

20 August 2021

Our ref: [WD-NFP]

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

By email: [REDACTED]

Dear Not for Profit Unit

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

The Queensland Law Society (QLS) appreciates the opportunity to respond to the consultation paper on “Reform of the Australian Charities and Not-for-profits Commission secrecy provisions – Recommendation 17 of the ACNC Review” (**consultation paper**).

QLS is the peak professional body for Queensland’s legal practitioners. We represent and promote over 13,000 legal professionals and increase community understanding of the law. QLS also assists the public by advising government on improvements to laws affecting the community and working to improve their access to the law.

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

Executive Summary

1. If Recommendation 17 is implemented and the Commissioner is given a discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector:
 - a. QLS recommends that the exercise of a discretion by the Commissioner should be subject to full merits review, as recommended by the expert panel review of the ACNC Act; and
 - b. The ACNC Commissioner should not be permitted to review his or her own decision as occurs in registration and strike off procedures.
2. The current secrecy provisions give rise to uncertainty when our members or their clients cannot determine whether an investigation is being conducted, the status of the investigation or whether any action will be taken against the charity or any of its responsible persons.

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

3. The lack of transparency affects public confidence in the ACNC and its holding of registered charities to account. However, transparency needs to be balanced with the risks of prejudice to the charity involved, as discussed in our submission.
4. We support the suggested criteria for the assessment of the public interest outlined in question 3 in the consultation paper.
5. If a public interest test were to form the basis of the ACNC Commissioner's discretion to disclose information about regulatory activities, then the advantages of public disclosure must always be weighed up against the potential prejudice to the charity involved.
6. Early disclosure can give rise to significant harm to the charity, its responsible persons and also to the vulnerable people to whom it provides assistance, due to the negative impact on its ability to attract donations and secure funding. As a matter of appropriate balancing of competing interests, there should be no disclosure until allegations are at least tested by the ACNC.
7. The substantiation process must be completed before disclosing that an investigation is underway because of the potential harm from disclosure following an unjustified or misdirected complaint triggering an investigation.
8. QLS generally supports the disclosure of information about registration and revocation decisions, as this demonstrates transparency and this information is beneficial for professional advisors (including legal practitioners) who assist charities during these processes.

Background - Recommendation 17 and Government response

The ACNC Review recommended that 'the Commissioner should be given a discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector'.

In its response, the Government supported the recommendation. The Government also committed to consult on the detail of the change, including the triggers for and bounds of the Commissioner's discretion.

Questions and responses

We have responded to the consultation paper questions below, using the numbering from the paper.

We also make the following comments in relation to the introduction of any discretion to the Commissioner, as recommended by the ACNC Review.

In our view, the exercise of a discretion by the Commissioner should be subject to full merits review:

1. Given the serious consequences of adverse publicity for the charity and its beneficiaries, any discretion given to the Commissioner must be subject to full merits review.
2. The ACNC Commissioner should not be permitted to review his or her own decision as occurs in registration and strike off procedures.

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

3. Part 7-2 provides for an AAT review or an appeal to the Federal Court.
4. However, it is established that an AAT appeal is not a “merits review” but a review where the onus is on the charity to prove that the decision should not have been made or should have been made differently.¹ The same onus applies on appeal to a court.²
5. These matters were addressed by the *Senate Standing Committee for the Scrutiny of Bills* when it reviewed the ACNC Bill and expressed concern that:

...where the ACNC Commissioner exercises a discretionary power, it is not clear what is required to prove that the decision is wrong or should have been made differently.³
6. The expert panel review of the ACNC Act advised as follows:

“The Commissioner should not have additional powers nor be subject to less judicial scrutiny than other comparable regulators. A court should be able to consider afresh (a de novo review) any decision made by the Commissioner.”⁴
7. Further, Principle (g) of the Senate Standing Committee for the Scrutiny of Delegated Legislation notes that:⁵

Where an instrument provides for discretionary decisions to be made, the explanatory statement should state if independent review of those decisions is available. If merits review is not available, this should be justified by reference to the Administrative Review Council's Guide: What decisions should be subject to merits review?⁶

The popular press and social media have been a significant forum to call charities to account and have been decisive in the collective public judgement on the trustworthiness of charities. The narrative of a fallen saint, a disgraced charity, is of intense interest to the community and transgressions by a charity can give rise to a sense of moral outrage. It is one thing to be cheated by a business, but another to be taken down by a supposedly trusted pillar of society.

