youth and family violence focused outreach services across the Cities of Darebin and Yarra, as well as staff working in a number of Victorian Courts, including family violence duty lawyers at Heidelberg Magistrates Court and cross jurisdictional lawyers at the Neighborhood Justice Centre in Collingwood.

We provide services to approximately 5,000 Victorians per annum and our *Law Handbook* is one of the most relied upon legal resources in the state.

In addition, we also operate several specialist legal assistance programs:

- Drug Outreach Lawyer (DOL) program has been operating for over 20 years providing specialist legal services for Victorians whose engagement with the legal system is underpinned by drug use;
- Prison Law Advice Line providing legal advice and information to people incarcerated in Victoria, and their families, on matters related to their imprisonment;
- Migrant Employment Law Clinic assists people from overseas who are working in Australia and who have been underpaid or exploited by their employers; and
- The Women's Leadership Group which consists of employed staff with lived experience of the criminal justice system who provide guidance about and implement Fitzroy Legal Service's advocacy agenda regarding criminalized women.

FLS has a long and proud history of supporting civil and political rights in Australia through casework, community legal education, and advocacy work. Such activities are historically critical aspects of community legal centre work across Australia. This is due in no small part to the reality that the communities we serve – those with disproportionately fewer resources and higher legal needs – are often those compelled to engage in protest action to bring attention to and redress inequality, discrimination, marginalization, stigmatization, and disproportionate representation in legal systems.

Impact of the proposed changes on Fitzroy Legal Service

Registered charity status and the exemptions, concessions, and benefits that flow from registration, are vital to a charity's existence. Without these supports, a significant proportion of not-for-profit organisations and services in Australia simply would not exist.

We are concerned that some of our vital work could put us in conflict with the proposed regulations and jeopardise our registered charitable status. Of particular concern to our own status as a registered charity is the proposed amendment to Governance Standard Three.

The proposed amendment adds the requirement that a registered entity take reasonable steps to ensure that its resources are neither used, nor continued to be used, *to promote or support acts or omissions* that may be dealt with as an indictable offence (or indictable offence that may be dealt with summarily), a relevant summary offence, or a civil penalty of 60 penalty units or more.

As community lawyers and legal service providers, our work often connects us with those who have already committed, or are at risk of committing, an indictable offence, summary offence, or a civil wrong. To ensure a proper functioning legal system, the relationship between lawyer and client is highly protected and allows for clients to disclose the commission of offences. Lawyers can breach confidentiality only in limited circumstances to prevent the commission of a serious criminal offence or to prevent imminent serious physical harm to the client or other person.

In other words, it is the very nature of our profession as lawyers and legal service providers that we have knowledge of the commission of offences. And that irrespective of this knowledge we work to support and promote the rights of our clients who, by their very nature of being our clients, have been or are at risk of being criminalized. Noting that our clients can be both individuals and community groups and other organisations that may be registered charities.

We draw your attention to the following examples of our important work to illustrate this concern:

- *Supporting, and promoting the rights of, people experiencing homelessness*

The City of Melbourne has in place strict local laws about how people experiencing homelessness can use public space, including a cap on the number of bags people are allowed to have, a cap on the number of people who are allowed to sleep next to each other, banning certain sleeping equipment, and disposing of belongings left unattended.

Fitzroy Legal Service has taken a public stance against such local laws as they have an incredibly detrimental effect on the safety and wellbeing of people experiencing homelessness in the City of Melbourne.

We have supported and worked with the Homeless Persons Union of Victoria (HPUV) on opposing these local laws, as well as other legal and related social issues facing

people experiencing homelessness. The HPUV is a representative organisation made up of individuals who are currently experiencing, or have previously experienced, homelessness and may have been in breach of the local laws or other offences at any time during our support and promotion on this issue as well as others.

- *Supporting, and promoting the rights of, people who use drugs*

The Drug Outreach Lawyer program is one of only a few legal services available to support those whose legal problems are underpinned by drug use. The program recognises drug addiction as a complex health issue that can place people in disproportionate contact with the criminal legal system as well as, once in the criminal legal system, at greater risk of poorer legal outcomes.

Lawyers across our service meet with clients who may be under the influence of drugs. While our lawyers would not take instructions from someone if their intoxication precluded them providing instructions and understanding our advice, there will be occasions where we provide support to people who may be in contravention of indictable offences such as drug use and/or drug possession. This support would often include referring our clients to health and other allied services should they need it. It would drastically undermine the lawyer-client relationship if we were unable to provide legal and other support because of risks to our charitable status.

In addition, FLS publicly supports a harm reduction approach to drug use instead of a criminal justice response. We consider that drug use is a public health issue and that use, possession and low-level trafficking should be decriminalised. We use multiple platforms and media avenues to promote the legal and human rights of people who may be committing indictable offences connected to drug use.

- *Supporting people leaving unsafe housing*

Victoria is in the midst of a housing crisis. We have the lowest per-capita spending on social housing of any state or territory and a housing waitlist of around 100,000 people.

The main reason that people need to leave their home, and the key driver of homelessness in Victoria, is family violence. Other key factors are a person's mental health and wellbeing or whether they are recently released from prison or other institutional setting.

Our work in delivering legal services in the areas of family violence, family law, crime, prison, and tenancy mean that we are often supporting clients that by necessity have begun living in disused or abandoned houses or other buildings. Colloquially known as "squatting", living in these places puts our clients at risk of trespassing charges, as are our staff who may be conducting outreach services to these clients.

