

26 August 2021

**By E-mail**

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Your Ref

File No. 011749052

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Dear Jacky

**Submission in relation to ACNC secrecy provisions**

- 1 Thank you for the opportunity to provide a submission in relation to Treasury's consultation into the Australian Charities and Not-for-profits Commission (**ACNC**) secrecy provisions.
- 2 Arnold Bloch Leibler has an extensive charity law practice. We advise a broad range of charitable and not-for-profit organisations regarding, for example, governance, constitutional, and commercial issues. We also advise on philanthropy and charitable giving, including on establishing special purpose philanthropic entities and private and public ancillary funds. We are actively engaged in developing the legal landscape for the charity and not-for-profit sector. We are pleased to provide this submission.

**A BACKGROUND**

- 3 The ACNC is subject to secrecy provisions set out in Chapter 7 of the *Australian Charities and Not-for-profit Commission Act 2012* (Cth) (**ACNC Act**).<sup>1</sup>
- 4 The secrecy provisions prohibit the ACNC from disclosing information provided to it in the performance of its statutory functions, where the information in question relates to the affairs of a registered entity and identifies, or is reasonably capable of being used to identify, that entity. Such information is defined as 'protected ACNC information'.<sup>2</sup>
- 5 This prohibition is subject to a number of exceptions. Specifically, protected ACNC information can be used or disclosed by ACNC officers where the use or disclosure:
  - (a) is to the relevant entity (or to its agent or responsible persons);<sup>3</sup>
  - (b) is made by the ACNC officer in the performance of their duties;<sup>4</sup>

<sup>1</sup> See section 150-30, ACNC Act.

<sup>2</sup> Section 150-15, ACNC Act.

<sup>3</sup> Sections 150-25(a)(c) and 150-25(2), ACNC Act.

<sup>4</sup> Section 150-30, ACNC Act.



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- (c) is made to the public via the ACNC's public charity register (which displays information regarding registered charities);<sup>5</sup>
  - (d) is made to Australian government agencies in specific circumstances;<sup>6</sup>
  - (e) is made with the consent of the relevant entity;<sup>7</sup> or
  - (f) is made in circumstances where the information is already lawfully available to the public, *and* the disclosure is for the purposes of the ACNC Act.<sup>8</sup>
- 6 The recent Treasury Discussion Paper entitled *Reform of the ACNC Secrecy Provisions: Recommendation 17 of the ACNC Review 2018 (Treasury Discussion Paper)*<sup>9</sup> considers reform to the ACNC secrecy provisions in response to Recommendation 17 of the ACNC Review of 2018.
- 7 Recommendation 17 proposes that 'the Commissioner 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'.
- 8 The Treasury Discussion Paper contains 13 discussion questions regarding the ACNC's secrecy framework generally and three areas for proposed reform, which are:
- (a) reasons for registration decisions;
  - (b) new and ongoing investigations; and
  - (c) finalised investigations and resulting compliance.
- 9 In this submission, we have provided responses to each of the questions (Part B), and a summary of key recommendations in relation to each of the three areas for proposed reform (Part C).

## **B RESPONSES TO SPECIFIC QUESTIONS**

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

- 10 ABL advises a broad range of charity clients. In our experience, the secrecy provisions provide a helpful buffer for a charity which may have had a concern raised in relation to it. Rather than having to focus on managing any reputational damage created from a disclosure regarding an investigation, the charity can focus all its effort on working collaboratively with the ACNC to fully address the concern itself while continuing to undertake its crucial public interest work in an appropriate manner.

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

- 11 We do not have concerns about the ACNC's current secrecy provisions. In our view, they are appropriate and fit-for-purpose.
- 12 In particular, under the current framework:

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<sup>5</sup> Sections 150-35 and 40-5, ACNC Act.

<sup>6</sup> Section 150-40, ACNC Act.

<sup>7</sup> Section 150-45, ACNC Act.

<sup>8</sup> Section 150-50, ACNC Act.

<sup>9</sup> Department of the Treasury (Cth), *Reform of the ACNC secrecy provisions: recommendation 17 of the ACNC Review 2018* (July 2021).

- (a) a charity can receive information from the ACNC that relates to it;
  - (b) the ACNC can share information with other Australian government agencies in appropriate circumstances;
  - (c) the ACNC can publish details about its approach when it receives complaints (thereby ensuring the public is made aware that the ACNC considers every complaint received, and triages and investigates as appropriate); and
  - (d) the ACNC can publish deidentified investigation-related information and fictional case studies based on issues it has identified to be arising in the sector.
- 13 Considering the above, we see no need to amend the current secrecy provisions.
- 14 If any amendment is made to the provisions, it should only be to facilitate disclosure in circumstances where such a disclosure will prevent significant public harm, as we have outlined in paragraphs 19 and 20.