Adverse publicity about charity has a wider impact on the organisation than on business sector entities. It has an almost immediate and significant impact on its ability to fundraise, attract volunteers and cooperate with others in achieving its mission, which in turn potentially has an impact on beneficiaries and their families (for example, for charities involved in aged care or disability care).

¹ S. 165-40 ACNC Act .Referred to in Waubra Foundation and Commissioner of Australian Charities and Not-for-profits Commission [2017] AATA 2424 (4 December 2017)
See also discussion of the Commissioner’s discretion at page 35 Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018.

² S.170-10 ACNC Act

³ Senate Standing Committee for the Scrutiny of Bills, 31 October 2012, ‘Thirteenth Report of 2012’ (Report 13/2012,) page 449.

⁴ *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* at page 37.

⁵https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines

⁶ See also <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>

The regulatory strategy of some business regulators such as the ACCC and ASIC of “naming and shaming” errant business firms is not effective with the vast number of cases involving charities.

An example of significant adverse impact of publicity on a charity is the “Keeping Kids Company” in the United Kingdom. In 2015, the Board applied for the charity to be wound up on the basis that it was unable to pay its debts after an allegation of serious criminal behaviour, including sexual assault and rape in the wake of the Jimmy Savile scandal. The directors concluded that, with the uncertainty caused by the investigation, its likely impact on donations and on the government grant, the restructuring would not be able to proceed and Keeping Kids Company would have to close. The allegations were subsequently not proved.⁷

For business shareholders, such regulatory actions give rise to the adverse effect of lower dividends and share value. In charitable organisations, it is usually the case that the objects of the charity will suffer due to regulatory action, giving rise to reduced services and resourcing constraints and negatively affecting the vulnerable people which the charity serves.

For these reasons, it is critical that regulatory action against a charity must be set within a framework supported by all of the procedural protections of the rule of law. The proper exercise of discretion is required and it should be judicially supervised.

ACNC’s current secrecy provisions

1) What is your experience of the ACNC’s current secrecy provisions in your capacity as an individual, charity or other organisation?

Our members indicate that the current secrecy provisions applying to the Australian Charities and Not-for-profits Commission (**ACNC**) create uncertainty when the ACNC cannot confirm or deny:

- if a charity investigation is being conducted;
- if an investigation has been completed;
- whether any particular action will be taken against the charity or an individual responsible person concerning the charity; or
- details of accusations made by a complainant when an investigation is underway.

As mentioned above, a balance must be struck, and disclosure will not be appropriate in many cases. However, in some cases it may. For example, it may be appropriate for the ACNC to publicly state that it is not undertaking an investigation.

2) What concerns, if any, do you have about the ACNC’s current secrecy provisions?

The lack of transparency affects public confidence in the ACNC and its holding of registered charities to account.

⁷ [Official Receiver v Batmanghelidjh & Ors \[2021\] EWHC 175 \(Ch\) and https://eprints.qut.edu.au/208177/](https://eprints.qut.edu.au/208177/)

Balancing privacy and transparency via a public interest test

- 3) **If a public interest test were to form the basis of the ACNC Commissioner’s discretion to disclose information about the ACNC’s regulatory activities, what public interest benefits should the ACNC Commissioner take into consideration when exercising the discretion and why?**

We support the 5 suggested criteria for the assessment of public interest identified in the consultation paper; namely:

- to protect public trust and confidence in the charity sector and/or in the regulator;
- to promote the transparency and accountability of the charity sector and/or the regulator to the public;
- to deter misconduct or allay public concern about conduct in the charity sector;
- provide regulatory guidance about a particular regulatory or legal matter that the sector would benefit from; or
- to correct the public record and clarify the facts around a particular case.

- 4) **If a public interest test were to form the basis of the ACNC Commissioner’s discretion to disclose information about the ACNC’s regulatory activities, what risk factors should the ACNC Commissioner take into consideration when exercising the discretion and why?**

The advantages of public disclosure must always be weighed up against the potential prejudice to the charity involved. This is particularly so for widely-held charities (with a large membership) where only a small number of individuals may have a particular agenda and can make an anonymous complaint to the ACNC which might give rise to further investigation.

