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Not-For-Profit Unit
Not-for-profits and Tax Administration Branch
Treasury Melbourne
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(submitted by email: charitiesconsultation@treasury.gov.au)

Secrecy Provisions in the *Australian Charities and Not-for-Profits Commission Act 2012 (Cth)*

Justice Connect appreciates the opportunity to comment on the *Reform of the Australian Charities and Not-for-profits Commission secrecy provisions* consultation paper (**Consultation Paper**) in relation to the *Australian Charities and Not-for-Profits Commission Act 2012 (Cth)* (**ACNC Act**).

Summary


For the reasons set out below, **Justice Connect does not support relaxing the current secrecy provisions in the ACNC Act as proposed in the Consultation Paper.**

Instead, Justice Connect submits that the ACNC Act should be amended to allow for the disclosure of:

1. **de-identified registration decisions** (Area 1) and identified decisions where the charity consents,
2. information about new or ongoing investigations where it is necessary **to prevent public harm** (Area 2), and
3. information about finalised investigations and resulting compliance action of **negative outcomes with high-level comments only** (Area 3).

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those



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who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive.

We have been serving the community for more than 25 years. We are a registered charity, operating nationally.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit community organisations and social enterprises, many of whom are registered charities. We handle than 1,600 enquiries annually from a diverse range of groups, primarily small-medium and most volunteer run.

Disclosure of registration decisions (Area 1)

Justice Connect is supportive of the move to disclose information about registration decisions if published registration decisions are de-identified. This would recognise that registration decisions do not create precedent and would bring it in line with the ATO's publication private binding rulings. Identified decisions could be made public where the charity consents.

Disclosure of information about new and ongoing investigations (Area 2)

The secrecy provisions should not be relaxed to include disclosure of new and ongoing investigations in the public interest.¹

Disclosure can be detrimental to a charity's reputation

Disclosure of information about new and ongoing investigations can be extremely detrimental to a charity's reputation, particularly where serious allegations are not substantiated.

In a recent UK case,² allegations of sexual assault and rape were made at a large and well-known charity, Keeping Kids Company. In light of these allegations, the charity decided to wind up because of the impact on its ability to attract donations and grant funding. However, a formal police investigation concluded that the allegations were not substantiated. Despite this, the reputational damage to the charity was too great. The judge concluded that '*absent the unfounded allegations it is more likely than not that [the restructuring of the charity] would have succeeded*'³.

¹ The current position under s 150-25 ACNC Act is that it is an offence for an entity to disclose, or otherwise use protected ACNC information if the entity has acquired the protected ACNC information in its capacity as an ACNC officer.

² *Official Receiver v Batmanghelidjh v Ors* [2021] EWHC 175.

³ [2021] EWHC 175 (Ch), paragraph 603.

Regulatory disclosure of information about new or ongoing investigations is rare

Out of the comparable international charity regulators listed in the Consultation Paper, only the United Kingdom Charity Commission can release information such investigations in the public interest.⁴ Both the New Zealand Charities Service and the Canadian Revenue Agency charity regulators do not allow for the disclosure of such information.

The Australian Consumer and Competition Commission's practice imposes a higher standard than the public interest. It does not proactively comment on investigative matters, and only makes a public statement where *'a matter is already in the public domain'* and it determines that it is in the public interest.⁵

Although Australian Securities and Investments Commission has the legislative power to disclose information about investigations in the public interest, it states its practise is to not make public statements about a new or ongoing investigation *'where the risk of damage to an individual from the publicising of an investigation is high... until further facts about the alleged misconduct can be gathered, analysed and tested'*^{6,7}

The inability for some comparable international charity regulators to disclose such information, and the reluctance of Australian regulators to disclose such information suggest that an exception to the disclosure of new or ongoing investigations is to be treated with caution.

Our alternative exception: disclosure of information about new or ongoing investigations where it is necessary to prevent public harm

The public interest is too low a standard for the Commissioner to disclose information about new and ongoing investigations.

Instead, an exception to the current offence under the ACNC Act should be where disclosure is ***necessary to prevent public harm***.

Inverting the analysis (focusing on public harm instead of the public interest) strikes the right balance between promoting transparency and confidence in the sector, with ensuring the public reputation of a charity is not tarnished prematurely or unfairly (and even fatally).