**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?***

- 15 In our view, the prevention of serious harm to persons (natural or legal) is the only public interest benefit that should be taken into account if a new exception to the prohibition on the disclosure of protected ACNC information is to be created.
- 16 In contrast to this, the Treasury Discussion Paper lists a number of possible public interest benefits that could be achieved by disclosure of protected ACNC information. These are:
- (a) protect public trust and confidence in the charity sector and/or in the regulator;
  - (b) promote the transparency and accountability of the charity sector and/or the regulator to the public;
  - (c) deter misconduct or allay public concern about conduct in the charity sector;
  - (d) provide regulatory guidance about a particular regulatory or legal matter that the sector would benefit from; or
  - (e) correct the public record and clarify the facts around a particular case.
- 17 We submit that disclosure of information beyond what is permitted under the current ACNC secrecy framework is not required to achieve any of Treasury's listed public interest benefits, nor justified by the pursuit of them. The reasons for this follow:
- (a) *Protect public trust and confidence in the charity sector and/or in the regulator:* In our view there is no reason to assume a lack of public trust and confidence in the charity sector and/or the regulator. On the contrary, the continued growth of the sector in terms of revenue and donations according to the most recent Australian Charities Report<sup>10</sup> suggests continued trust and confidence in the sector. Further, the ACNC can increase trust and confidence by continuing and increasing its efforts to better educate the public about its regulatory and compliance approach.

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<sup>10</sup> Australia Charities Report 7<sup>th</sup> Edition, May 2021, ACNC

- (b) *Promote the transparency and accountability of the charity sector and/or the regulator to the public:* In our view, transparency is an outcome, rather than a factor that weighs in favour of disclosure. A regulator can be transparent without making damaging disclosures of the private information of those it regulates. In this regard, the ACNC publishes significant information about registered charities on the charities register, as well as helpful deidentified data and analysis.

The *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* in which recommendation 17 is found, seems to suggest that members of the public are well placed to, and should have a right to, consider for themselves whether a charity is using its assets appropriately in pursuit of its purpose(s), or to determine – by accessing confidential information – whether the ACNC is doing its job properly. This shift toward subjecting registered charities and the ACNC to a court of public opinion is concerning. The general public are not the appropriate arbiters of whether a charity is complying with its legal obligations; charity law is a complex, nuanced, and evolving body of law which requires expert knowledge.

The secrecy framework in the ACNC Act was intended to balance the need to protect registered charities' personal and confidential information with the need to allow disclosures of such information in appropriate circumstances. The former is necessary to secure the trust and confidence of responsible entities and registered charities in the regulator, while the latter is necessary to ensure public trust and confidence through transparency and accountability.<sup>11</sup> We submit that the existing secrecy framework strikes this balance appropriately.

Further, entities within the charities sector are accountable to members (Governance Standard 2), the regulator, donors to the extent donors require it (because otherwise they will not donate), and to funders through grant agreements. Charities are accountable to those who use their services through the application of the law. We submit that there is no justification for requiring even greater accountability.

Finally, the ACNC is a competent regulator that is subject to appropriate oversight; for example, it was recently audited by the Australian National Audit Office. We see no justification for the disclosure of protected ACNC information in order to demonstrate to the general public that the ACNC is effective.

- (c) *Deter misconduct or allay public concern about conduct in the charity sector:* We have seen no evidence of a significant degree of misconduct in the charity sector nor of public concern about conduct in the sector. We refer to the increase in revenue and donations in the sector as evidenced in the most recent Australian Charities Report. This report discloses 18 revocations in the year ended 30 June 2020, from a register that holds more than 48,000 registered charities. The information published in the Treasury Discussion Paper demonstrates a tiny number of investigations each year for the past three financial years when compared with the number of registered charities. To the extent that there may be any public concern about conduct in the charity sector, then the ACNC can certainly point to data demonstrating growth and compliance to allay such concern.
- (d) *Provide regulatory guidance about a particular regulatory or legal matter that the sector would benefit from:* There is no compelling reason why this public

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<sup>11</sup> See the Explanatory Memoranda to the *Australian Charities and Not-for-profits Bill 2012*

benefit is not met through deidentified case studies and guidance using the ACNC's education function.

