

Submission on Proposed Changes to the Governance Standards for Registered Charities

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1. Summary

This submission is written by two University of Western Australia Law School academics in their personal capacities. The submission concerns the proposed changes to the governance standards that apply to registered charities set out in the *Exposure Draft Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the ‘Regulations’).

The primary stated reason for the Regulations is to improve legal certainty about when engaging in or promoting certain unlawful activities will endanger a charity’s registration with the Australian Charities and Not-for-profits Commission (‘ACNC’). However, the Regulations fail to achieve this objective and will decrease legal certainty because:

- They introduce a vaguely worded and amorphous standard that will provide little clear guidance for charities and that does not even address the issues-based advocacy/political-purpose distinction that was the cause of uncertainty identified in the *Strengthening for Purpose* statutory review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (the ‘Act’).
- The administration of the proposed governance standard is likely to be inconsistent and unpredictable. That is because not only is the standard itself vague, but the ACNC Commissioner has a very broad discretion in the exercise of his enforcement powers relating to that standard and the Act imposes the burden of proof on charities in review proceedings in such a way as to make the practical availability of review very limited.
- The validity of the Regulations is open to question under s45-10(6) of the Act and the constitutionally guaranteed implied freedom of political communication (‘IFPC’).

In our view Regulation (ii) (set out in the ‘Context’ section below) is arguably unconstitutional on the basis that it breaches the IFPC due to:

- the burden on political communication generated by the deterrent effect of Regulation (ii) on political communication protest activities; and
- the failure of Regulation (ii) to promote its stated objective of improving legal certainty – meaning that it is not reasonably appropriate and adapted to advancing that objective in a manner that is compatible with the constitutionally prescribed system of representative and responsible government.

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2. Context

The Regulations provide that a charity is not entitled to be registered or remain registered under the Act if:

- (i) the entity does an act (or omits 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; or
- (ii) the entity fails to take reasonable steps to ensure its resources are not used to promote acts (or omissions) by any entity that may be dealt with as an indictable offence, a relevant summary offence, or a civil penalty of 60 penalty units or more.

The primary stated reason for the Regulations is to ‘address uncertainty about when engaging in or promoting certain kinds of unlawful activity may affect an entity’s entitlement to registration under the Act’.¹ The concern is that ‘[d]ue to the current scope of unlawful activities prohibited under governance standard three, the existing standard may create uncertainty in the public domain about what other kinds of activities, including the promotion of such activities, could place a charity’s registration at risk’.² This concern is claimed to be linked to the uncertainty identified in Recommendation 20 of the final report arising from the statutory review of the Act. A further concern is that public trust in charities is undermined by ‘activist organisations masquerading as charities... some organisations are using their position as charities to engage in, promote and condone activities that are not legitimate charitable acts and are, quite frankly, criminal’.³ The purpose of the Regulations is therefore to achieve greater legal certainty about the activities that could jeopardise a charity’s registration, while also curbing unlawful activities on the part of registered charities so to promote public trust in the sector.

3. Certainty in the Law

The importance of certainty in the law flows from Australia’s adherence to the Rule of Law. While there are many elaborations of the Rule of Law, including different approaches to the extent of its substantive and procedural terms, most people agree that it contains the following key elements. First, the actions of the government must be permitted by laws made in advance; second, that the same laws should apply to all persons, so that they are treated equally;⁴ and third, that all persons, including the executive, are answerable before the law.⁵ These general

¹ Exposure Draft Explanatory Statement, Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (Cth).

² Australian Government, The Treasury, ‘Unlawful Activity – Changes to the Governance Standards for Charities FAQs’ (Web Page) <https://treasury.gov.au/sites/default/files/2021-02/c2021-149084_faqs.pdf>.

³ Senator The Hon. Zed Seselja, ‘Charities Supporting Unlawful Behaviour Will Not be Tolerated’ (Media Release, 13 December 2020, Web Page) <<https://www.financeminister.gov.au/assistant/media-release/2020/12/13/charities-supporting-unlawful-behaviour-will-not-be-tolerated>>; Exposure Draft Explanatory Statement, Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (Cth) 4.

