



Law Council
OF AUSTRALIA

Legal Practice Section

13 October 2023

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

Dear Sir/Madam

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

1. This submission has been prepared by the Charities & Not for Profits Committee of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to Treasury in relation to the exposure draft of the *Treasury Laws Amendment (Integrity and Transparency) Bill 2023: ACNC Review Rec 17—Secrecy Provisions* (the **Exposure Draft**).
2. We refer to the Committee's submission of 26 August 2021 (**ACNC Review Submission**—available [here](#)¹) in relation to Recommendation 17 of the ACNC Review. In that submission, the Committee expressed the diversity of views among Committee members, and more broadly within the sector, about the extent to which there should be reform to the secrecy provisions of the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (**ACNC Act**).
3. In summary, in the ACNC Review Submission, the Committee:
 - (a) supported Recommendation 17 of Strengthening for Purpose: Australian Charities and Not-for-Profit Commission Legislation Review 2018 (the **ACNC Review**) that the current secrecy provisions of the 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;
 - (b) considered that disclosure in the public interest should require positive affirmation from the Commissioner that disclosure is in the public interest;
 - (c) considered that, 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; and

¹ <https://lawcouncil.au/resources/submissions/reform-of-the-australian-charities-and-not-for-profits-commission-secrecy-provisions-recommendation-17-of-the-acnc-review>

- (d) the disclosure regime should enable confidence that the Commissioner's exercise of discretion is based on sound reasoning after consideration of relevant information.
4. Our comments on the Exposure Draft are consistent with our ACNC Review Submission, but expand upon that commentary and reflect the specific draft legislation.
5. The Committee's comments on the Exposure Draft are not as detailed as we would like given the shortened consultation period. The Committee regrets the short time frame in which this Exposure Draft, dealing with a matter of great importance to the sector, must be considered, particularly given the diversity of views to be distilled and tested.
6. The Committee comments are as follows:

Charities are different from other entities in relation to the utility of "naming and shaming" practices

- (a) We repeat paragraph 4(c) of our ACNC Review Submission with respect to the impact of regulatory disclosures on charities and note further examples since that submission of regulatory disclosures about the investigation of charities which were found not to be substantiated.²

Procedural fairness

- (b) The Committee considers that the Exposure Draft does not adequately afford procedural fairness to an entity the subject of a proposed disclosure.
- (c) The Committee's strong view is that the Commissioner must always give notice to an entity subject of the proposed disclosure, before making a disclosure and must be required to consider any objection by that entity.
- (d) We otherwise repeat our submission in paragraph 4(b) of our ACNC Review Submission.

Relevant Decisions must be reviewable

- (e) The decision under proposed sections 150-52(1) and 150-52(3) should be reviewable, either:
- (i) within the existing review framework set out in Part 7-2 of the ACNC Act, with the wording:

"A registered entity that is dissatisfied with a decision to disclose protected ACNC information may object against the decision in the manner set out in Part 7-2", or

² *Official Receiver v Batmanghelidjh* [2021] EWHC 175 (Ch); *Madden v Commissioner of Police* [2023] QCA 31 and *Madden v Commissioner of Police* [2023] QCA 182. Another recent example of a regulatory press release that turned out after scrutiny to be misplaced, which is not the subject of a court or tribunal decision, concerns public disclosures about the use of the Jim Ratcliffe Foundation assets. The regulator's public disclosures about were not found to be substantiated.

- (ii) within a new review framework by which an entity the subject of a proposed disclosure may apply to the Administrative Appeals Tribunal (or, in future, its replacement body) for review of the relevant decision.
- (f) We otherwise repeat our submission in paragraph 4(e) of our ACNC Review Submission.

Commissioner’s decision must be on reasonable grounds

- (g) Proposed section 150-52(3)(a) 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).
- (h) The Committee recommends that this be amended to require that the Commissioner “reasonably believes” the relevant matters, for the following reasons:
 - (i) “reasonably suspects” is a lower threshold than “reasonably believes” and would have the effect that a lower threshold of belief is permitted to make a public disclosure than is required to exercise enforcement powers under Divisions 70, 80, 85 or 100;³ and
 - (ii) “reasonably believes” is the language that the ACNC Act uses in relation to decisions of the Commissioner of similar import: 70-5(1); 80-5(1)(a), (b), (c); 85-5(1)(a), (b), (c), 100-5(1)(a), (b), (c).
- (i) Section 150-52(3)(c) should also be amended so that the Commissioner is required to “reasonably believe” that the disclosure is necessary.

