

19 October 2023

Our ref: [KB:NFP]

Personal and Indirect Tax and Charities Division
Treasury
Langton Cres
Parkes ACT 2600

By email: [REDACTED]

Dear Personal and Indirect Tax and Charities Division,

Australian Charities and Not-for-profits Commission (ACNC) secrecy provisions reform – new and ongoing investigations

Thank you for the opportunity to provide feedback on the Australian Charities and Not-for-profits Commission (ACNC) secrecy provisions reform – new and ongoing investigations via this written submission and via the stakeholder roundtables.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission has been compiled by the QLS Not for Profit Law Committee, whose members have substantial expertise in this area.

QLS is pleased to provide feedback on the exposure draft of the Treasury Laws Amendment (Integrity and Transparency) Bill 2023: ACNC Review Rec 17 – Secrecy Provisions (**Exposure Draft**). However, we are concerned that the short timeframe within which to consider the Exposure Draft has not allowed for a full consideration of the reforms, including to determine whether there are any unintended consequences.

The purpose of the Exposure Draft is to amend the current secrecy provisions of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) to allow the Commissioner of the ACNC discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector.

We refer to and **enclose** our submission on the earlier consultation, "Reform of the Australian Charities and Not-for-profits Commission secrecy provisions - Recommendation 17 of the ACNC Review" dated 20 August 2021. Specifically, we reiterate our comments about balancing

the need for transparency and provision of information to the public against the adverse impacts that disclosure by the ACNC, during the course of an investigation, may have on charities.

Tests for disclosure

“Reasonably suspects”

Proposed section 150-52(3)(a) of the Exposure Draft provides that the Commissioner may authorise disclosure of protected ACNC information if the Commissioner “reasonably suspects” the matters set out in proposed section 150-52(3)(a)(i) and (ii). This test of “reasonably suspects” is not, in our view, sufficiently high enough given the potential harm that may be caused by a disclosure where the ultimate finding is that there is no wrongdoing by the registered entity.

We consider that the purposes of these amendments being to provide greater transparency and information to the public would be achieved if the Commissioner “reasonably believes” one of the matters set out in proposed section 150-52(3)(a)(i) and (ii).

The test of “reasonably believes” is well understood at law and is used in other parts of the ACNC Act.¹

Section 150-52(3)(c) should also be amended such that the Commissioner is required “reasonably believe” that the disclosure is necessary.

We have had the privilege of reviewing the submissions of the Law Council of Australia and agree with their submissions in relation to this particular issue.

What is meant by “significant harm” and “public harm”?

QLS considers it would be valuable if further information on the interpretation of these terms was available. Whilst it may not be possible for such information to be set out legislatively, regulatory guidance issued by the ACNC would be prudent in the circumstances.

Procedural fairness, reviews and oversight

As stated at the roundtable and in our earlier submission, the disclosure process must include the provision of procedural fairness to the subject registered entity and the opportunity for that registered entity to seek a merits review of the decision.

Once a preliminary decision has been made to publicly disclose information, the relevant registered entity must be given notice of this which includes:

- what information is to be disclosed;
- the mechanism of disclosure;
- the reasons for the decision;
- the procedure and timeframes for responding to the notice; and
- the procedure and timeframes for seeking a merits review.

The registered entity must be given a timeframe to respond to the notice which includes the opportunity to object and to provide further information for consideration by the ACNC.

¹ See sections 70-5(1); 80-5(1)(a), (b), (c); 85-5(1)(a), (b), (c), 100-5(1)(a), (b), (c) of the ACNC Act.

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Following this consideration, a further notice must then be issued to the registered entity which again outlines the review process.

Merits review

We have significant concerns about a disclosure being made with no notice or capacity for oversight or review. Reviews are already provided in respect of other decisions of the ACNC pursuant to Part 7-2 of the ACNC Act. The Exposure Draft should be amended to include a decision under section 150-52. We again refer to comments made in our earlier submission.

We note the comments made at the roundtable that it might be difficult to provide notice with an opportunity to respond and a review process if there is some information already in the public domain and that the ACNC needs to be seen to be performing its functions. This is reflected in paragraph 1.14 of the exposure explanatory memorandum:

- 1.14 Any decision made by the Commissioner or an ACNC officer in relation to the disclosure of information about a new or ongoing recognised assessment activity about a registered entity's suspected contravention or non-compliance is not subject to merits review. This is appropriate given the decision relates to an ongoing or proposed investigation into an enforcement matter. Additionally, disclosures will only occur if necessary to avoid public harm, so any delay caused by a merits review process could lead to public harm.

However, harm is also caused to the registered entity and those individuals involved from a disclosure where there is subsequently no finding of wrongdoing. We do not consider excluding merits review to be appropriate.

Oversight by either the AAT or Federal Court by way of merits review would assist the ACNC and government to review the decisions about disclosures more broadly to assess whether these reforms have achieved their stated purposes. These courts and tribunals have settled processes and procedures in place to ensure that procedural fairness is afforded to the charity in question and the Commissioner is subject to appropriate evidentiary burdens.

Ongoing Review and removal of notices from the register

Rather than excluding any merits review processes, consideration could be given to:

- ongoing reviews, which consider the ongoing risk and the factors outlined in proposed section 150-52(3) more generally; and/or
- an alternate interim/neutral form of disclosure during the review period.

The Exposure Draft should be amended to include a process whereby the information disclosed and placed on the register is subject to ongoing review and, once the risk is passed, removed.

If any disclosure is to be made, we submit that it should be the ongoing responsibility of the ACNC to ensure that it is appropriate that the disclosure remain on the register. It follows, that if the Commissioner is no longer of the view that the disclosure is no longer warranted based on proposed legislative provisions, the disclosure should be removed.

In order to ensure that such reviews and disclosures are not overlooked inadvertently, we also submit that it would be prudent to include a definite 'sunset period' at the conclusion of which disclosures are automatically removed unless the Commissioner is satisfied that they should remain on the basis of the provisions of section 150-52.

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Other circumstances in which any disclosure should be removed may include:

- immediately following the completion of any ongoing investigation, if the ACNC determines that the registered entity is not guilty of any wrongdoing;
- promptly after all issues are addressed and rectified to the satisfaction of the Commissioner;
- by order of a court or tribunal following a merits review or application for an injunction (or the like); or
- at the end of a specified sunset period.

In certain circumstances it might be prudent for a notification to remain in some form to advise the public that a notice, pursuant to proposed section 150-52, was made, but removed following no finding being made about the registered entity.

We consider that an indefinite disclosure is unlikely to be appropriate. If the conduct of a registered charity or its responsible entities was such that indefinite disclosure was to be contemplated, it is likely that the severity was such that the Commissioner would have the ability of exercising their right to revoke a charity's registration, pursuant to section 35-10 of the ACNC Act.

At the roundtable, the point was also made about the ability to provide a review period in circumstances where there was no information circulating in the public domain. We reiterate our submission that the Commissioner should not have the right to initiate any disclosure which is not already in the public domain.

The Commissioner's right should be limited to circumstances in which it is appropriate for the ACNC to respond to allegations which are already within the public domain due to media coverage or political process. For example, it may be appropriate for the Commissioner to make disclosures as part of his or her response to Senate questions concerning whether a particular charity is subject to investigation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully,

[REDACTED]
Chloe Kopirovic
President