- (e) *Correct the public record and clarify the facts around a particular case:* The public record can already be clarified with consent from the relevant charity. Reform is not necessary.
- 18 Having considered each of the public interest benefits listed in the Treasury Discussion Paper that might be achieved by disclosure of protected ACNC information we find none to be compelling. As outlined above, to the extent they are relevant, each can be achieved in other ways.
- 19 However, we submit that there is a public interest in preventing serious harm to persons (natural or legal). This is the only relevant public interest that should form the basis of any exception allowing the disclosure of protected ACNC information.
- 20 Circumstances where the prevention of serious harm could be necessary include:
- (a) where a charity works with vulnerable people and there is an ACNC investigation into allegations of abuse or neglect which have a credible foundation; and
- (b) where there is an ACNC investigation and it relates to the likely conduct of serious financial fraud that could lead to serious harm to the charity, its partners, those relying on the charity's services, and those involved with the charity itself.
- 21 The Treasury Discussion Paper lists a number of other circumstances in which it may be necessary and in the public interest to disclose information. They are:
- (a) where there is significant public discourse about an issue;
- (b) where the information may be of wider public interest or serve to educate the sector and the public;
- (c) where the public record may require correction or clarification;
- (d) where the regulator has made a decision or taken action that could be precedential or significant;
- (e) where there is evidence of misconduct; and
- (f) where a case raises issues that may pose a risk to other registered charities or the public.
- 22 In our view, for the reasons that follow, only the circumstances arising in paragraphs 21(e) and (f) could indicate the potential for serious harm such that disclosure may be justified in the public interest. None of the other circumstances would justify the disclosure of information for the following reasons:
- (a) *Public discourse:* It is relatively simple for vocal commentators to generate significant public discourse in relation to a charity by issuing media releases and using social media. Significant public discourse about an issue is not of itself a reasonable indicator of whether there is a likelihood of serious public harm such that the public interest in disclosure outweighs a charity's interest in protection of its information and reputation.
- (b) *Information may be of wider public interest or serve to educate the sector and the public:* We submit that neither the general public interest nor educating the

sector are sufficient circumstances to warrant the disclosure of information beyond what is allowed by the current secrecy provisions. Many private things may be of public interest, but that does not mean the public has an overriding right to know the details nor that by the public knowing such details significant public harm will be avoided.

In relation to educating the sector, we see no persuasive reason why this cannot be done with deidentified case studies.

- (c) *The public record may require correction or clarification:* Provided that the ACNC has the consent of the relevant charity, the ACNC can already do this. If a charity is concerned about the public record and believes that the ACNC could correct the record by making a public statement, the existing regime is sufficient to achieve this. If the issue is in relation to the ACNC and whether it takes sufficient action, then the ACNC is able to educate the public about its compliance processes and demonstrate, with deidentified statistics, its compliance activities. There is no foreseeable risk of serious public harm through a failure to disclose in this situation.
- (d) *The regulator has made a decision or taken action that could be precedential or significant:* The regulator does not make decisions that have precedential value. The regulator does not issue binding rulings. Thus, any argument about a decision being precedential has no merit. Further, the sector can be informed of significant decisions by deidentified case studies or with the consent of the relevant charity. Accordingly, the current secrecy regime is adequate.
- (e) *There is evidence of misconduct:* In several circumstances, the ACNC can already publish actions taken in relation to a charity where there has been a finding of lack of compliance. The ACNC can publish the fact of a revocation and it can publish details of warnings, directions, undertakings, injunctions, and suspensions or removal of responsible persons on the ACNC register under section 40-5(1)(f) of the ACNC Act. Evidence of misconduct may demonstrate that there is a risk of serious public harm, however it clearly depends on the misconduct. Accordingly, evidence of misconduct will not always be a circumstance where disclosure should be permitted.
- (f) *A case raises issues that may pose a risk to other registered charities or the public:* We submit that disclosure may be warranted in these circumstances, but only where the risk is of serious harm to persons as outlined in paragraphs 19 and 20.

23 Overall, we submit that the only public benefit that could justify disclosure of protected ACNC information in the public interest is the prevention of significant harm to natural or legal persons. Permitting disclosure only in these most serious of circumstances is consistent with the current ACNC approach as set out in the ACNC's Regulatory Approach Statement which says 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*'.

24 Of course, even in situations of serious allegations, the allegations may be unfounded. An instructive example is found in the case of Kids Company in the UK.