⁴ Consultation Paper, page 9.

⁵ ACCC, 'Compliance and Enforcement policies and priorities' <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities#compliance-and-enforcement-priorities>, accessed 19 August 2021.

⁷ Australian Securities and Investments Commission, 'Public comment on ASIC's regulatory activities', <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/public-comment-on-asic-s-regulatory-activities/>, accessed 18 August 2021.

In our formulation, what is necessary to prevent public harm would be an extremely limited exception and include the situations discussed below.

Disclosure of information about investigative action should be limited to the Commissioner confirming that a complaint (if any) has been received and that it is investigating. The Commissioner should not disclose any further information until an investigation is finalised and compliance action decided upon.

Further, the Commissioner should not inform a complainant that an investigation is underway. This has the potential to undermine the operation of the secrecy provisions entirely. If a complainant were to be informed, and then the complainant informed the media that the ACNC was undertaking an investigation, a charity would once again be at risk of premature and unfounded reputational damage.

We highlight two situations that would justify the use of our proposed public harm exception:

Prevention of public harm: information already in the public domain

This first proposed exception is where the Commissioner determines that information is too widely in the public domain that non-disclosure would place the public's trust and confidence in the sector or regulator at risk. This would be akin to Australian Consumer and Competition Commission's policy position outlined above. An example from recent years could include concerns about the New South Wales peak body for RSL's.

We accept that this example relies on similar considerations to those public interest factors listed in the Consultation Paper.⁸ However, by framing it in terms of preventing public harm, instead of being in the public interest, the bar is higher.

Prevention of public harm: risk to vulnerable people

The second proposed exception is where the Commissioner determines that non-disclosure carries with it a serious risk of harm to vulnerable people.

This language is taken from the ACNC's Regulatory Approach Statement, which states that the ACNC will '*act swiftly and firmly where vulnerable people or significant charity assets are at risk, where there is evidence of serious mismanagement or misappropriation, or if there is a serious or deliberate breach of the ACNC Act or ACNC Regulations*'.⁶

The default position of non-disclosure of investigative actions aligns with the ACNC's regulatory ethos of educating, guiding, and supporting charities where possible.⁶

⁸ See Consultation Paper page 11.

Disclosure of finalised investigations and compliance action (Area 3)

Justice Connect is broadly supportive of the move to disclose information about finalised investigations and compliance action. However, the legislation should be amended to only allow for the disclosure of finalised negative investigations which amount to serious breaches of the law, regulations or governance standards. Where there is disclosure of information about finalised negative investigations and compliance action, there should only be high level reasons provided.

Disclosure of finalised investigations or compliance action is unnecessary in the following circumstances:

Breach related to procedural, administrative or otherwise minor provisions of the Act, Regulations or Governance Standards

Not disclosing finalised investigations and any compliance action taken is particularly important with the proposed introduction of reforms to Governance Standard 3.

The proposed reforms to Governance Standard 3 place an obligation on charities to comply with certain summary offences that may be committed by individuals within a charity.⁹ The Commissioner could take enforcement action against the charity if he believes that a summary offence has been committed, even though no charges have been laid or proven.¹⁰

Disclosing a breach under the proposed reforms to Governance Standard 3 could unfairly tarnish a charity's reputation – any 'bad mark' against a charity's name on the register will stand out even if it is a summary offence that may have been committed by one employee, rather than a serious breach of the charities law.

There is a positive outcome for the charity

Under the ACNC Act a charity can consent to the disclosure of ACNC protected information.¹¹ An example of a charity consenting to the release information about positive investigative outcome occurred in the *Bushfire Response 2019-20: Reviews of three Australian charities*.¹² In this way, the charity can decide whether to correct the public record. It is appropriate that a compliant charity makes this decision rather than automatic disclosure.

⁹ Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021, Schedule 1, r 1.

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021, Schedule 1, r 2.

¹¹ ACNC Act s 150-45.

¹² ACNC, *Bushfire Response 2019-20: Reviews of three Australian charities*, October 2020, page 4.

Positive outcomes would include the scenario in which an investigation concludes that complaints are vexatious, frivolous, or lack merit.

Conclusion

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signatures redacted).

Yours sincerely,



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