Without careful consideration of these factors, significant harm can be done to both the charity and responsible persons. These risks are heightened when stakeholders involved in a charity may include, not only members, but also volunteers who are able to make anonymous complaints to the regulator. . As a matter of appropriately balancing competing interests, there should be no disclosure until allegations are at least tested by the ACNC.

A further consideration is the harm that can be caused to the pursuit of a charity’s charitable objects and the often very vulnerable people to whom it provides assistance. Any unnecessary harm to a charity’s reputation caused by the publication of information which is found to be unsubstantiated could seriously impact its ability to attract donations and secure funding from Governments and foundations. It could also cause vulnerable people to have concerns about the security of their services or to doubt the quality of the services and assistance they receive.

Any public interest test applied should take these risk factors into account.

Potential areas for increased disclosure for consideration

Area 1: Reasons for registration decisions

5) Do you have any concerns (other than privacy and confidentiality) about the disclosure of registration decisions?

See question 6 below.

6) Will your concerns be addressed if the information is de-identified?

De-identification of information addresses concerns around privacy and confidentiality and is a satisfactory solution if the primary intention of the disclosure of registration decisions is to inform the public at large and facilitate transparency.

We suggest that the following approach be taken:

- 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.

7) Should a public interest test form the basis of the discretion to disclose information about reasons for registration and why?

Yes. Public disclosure of itself is not necessarily in the best interest of the sector or an individual charity. It should be done when there is a benefit for it to be done. The decision to disclose remains a matter of balancing transparency with confidentiality and privacy concerns.

In addition to facilitating transparency, one of the benefits of the regulator disclosing registration and revocation decisions (in appropriate cases) is for professional advisors (including legal practitioners) who assist charities in the registration process.

The consultation paper indicates that the UK Commission "publishes a full summary of its registration decisions when they are novel, significant, involve new purposes or set a legal precedent, or of wider interest".⁸ This type of information would be very beneficial from an educational perspective for advisors and charities when preparing registration applications.

⁸ Consultation paper at page 9 - https://treasury.gov.au/sites/default/files/2021-07/c2021-190067-cp_2.pdf

Area 2: New and ongoing investigations

- 8) **Do you have any concerns (other than privacy and confidentiality) about the disclosure of the fact that an investigation into a registered charity has commenced or is ongoing or that no investigation is being undertaken?**

The concern is that significant harm can be caused when there is disclosure following an unjustified or misdirected complaint triggering an investigation. There needs to be a substantiation process gone through before disclosure of the fact of an investigation is made.

The current time taken by the ACNC to conclude investigations is too long and hence initial complaint disclosures are not able to be resolved in a timely fashion.

- 9) **Would your concerns be mitigated if the ACNC Commissioner could only confirm if an investigation is or is not underway?**

No. The ability to confirm if an investigation is or is not underway could still cause considerable harm to a charity and its responsible persons if the investigation ultimately does not identify any compliance issues.

- 10) **Should a public interest test form the basis of the discretion to disclose information about new and/or ongoing investigations and why?**

A public interest test should be the basis for exercising a discretion as to disclosure but only where sufficient regard has been had to the risk factors identified above.

Area 3: Finalised investigations and resulting compliance action

- 11) **Do you have any concerns (other than privacy and confidentiality) about the disclosure of information on finalised investigations and resulting compliance action?**

No.

However, subject to comments below under question 12, disclosure of all compliance outcomes should not be mandated as there may be good reasons for no disclosure.

- 12) **Under what circumstances do you think information about finalised investigations and the reasons for revoking a charity's registration should be disclosed and why?**

Information about finalised investigations and reasons for revoking a charity's registration should always be disclosed.

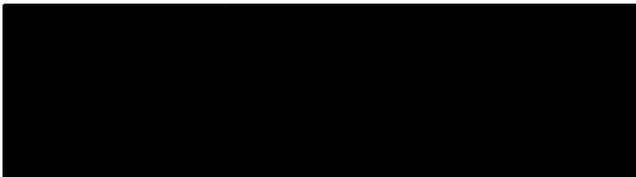
We also reiterate our comments under question 7 above, in relation to the educational benefit of publishing revocation decisions, which would assist charities and their advisors.

- 13) **Should a public interest test form the basis of the discretion to disclose information about finalised investigations and any resulting compliance action (including revocation, alternative regulatory approaches and no action) and why?**

No. See Question 12.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President