⁴ Some writers go further in arguing for generality and equality. See, eg, TRS Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ 115 (April) *Law Quarterly Review* 221, 222-3.

⁵ See, eg, AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan & Co, 10th ed, 1959) Pt II Ch IV; John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 235-40; Cheryl Saunders and Katherine Le Roy, ‘Perspectives on the Rule of Law’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 5; Emilio Santoro, ‘The Rule of Law and the “Liberties of the English”’: The

propositions have been developed to proffer specific procedural principles, including that laws are clear, coherent as a body and stable enough to allow guidance of persons;⁶ and that the law must be administered ‘rationally, consistently and impartially’.⁷

What this means for ‘certainty’ is that charities ought to be able to clearly interpret and understand the Regulations and that the Regulations should help illuminate the scope of unlawful activities that might put a charity’s registration at risk. Further, it means that the ACNC Commissioner should be able to consistently apply the Regulations in a way that charities can predict and that treats charities equally. Linked to this point about administration, broad discretionary powers are often viewed as undermining the Rule of Law and certainty in the administration of the law.⁸ There is obviously a need for administrative discretions to recognise the extensive involvement of government in society and the range of complex and unanticipated circumstances that might arise.⁹ However, certainty requires oversight and restraints on the manner of exercise of such discretions.¹⁰

3.1. Certainty in Interpretation

Regulation (ii) obliges registered charities to ‘take reasonable steps’ to ensure that their resources are not used to promote or support acts or omissions by any entity that may be dealt with as one of the offences discussed above. Given the lack of a body of case law to help inform what steps are ‘reasonable’, this is an incredibly vague standard. For example, to what extent are negligence cases on the breach of the standard of care relevant? Negligence cases typically weigh the probability and seriousness of harm occurring (from action or inaction) against the burden of precautions and the social utility of the action.¹¹ However, the Regulations appear to effectively deem the harm to be serious and it is unclear whether they leave any scope to assert the social utility of protest actions. As to the difficulty in trying to construe a phrase such as ‘reasonable steps’ and the intensively fact specific requirements of applying such a phrase, it is instructive to observe the way in which courts are only starting to grapple with similar phrases in a financial services context, as they apply to ‘reasonable steps’ in relation to a more restricted range of people and a more restricted range of legal obligations.¹²

Further, Recommendation 20 of the *Strengthening for Purpose* review report was made in a chapter discussing ‘Advocacy’. In that Chapter, the Review Panel highlighted that charities have a legitimate role in ‘advocacy to promote or oppose changes to any matter of law policy

Interpretation of Albert Venn Dicey’ in Pietro Costa and Danilo Zoro (eds), *The Rule of Law: History, Theory and Criticism* (Springer, 2007) 153, 163-4.

⁶ See, eg, John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 270-1. To similar effect, see also, Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 198-202; Saunders and Le Roy (n 5) 5; PS Atiyah, *Law & Modern Society* (Opus, 2nd ed, 1995) 107.

⁷ Mary Gaudron, ‘Reply to Michel Troper’ in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 98, 98.

⁸ See, eg, Dicey (n 5) Pt II Ch IV.

⁹ Emmette S Redford, *Democracy in the Administrative State* (Oxford University Press, 1969) 187; Atiyah (n 6) 105. In a tax context, see also Michael Walpole and Chris Evans, ‘The Delicate Balance: Revenue Authority Discretions and the Rule of Law in Australia’ in Chris Evans, Judith Freedman and Richard Krever (eds), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, 2011) 121, 122-3; Graeme S Cooper, ‘Conflicts, Challenges and Choices – The Rule of Law and Anti-Avoidance Rules’ in Graeme S Cooper (ed), *Tax Avoidance and the Rule of Law* (IBFD Publications, 1997) 13, 16-17.