Limiting content of disclosure of recognised assessment activities

- (j) In the Committee’s view, proposed section 150-52(3)(b) should be amended so that the Commissioner is limited to disclosing that a recognised assessment activity is or is not being carried out. The current drafting says the commissioner can disclose protected information:

... for the purpose of describing a recognised assessment activity being carried out, or proposed to be carried out, by the Commissioner under this Act in relation to such a suspected contravention, or such suspected non-compliance, by the entity;

It is not clear what the limits are on “describing” a recognised assessment activity or why a description of the recognised assessment activity would ever be necessary to prevent or minimise the risks set out in proposed section 150-52(3)(c)(i)-(iii).

³ See *George v Rockett* [1990] HCA 26; 170 CLR 104 [8]-[14] (the Court).

Limiting circumstances of disclosure of recognised assessment activities

- (k) The Committee considers that disclosures should only be allowed where no assessment activity is being carried out, or an assessment activity is already being carried out. There should be no disclosure where it is merely the case that an assessment activity is “proposed to be carried out”. Such an amendment is consistent with affording an entity procedural fairness to respond to any fact grounding the Commissioner’s belief that the entity has not complied with the ACNC Act, the Governance Standards or the External Conduct Standards.

Risk of significant harm

- (l) The Committee considers that the current test under proposed section 150-52(3)(c)(i) should also refer to other legal persons, not merely individuals. This would capture the risk of significant harm to other charities.
- (m) The Committee considers that the current test under proposed section 150-52(3)(c)(iii), that disclosure must be necessary “to prevent or minimise the risk of significant harm to the public trust and confidence in the Australian not-for-profit sector, or to a part of the sector”, is not appropriate because it lacks clarity as to how it would be applied and how a Commissioner would make such a decision.
- (n) In the Committee’s view, minimising harm to public trust and confidence in the Australian not-for-profit sector is more properly characterised as an outcome rather than a factor to consider when weighing whether to make disclosure. By broadening and making ambiguous the circumstances in which the Commissioner may make a disclosure under proposed section 150-52(3)(c)(iii), the proposed regime risks harming the public trust and confidence in the not-for-profit sector that the regime was intended to protect.
- (o) Nevertheless, given Treasury’s intention is to give the Commissioner powers to disclose in circumstances related to public trust and confidence in the sector we recommend section 150-52(3)(c)(iii) should be amended as follows:
 - (c) *the Commissioner reasonably believes ~~is satisfied~~ that the disclosure is necessary to:*
 - ...
 - (iii) *protect the public trust and confidence in the Australian not-for-profit sector, or to a part of the sector”.*
- (p) In the Committee’s view, provided our other recommendations in relation to procedural fairness, appeal rights and revised language are accepted, this proposed section 150-52(c)(iii) strikes a reasonable balance between the discretion of the Commissioner and the rights of the entity and other persons. However, if our recommendations as to procedural fairness, appeal rights and revised language are not accepted, then the current proposed section 150-52(3)(c)(iii) should be deleted.
- (q) We also refer Treasury back to paragraphs 4(a) and (b) of our ACNC Review Submission.

Section 150-52(4)

- (r) This drafting should clarify that the relevant harm is harm to be caused by the disclosure.
- (s) In addition, this paragraph should be extended to consider harm not only to individuals but to entities that are associated with the relevant registered entity, such as parents and subsidiaries.
- (t) These can be achieved by making the following amendments:

However, the Commissioner may only authorise a disclosure under subsection (3) if the Commissioner is satisfied that any harm that is likely to be caused by the disclosure to the registered entity mentioned in paragraph (3)(a), or to a person ~~an individual~~ ...

- (u) We also recommend that responsible persons of the entity be explicitly included as a sub-paragraph in subsection 150-52(4). While they may be covered in sub-paragraph (d), (e) and/or (f), they are an important category of person and for clarity should be expressly named.

Removal of notices from the Register

- (v) The Exposure Draft should provide that the Commissioner must remove the disclosure from the ACNC website, ACNC register, or any other place the within Commissioner's control, when:

"the Commissioner is reasonably satisfied that disclosure is no longer necessary, having regard to the matters in sub-section (3)."

- (w) This recommendation reflects that:
 - (i) non-compliance arises from individuals responsible for controlling the entity, not the entity itself, and
 - (ii) a permanent record of an entity's prior non-compliance is inconsistent with the first object of the ACNC Act to maintain, protect and enhance public trust and confidence in the Australian non-for-profit sector.

7. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Committee Chair, Bridgid Cowling on bcowling@abl.com.au.

Yours sincerely

(please leave 3 lines for the signature to be placed)

Geoff Provis
Section Chair