



Law Council  
OF AUSTRALIA

*Legal Practice Section*

26 August 2021

Not-For-Profit Unit  
Not-for-profits and Tax Administration Branch  
Treasury Melbourne  
Level 7, 530 Collins Street  
Melbourne VIC 3000

By email: [charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Colleague

**Reform of the Australian Charities and Not-for-profits Commission secrecy provisions – Recommendation 17 of the ACNC Review**

The Charities & Not for Profits Committee of the Law Council's Legal Practice section (the **Committee**) appreciates this opportunity to provide views on the matters raised in the consultation paper on "Reform of the Australian Charities and Not-for-profits Commission secrecy provisions - Recommendation 17 of the ACNC Review" (the **consultation paper**).

Many of the members on this Committee are lawyers with clients who are charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

**Summary of Committee's position**

1. The consultation paper presents information and sets out important questions around the design of a new disclosure regime. Members of the Committee would welcome the opportunity for further discussions once you have considered the submissions you have received in writing and the views put to you in the consultation meetings that have been conducted. We are aware that in these you will see that there is a diversity of, and divergent, views amongst charities and also lawyers who advise them (many of whom are members of the Committee).
2. Overall, the Committee supports Recommendation 17 Strengthening for Purpose: Australian Charities and Not-for-Profit Commission Legislation Review 2018 (the ACNC Review) that the current secrecy provisions of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) should be amended to allow the Commissioner of the ACNC (the Commissioner) discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector.
3. However there are differing views about the current regime:
  - a. There are many more instances where the provisions have been problematic. For charities there is often uncertainty and the perception in some cases of arbitrariness or that decisions are not objective (externally influenced even,

as alleged by Aussie Farms following the decision of the Commissioner to deregister that organisation in November 2019).

- b. There are also specific examples where the experience of charities with the current secrecy provisions have been positive. These are instances where disclosure of an investigation would have led to significant unnecessary attention from media or general public, for example, that would have been challenging for the charity to manage and instances where the standing of the organisation as a non-government organisation, and therefore the ability of its personnel to be seen as non-aligned and to work in certain contexts, would have been compromised.
  - c. On a broader level, the lack of explanation frustrates the general public. There was wide speculation about the decision relating to Aussie Farms, for example.
  - d. Members of the Committee who advise applicants for registration and registered charities under investigation have also found that the lack of information unhelpful in that they have not been able to draw lessons from decisions which would normally lead to clarity about the regulatory approach of the ACNC.
4. At this time, the Committee's submission is as follows:
- a. While the Committee is supportive of disclosure in the public interest as set out in the consultation paper, we also believe there is merit in the views that:
    - (i) The Commissioner only makes a disclosure where the ACNC can positively affirm that disclosure is in the public interest.
    - (ii) In the case of disclosure of ongoing investigations, public interest is too low a standard and that instead, the question should be whether the disclosure is necessary to prevent public harm.
  - b. The disclosure regime should have clarity about how the Commissioner's discretion is to be exercised so that there is confidence that the Commissioner's exercise of the discretion is consistent and not arbitrary, and based on sound reasoning after consideration of relevant information.

The regime should set out what the Commissioner should consider in terms of public interest and risks.

The Commissioner should be required to consult with the affected charity. This will allow the affected charity to inform the ACNC of potential risks that may arise from disclosure, of which the ACNC may not be otherwise aware and provide the ACNC with information about the significance of the risks. The Committee elaborates on this further below.

Further, in the Committee's view the affected charity should also be informed about what other matters the Commissioner is taking into account, including the sources of that information. As an example, the Committee refers again to the Aussie Farms matter where it was claimed by Aussie Farms (the affected charity) that the Commissioner had been subject to inappropriate influence.

- c. In making the decision about whether to disclose, the Commissioner should take into account the impact of disclosure on the charity. This is especially important where the disclosure is about an investigation that is underway or the outcomes of an investigation that is completed.

A “name and shame” approach can be catastrophic for charities. An example of this is the effect on Keeping Kids Company<sup>1</sup>, a charity registered in England, after an investigation into it was made public. There was such “bad press” that the trustees, faced with downturn in funding, chose to shut down the organisation. The allegations were ultimately not proven. It is not in the interest of the beneficiaries or the public more broadly, that charities are left with no choice but to shut down in this way.

Another example is that of charities operating overseas. The reporting of some matters, such as an investigation by a government regulator, may be viewed very differently in Australia (where such investigations are typically conducted routinely, fairly and without political interference) than in other jurisdictions (where an investigation by a regulator is usually seen entirely negatively). These are instances where disclosure would significantly inhibit the ability of the organisation to carry on with its activities or compromise the position (including safety) of their personnel in-country.

- d. Generally, the Committee supports the position that information should always be de-identified unless the applicant has consented otherwise. There is merit in the submission of Justice Connect on this point. On registration decisions, the Committee encourages you to consider the suggestion of the Queensland Law Society which is that:
- full disclosure should be made of approved registration decisions, as the public should have the benefit of transparency about these decisions.
  - applications which are withdrawn should not be disclosed.
  - applications which are rejected should not be disclosed, but de-identified novel situations or reasons should be made public on educational grounds; and
  - the Commissioner’s review of registration decisions should be made public (whether favourable or not) once further review periods have lapsed, on transparency and educational grounds.”
- e. The Commissioner’s decision to disclose should always be subject to an external/independent merits review. On this we specifically refer you to the submission of the Queensland Law Society. In their submission, it was pointed out that a full merits review is necessary because of the serious consequences adverse publicity resulting from disclosure can have on the charity and its beneficiaries. Reference was made in that submission to the advice of the expert panel review of the ACNC Act that “the Commissioner should not have additional powers nor be subject to less judicial scrutiny

---

<sup>1</sup> *Official Receiver v Batmanghelidjh and Ors* [2021] EWHC 175 (Ch) <https://eprints.gut.edu.au/208177/>

than other comparable regulators. A court should be able to consider afresh (a de novo review) any decision made by the Commissioner.”

The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Seak-King Huang the Committee Chair, at [shuang@milnerhuang.com.au](mailto:shuang@milnerhuang.com.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Tidball', with a horizontal line underneath.

**Michael Tidball**  
**Chief Executive Officer**