¹⁰ Redford (n 9) 193-6, 200.

¹¹ See, eg, *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

¹² *ASIC v Financial Circle* [2018] FCA 1644, [116]-[128] (concerning ss 912A(1)(ca) and 961L *Corporations Act 2001* (Cth)).

or practice that is linked to their charitable purpose'.¹³ The motivation for the recommendation, however, was the difficulty in distinguishing 'between issues-based advocacy linked to a charitable purpose and activities undertaken to achieve a political purpose that constitutes a disqualifying purpose'.¹⁴ The proposed governance standard does not address the issues-based/political-purpose distinction in any discernible way and it will do little to resolve this particular uncertainty.

3.2. Certainty in Administration

Recommendation 20 of the *Strengthening for Purpose* Report called for 'Test case funding be made available to develop the law in matters of public interest, including disqualifying purposes.' The recommendation did not relate to governance standard 3, in respect of which recommendation 9 expressly called for governance standard 3 to be repealed, on the basis that:¹⁵

Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. 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.

The Regulations will increase this regulatory duplication, contrary to the Act's object of 'promot[ing] the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'.¹⁶ From the perspective of certainty, it also seems that asking a regulator that is inexpert at regulating particular offences to determine whether reasonable steps have been taken to avoid promoting or supporting those offences, is unlikely to result in clear and consistent administration. Indeed, the Exposure Draft Explanatory Statement explicitly states that the ACNC Commissioner might make such decisions before any person is charged or found guilty of an offence,¹⁷ suggesting that the ACNC Commissioner might act before the authority responsible for responding to the potential offence.

The risks for certainty are exacerbated not only by the vagueness of the standard set out in the Regulation, but also because the Act provides the ACNC Commissioner with an incredibly broad discretion as the exercise of enforcement powers in circumstances where the practical availability of review is limited.

Many of the ACNC's enforcement powers, such as revoking charity registration, issuing warnings, issuing directions, and suspending or removing charity controllers, can be exercised if the Commissioner reasonably believes that a charity has, or it is more likely than not that it will, breach the Act or governance standards.¹⁸ The Regulations will sometimes require the ACNC Commissioner to decide whether it is more likely than not that a registered charity will (prospectively) fail to take reasonable steps to ensure that its resources are not used to promote

¹³ Patrick McClure et al, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (Final Report, 2018) 82.

¹⁴ McClure et al (n 13) 82-3.

¹⁵ McClure et al (n 13) 47.

¹⁶ Act s15-5(1)(c).

¹⁷ Exposure Draft Explanatory Statement, Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (Cth) 6.

¹⁸ Act ss 35-10(1)(c), 80-5(1), 85-5(1), 100-5(1).

or support acts or omissions by any (other) entity that may be dealt with as one of the offences discussed above.

Similar words have been construed as meaning that the relevant regulator ‘had the relevant belief and there were reasonable grounds or cause for that belief’.¹⁹ Thus, the requirement for a reasonable belief imposes an objective floor to the test: it must be possible to say that a reasonable person with the information held by the ACNC Commissioner would hold the belief.²⁰ However, this still leaves a very broad discretion with the ACNC.