While it is clear from the supporting documents to the exposure draft that the proposed amendments seek to capture protest and related activities, the actual drafting is broad and leaves it open that our work could put us in contravention of the regulations.

Promoting legal rights and needs of protesters

In Australia, our right to protest is protected through the constitutional implied right to freedom of political communication. In Victoria, our rights to protest are further protected through the *Charter of Human Rights and Responsibilities Act*. Australia is also a signatory to the UN Declaration of Human Rights and the International Covenant of Civil and Political Rights and has obligations to uphold the rights to protest captured therein.¹

It is also a cornerstone of our legal and democratic system that all persons, regardless of the alleged offence, have the ability to access legal advice, representation, information and assistance. The commission of an offence does not place a person, group, or other entity as any less deserving or entitled to legal information or legal assistance.

Like most community legal centres, FLS has a proud history of supporting and promoting the legal and human rights to engage in protest and publicly communicate about political issues.

We use our social media accounts, our website, and other publications to promote legal information relevant to protest activities and where people can access help for legal problems that arise out of their participation in protest events.

We do not take a position on how, when, and where people should engage in protest activity – this would be outside our scope as a community legal centre and inappropriate for us to do so. Our particular role is ensuring that the public has access to information about the human rights and legal frameworks surrounding protest activities and, as with our client base generally, can access legal assistance for actualised legal needs.

Protest by its very nature is often in contravention of some law, most commonly summary laws that regulate the use of public space. Furthermore, protest is often not celebrated at the time by the sitting government or other relevant body with decision making power over the relevant issue.

We are deeply concerned that promoting and supporting the right to protest, and related legal rights (such as people’s rights and responsibilities in relation to police), could contravene the regulations under the proposed amendments.

It is also sometimes the case, as mentioned above, that the communities we serve are engaged in protest activities seeking redress for issues that we, as a community legal centre, have a public stance on or otherwise support in principle. In these instances, we are concerned that posting or re-posting information about such events could be considered “promoting” or “supporting” and therefore contravene the regulations.

¹ For the remainder of this submission, the ‘right to protest’ will be used to encompass the *Constitutional* implied right to political communication, the Victorian *Charter* rights to freedom of peaceful assembly and association and the right to freedom of expression, and Australia’s international obligations to uphold ICCPR and UNDHR rights to peaceful assembly and association, freedom of opinion and expression, and the right to participate in democracy.

Likewise, we are concerned that any accompanying legal information on the human and legal rights to engage in protest and/or the availability of legal support for legal problems arising out of protest activity could also be considered “promoting” or “supporting”.

Our website, social media accounts and other forms of communication are vital tools for connecting with the communities we serve to identify legal needs and connect people with appropriate legal support services. This is the case whether the legal need stems from protest activity or otherwise. It is a grave scenario where our financial ability to exist is put at risk by using these modern tools to do the work we have always done.

Lastly, there are times when the specific rights and needs of community legal centres are threatened – or where an issue is so intimately connected with the work we do and the communities we serve – that as an organisation we feel compelled to march alongside the community. Public marches, though usually tolerated by police, can nonetheless contravene summary offences and we are concerned that engaging in or being associated with such activities would put our service in breach of the regulations.

Impact of the proposed changes on other community groups engaging in or supporting protest activity

As mentioned, in Australia we have domestic legislation protecting, and international obligations to uphold, the right to protest. It is well understood in Australia that the ability to engage in protest activity and to communicate publicly about political issues is fundamental to a functioning democracy.

The commission of an offence, whether or not actually charged, is inherent to most protest activities and is often tolerated by police in Australia on balance with the right to protest. With this understanding, the substantive consequence of the proposed amendments is that any entity that engages in the right to protest is at risk of losing their charitable status – without which most charitable organisations will cease to exist. By financially targeting charitable entities, it is the very real possibility that these regulations will work to suppress, stifle, and penalise protest.

Some of the most treasured rights and freedoms enjoyed in Australia have been achieved through protest activity that involved the commission of offences specified in the regulations and exposure draft. To name but a few: The Aboriginal Tent Embassy, Union protests for the 8-hour working day, Save the Franklin Dam, The Cummeragunja Walk-off and the Wave Hill Walk-off – and many other actions taken for better working conditions and industrial rights for First Nations peoples, Suffragette protests, the first Mardi Gras, Anti-whaling protests, the Jabiluka protests, the Freedom Rides, and the Vietnam War protests.

These long-standing and historical protests have had immeasurable impacts on the environmental and political landscape of Australia. Even for particular issues that individuals may not support, it is undeniable that these protests form part of our collective history and have shaped our country.

These amendments have the potential to create a future in Australia where important protest events and movements will be crippled if not entirely snuffed out and the vibrancy that protest has brought to our collective identity will be a thing of the past.

Recommendation

The proposed changes to Governance Standard 3 should not proceed. They will place an enormous administrative burden on already stretched charities in the midst of a pandemic and economic recession; unfairly target charities and impose regulations that would be unthinkable for businesses; and impact the constitutional right to political communication and other protections on protest rights.

Finally, the proposed changes directly contradict the findings of the government-commissioned review² of the ACNC legislation, undertaken by a Review Panel chaired by Partrick McClure AO in 2018. That review concluded that existing governance standard 3 is not appropriate and should be repealed in its entirety, because it is “not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence (unrelated to the ACNC’s regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence”³.

² Strengthening For Purpose: Australian Charities and Not-for-Profits Commission, Legislation Review 2018 - <https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf>

³ Ibid, Page 47.