Further, while it is true that the exercise of that discretion is subject to review, the practical reality is that there are material impediments to review. That is because the ACNC can institute enforcement actions without seeking a court order, the ACNC’s decision stands pending any administrative tribunal review or court appeal and the charity bears the burden of proof in review or appeal proceedings.²¹ Indeed, there are suggestions in *Waubra Foundation and Commissioner of ACNC* and the *Strengthening for Purpose* Report that the burden of proof imposed under the Act limits the extent to which the Administrative Appeals Tribunal can consider an enforcement decision afresh on its merits.²² The difficulty is that the applicant charity is limited to the grounds raised in its objection, but that it must demonstrate on the basis of those grounds, that the decision should not have been made or should have been made differently. Administrative law judicial review principles might thus furnish objection grounds (eg based on deficiencies in the procedural fairness or reasoning process adopted by the ACNC Commissioner), but have little to say about how the decision should have been made. There is a lack of clarity about precisely what (useful) grounds can be raised in circumstances such as these where the decision objected to relates to the exercise of a broad administrative discretion.²³ To the extent that a charity applicant does address how the decision should have been made in its grounds, pertinent matters would presumably include the range of matters to which the ACNC Commissioner is directed (by the Act) to have regard in determining whether to take an enforcement action. In the case of revocation of charity registration, for example, those matters include some for which the charity would likely have difficulty in providing information. In particular: ‘any other matter that the Commissioner considers relevant’,²⁴ ‘what action the Commissioner... could take or have taken to... address any such contravention or non-compliance... [or] to prevent any similar contravention or non-compliance’²⁵ and, to the extent that it requires a sector-wide view ‘the extent (if any) to which the registered entity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the not-for-profit sector’.²⁶

¹⁹ *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, 674 (Young J) (‘has reason to believe’) (in relation to revocation of a securities dealer’s licence); *Nakkuda Ali v Jayaratne* [1951] AC 66, 76-7 (Privy Council).

²⁰ See, eg, Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) [9.36].

²¹ Act ss 165-40(b), 165-50, 170-10, 170-25.

²² [2017] AATA 2424, [47]-[48]. [77] (White J and Bean DP). See also McClure et al (n 13) 35; Nicholas Aroney and Matthew Turnour, who adopt an even more restrictive interpretation of *Waubra*: ‘Charities are the New Constitutional Law Frontier’ (2017) 41(2) *Melbourne University Law Review* 446.

²³ See eg Senate Standing Committee for the Scrutiny of Bills, 31 October 2012, ‘Thirteenth Report of 2012’ (Report 13/2012) 448-9.

²⁴ Act s35-10(2)(g).

²⁵ Act s35-10(2)(b).

²⁶ Act s35-10(2)(e).

Charities will thus incur the initial additional time and expense in objecting to and seeking review of decisions needed to clarify the boundaries of the Commissioner’s discretion and charities will have an arduous task due to the burden of proof.

3.3. Uncertainty Due to the Effect of s45-10(6) of the Act

Section 45-10(1) of the *Australian Charities and Not-for-profits Commission Act* enables the creation of the proposed Regulations. However, section 45-10(6) imposes limits on the content of such regulations:

- (6) The regulations must not require an entity not to comment on, or advocate support for, a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
 - (a) the comment or advocacy furthers, or is in aid of, the purpose of the entity; and
 - (b) the comment or advocacy is lawful.

The Regulations do not expressly or directly require a registered charity to not comment on or advocate support for such matters. However, given their likely deterrent effect on political communication, that is their practical effect. This raises administrative law questions such as whether the proposed Regulations are beyond the authorisation power or are being made for an improper purpose. Further, the contrast between the practical effect of the Regulations and the legislative intent expressed in s 45-10(6) undermines the Rule of Law.

4. The IFPC

The *Commonwealth Constitution* does not contain an express right to freedom of speech. However, the *Constitution* is regarded as giving rise to the IFPC. The IFPC is sourced in sections 7 and 24 of the *Constitution*, which require the ‘members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively’.²⁷ The rationale for the IFPC is that free political communication is an ‘indispensable incident of that system of representative government which the *Constitution* creates...’²⁸ The IFPC is not a right that is vested in individuals but rather a limit on Commonwealth, State and Territory legislative competence.²⁹

In *Lange v Australian Broadcasting Corporation* (‘*Lange*’), the High Court formulated the so-called *Lange* test to determine whether legislation breaches the IFPC.³⁰ In subsequent case-law, especially *McCloy v New South Wales* (‘*McCloy*’)³¹ and *Brown v Tasmania* (‘*Brown*’),³² the *Lange* test was developed to incorporate a test of ‘structured proportionality’. In its current form, the *Lange* test provides as follows:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

²⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁸ *Lange* (n 27) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁹ *Comcare v Banerji* [2019] HCA 23 [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

³⁰ *Lange* (n 27) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

³¹ (2015) 257 CLR 178.

³² (2017) 261 CLR 328 .

2. If ‘yes’ to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If ‘yes’ to question 2, is the law reasonably appropriate and adapted to advance that legitimate objective in a manner that is compatible with the constitutionally prescribed system of representative and responsible government?

Step (3) of the *Lange* test entails a further three stages:

1. *Suitability*. Does the law have a rational connection to the purpose of the provision?
2. *Necessity*. Is there an obvious and compelling alternative, reasonably practicable means of achieving the same purpose that has a less restrictive effect on the freedom?
3. *Adequate in its balance*. Is the law adequate in its balance? This step involves a value judgment, consistent with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction that it imposes on the freedom.

4.1. The Regulations and the IFPC

In this section, the *Lange* test is applied to the Regulations.

4.1.1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

It is well-established that protests are an important means of political communication. In *Brown*, for instance, it was noted that historically ‘protests have been a means of bringing about political and legislative change on environmental issues’.³³ Where legislation burdens the freedom of persons to engage in political communication through protests, this must be justified under the *Lange* test.

However, it is also well-established that the IFPC does not protect unlawful conduct, at least where the conduct is unlawful due to a law that does not itself breach the IFPC.³⁴ In other words, the IFPC protects the freedom of persons to communicate political ideas through lawful protest activities. Where persons engage in protest activities that are unlawful – due to laws that are not themselves constitutionally invalid – there is no burden on the IFPC.³⁵

Turning to the Regulations, Regulation (i) extends the scope of governance standard three to summary offences. Given that the IFPC does not protect unlawful conduct, this part of the submission will not discuss Regulation (i) further. There are cogent reasons to doubt the desirability of Regulation (i), including the recommendation of the *Strengthening for Purpose* report that governance standard three should be repealed on the basis that registered entities must already comply with all laws.³⁶ However, it is acknowledged that Regulation (i) does not impose a burden on the IFPC.

More challenging issues for the IFPC are raised by Regulation (ii), which requires registered charities to take reasonable steps to ensure that their resources are not used for certain unlawful

³³ *Brown* (n 32) [33] (Kiefel CJ, Bell J and Keane J).

³⁴ *Brown* (n 32) [259] (Nettle J), [561] (Edelman J).

³⁵ *Brown* (n 32) [259] (Nettle J), [558] (Edelman J).

³⁶ McClure et al (n 13) 47.

purposes. Regulation (ii) might therefore seem to also target unlawful protest activities and not burden the IFPC. However, as discussed in the sections above on legal certainty, Regulation (ii) imposes an extraordinarily vague governance standard on registered charities while vesting extensive discretionary decision-making power in the hands of the ACNC Commissioner that is not easily subject to review. It is not difficult to see that the practical effect of Regulation (ii) might be to deter lawful protests as registered charities adopt an overly cautious approach to avoid breaching the governance standard.

This observation brings to mind the US constitutional law doctrine of the ‘chilling effect’, which ‘occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity’.³⁷ The extent to which the ‘chilling effect’ forms part of the IFPC case-law is unclear.³⁸ However, in *Brown Kiefel CJ, Bell and Keane JJ* examined the validity of Tasmanian legislation that imposed restrictions on protests relating to forestry land.³⁹ In considering the practical effect of the legislation, the joint judgment emphasised that the areas to which the legislation applied were vaguely defined. This created difficulties both for protestors and police officers tasked with enforcing the legislation. The joint judgment noted that the legislation was ‘likely to have significant deterrent effects on protesters’.⁴⁰ This imposed a burden on the IFPC: ‘Protestors will be deterred from voicing their protests with respect to forest operations. The freedom is burdened.’⁴¹ In a separate judgment, Nettle J similarly emphasised that ‘the terms of the Protestor’s Act are of such breadth that the likelihood of them so operating in practice as to burden the implied freedom to a significant extent cannot be discounted’.⁴²

Should a charity breach Regulation (ii), the ACNC Commissioner would be able to exercise various powers including deregistering a charity. This would result in a loss of tax concessions, which may be financially significant for a charity. Further, it is not difficult to establish an effective burden on free political communication for the purposes of the first stage of the *Lange* test. In *Comcare v Banerji*, the majority said that a ‘law which prohibits or limits political communication to any extent will generally be found to impose an effective burden on the implied freedom of political communication’.⁴³ There is Canadian authority for the proposition that ‘a state-imposed burden need not be an outright prohibition. Any burden, including a cost burden, imposed by a government on the exercise of a fundamental freedom can qualify as an infringement of that right or freedom if it is not “trivial or insubstantial”’.⁴⁴ This approach accords with the IFPC case law. It follows that Regulation (ii) imposes an effective burden on freedom of political communication.

4.1.2. If ‘yes’ to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

³⁷ Frederick Schauer, ‘Fear, Risk and the First Amendment: Unraveling the Chilling Effect’ (1978) 58 *Boston University Law Review* 685, 693.

³⁸ *Brown* (n 32) [151] (Kiefel CJ, Bell and Keane JJ), [262] (Nettle J), [457]-[466] (Gordon J).

³⁹ *The Workplaces (Protection from Protestors) Act 2014* (Tas).

⁴⁰ *Brown* (n 32) [84] (Kiefel CJ, Bell and Keane JJ).

⁴¹ *Brown* (n 32) [95] (Kiefel CJ, Bell and Keane JJ).

⁴² *Brown* (n 32) [269] (Nettle J).

⁴³ *Banerji* (n 29) [29] (Kiefel CJ, Keane, Bell and Nettle JJ).

⁴⁴ *Canada Without Poverty v Attorney-General of Canada*, 2018 ONSC 4147, [29] (E.M. Morgan J).

This stage of the *Lange* test requires that the law should have a legitimate purpose. The purpose of the law is ascertained through ordinary methods of statutory interpretation.⁴⁵ The question is whether the purpose is legitimate, ‘in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.⁴⁶

The primary stated purpose of the Regulations is to achieve greater legal certainty about the types of activities that might place a charity’s registration at risk. A further purpose is to curb unlawful activities on the part of registered charities to promote public trust in the sector.⁴⁷ These purposes are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

4.1.3. If ‘yes’ to question 2, is the law reasonably appropriate and adapted to advance that legitimate objective in a manner that is compatible with the constitutionally prescribed system of representative and responsible government?

The question of whether the law is reasonably appropriate and adapted is addressed by reference to a three-part structured proportionality test. A law may be invalidated at any or all of these stages. In our view, Regulation (ii) is likely to fail at each stage of the structured proportionality test.

4.1.3.1. Suitability

The suitability stage of structured proportionality requires that the means used by the law should be rationally connected to the legislative aim.⁴⁸ This is a deferent standard of review. The requirement is only that the means should be capable of realising the aim.⁴⁹ The means need not be the only ones capable of realising the aim, nor need they realise the aim completely.⁵⁰ The suitability stage functions as a threshold test that eliminates ‘extreme cases of irrationality’⁵¹ or a ‘small number of runaway cases’.⁵²

A difficulty with determining the suitability of Regulation (ii) is that it has multiple purposes: a primary purpose of achieving greater legal certainty about the types of activities that might place a charity’s registration at risk and a secondary purpose of curbing unlawful activities on the part of registered charities to promote public trust in the sector. It is possible that Regulation (ii) is rationally connected to the latter purpose given that it is at least capable of realising this aim. However, it is doubtful that Regulation (ii) is rationally connected to the former purpose, given the clear potential for Regulation (ii) to engender greater uncertainty about the governance standards that apply to registered charities – and as elaborated in the section of this submission discussing legal certainty.

The issue of how to determine the suitability of a law that has multiple purposes has not been considered in the IFPC case-law. However, if a court were to consider the suitability of

⁴⁵ *Brown* (n 32) [96] (Kiefel CJ, Bell and Keane JJ).

⁴⁶ *Brown* (n 32) [104] (Kiefel CJ, Bell and Keane JJ).

⁴⁷ ‘Unlawful Activity – Changes to the Governance Standards for Charities FAQs’ (n 2).

⁴⁸ *McCloy* (n 31) [2] (French CJ, Kiefel, Bell and Keane JJ).

⁴⁹ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 305.

⁵⁰ Barak (n 49) 305.

⁵¹ *Clubb v Edwards; Preston v Avery* [2019] HCA 11 at [473] (Edelman J).

⁵² Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383, 389.

Regulation (ii) with reference to its primary stated purpose – the achievement of greater legal certainty about the types of activities that might place a charity’s registration at risk – then it is likely that Regulation (ii) would not be considered suitable in terms of the *Lange* test.

4.1.3.2. Necessity

The necessity stage of structured proportionality requires the court to consider whether there is a hypothetical alternative that is capable of advancing the law’s purpose and imposes a less restrictive burden on the IFPC. Importantly, the hypothetical alternative need not be equally effective as the impugned measure. Instead, the requirement is that there should be no ‘obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom’.⁵³

An issue raised at the necessity stage is why Regulation (ii) is required in addition to Regulation (i). The Regulations share the purposes of achieving greater legal certainty about the activities that could place a charity’s registration at risk while also curbing unlawful activities on the part of registered charities to promote public trust in the sector. However, Regulation (i) constitutes an obvious, compelling and reasonably practicable alternative to Regulation (ii) that imposes a less restrictive burden on the IFPC while also more effectively promoting the primary purpose of achieving legal certainty. Regulation (i) therefore casts significant doubt on the constitutionality of Regulation (ii).

Although Regulation (i) is consistent with the IFPC, and casts doubt upon the constitutionality of Regulation (ii), from a broader perspective the desirability of Regulation (i) is open to doubt. As noted elsewhere in this submission, the *Strengthening for Purpose* report criticised governance standard three – the scope of which Regulation (i) extends – on the basis that registered entities must already ‘comply with all applicable laws’.⁵⁴

4.1.3.3. Balancing

The final stage of the structured proportionality test requires the court to weigh the benefits gained by the public against the harm caused to the IFPC by the law. Balancing is the most controversial stage of structured proportionality and has been approached cautiously by the High Court. In *McCloy*, for instance, the joint judgment emphasised that balancing should be consistent with the limits of the judicial function,⁵⁵ and that the judiciary is not entitled to ‘substitute their own assessment for that of the legislative decision-maker’.⁵⁶ In a similar vein, in *Banerji* the joint judgment found that a law is ‘adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom’.⁵⁷

Notwithstanding these qualifications, it is arguable that Regulation (ii) is also invalid at the balancing stage of structured proportionality. On the one hand, the practical effect of Regulation (ii) may be to create a significant deterrent to protests involving registered charities at a clear cost to the IFPC and the system of representative and responsible government on which it is premised. On the other hand, the benefits obtained by Regulation (ii) are unclear,

⁵³ *McCloy* (n 31) [2] (French CJ, Kiefel, Bell and Keane JJ).

⁵⁴ McClure et al (n 13) 47.

⁵⁵ *McCloy* (n 31) [2] (French CJ, Kiefel, Bell and Keane JJ).

⁵⁶ *McCloy* (n 31) [89] (French CJ, Kiefel, Bell and Keane JJ).

⁵⁷ *Banerji* (n 29) (Kiefel CJ, Bell, Keane and Nettle JJ).

especially given the extent to which Regulation (ii) fails in its primary purpose of achieving greater legal certainty – a point emphasised throughout this submission.