25 Kids Company was investigated in relation to criminal behaviour, including allegations of sexual assault. The directors of Kids Company decided to close the charity because of the uncertainty created by the investigation and the likely impact on donors and

grants. All allegations were subsequently not proved, but the damage to the charity had already been done.<sup>12</sup>

**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?**

- 26 Key risks associated with disclosure of protected ACNC information that should be taken into account in any decision to allow disclosure or make disclosure of that information include:
- (a) the reputational damage to a charity, and all the effects of such damage, especially where the protected ACNC information relates to an investigation;
  - (b) the reputational damage to responsible persons or others closely associated with a charity;
  - (c) that once the fact of an investigation is made public, the relevant charity may suffer irreparable reputational damage even where the allegations are unfounded;
  - (d) the likely impact on the willingness of people to volunteer to run charities, knowing the reputational risk they face personally if information can be made public, especially before any outcome is reached; and
  - (e) an increase in risk aversion in an already risk-averse sector, which will impact the willingness of charities to innovate.

*What will be the detail of the relevant exception?*

- 27 If there is to be a very limited exception to the secrecy provisions for disclosure of protected ACNC information in the public interest, the exception needs to be detailed in the ACNC Act and that detail should include:
- (a) the public interest to be pursued by disclosure, which, we submit, must be limited to the public interest in preventing serious harm to persons (whether legal or natural); and
  - (b) the potential risks of disclosure to be considered.
- 28 This detail is crucial to enable the sector to understand any public interest exception, and also for any administrative law review of a decision by the ACNC Commissioner and/or other ACNC officers to rely on an exception.
- 29 As with the other exceptions to the ACNC secrecy provisions, the person relying on any public interest exception must bear the relevant evidential burden.

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

- 30 Yes. We are concerned about an increased perception that registration decisions have precedential value. Registration decisions are not binding, and charity registration is very fact-specific. While the existence of an unchallenged published decision can reasonably be viewed by the public as exemplifying a correct application of the law,

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<sup>12</sup> *Official Receiver v Batmanghelidjh and ors* [2021] EWHC 175 (Ch)

there are a range of reasons why an entity may not challenge an adverse registration decision, even if it has formed the view that the decision is not correct. If such decisions are placed on the register as guidance, it may dissuade entities who would be eligible for charity registration from applying.

- 31 Further, as acknowledged in the Treasury Discussion Paper, knowledge that a failure to be registered will be published may dissuade entities from applying for charity registration. Requiring decisions to be deidentified will alleviate this to some degree.
- 32 Finally, our assumption is that the proposal is to publish decisions not to register and, possibly, select positive registration decisions. However, if reasons for a decision were to be published for every positive registration decision, a large administrative burden would be placed on the ACNC for little value, and our concern is that this would be a poor use of ACNC resources.

**6) Will your concerns be addressed if the information is deidentified?**

- 33 Not all concerns are addressed by deidentification of the information. However, if a system akin to the ATO private binding ruling register was created and it was made clear that each decision had no precedential value, this would address our concerns to a large extent.

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

- 34 There is no basis for the application of such a test. We submit that there is no public interest in the publication of registration decisions that cannot be met by publication of deidentified information in a similar fashion to ATO private binding rulings. That is the only model that should be considered by Treasury.
- 35 Further, on the assumption that registration decisions would only be published on a deidentified basis and that only decisions not to register a charity would be published in this way, we submit that all such decisions should be published.
- 36 We can see no purpose in publishing only select decisions. If the objective of disclosure is to educate, to be transparent or to be accountable, then all deidentified negative registration decisions should be published.

**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?**

- 37 Yes. We are very concerned about any disclosure of the fact that an investigation into a registered charity has commenced or is ongoing, or that no investigation is being undertaken.
- 38 Charities rely on donors/funders and volunteers to achieve their charitable purpose. They have only their reputation and their purpose to attract donors/funders and volunteers. Success for charities relies on an unblemished reputation.
- 39 The Treasury Discussion Paper acknowledges the risk in causing severe or disproportionate prejudice to a person or entity from disclosure of information. In our view, this is a crucial factor in any discussion of the secrecy framework.
- 40 Significant damage can be done to donor confidence and volunteer numbers if there is even a suggestion that a charity has engaged in conduct worthy of investigating, notwithstanding that there may be no clear evidence of any misconduct and the charity

may be ultimately cleared of any finding of misconduct. Such damage can significantly undermine public trust and confidence in the charity sector.

- 41 Further, if responsible persons do not have confidence that their information will remain confidential and that they will receive fair treatment and natural justice before being tried in the court of public opinion, this is likely to have a negative impact on the willingness of people to take on voluntary directorships. This will, in turn, have an overall impact on the ability of the sector to thrive.

*Disclosure of current and ongoing investigations*

- 42 As outlined above, there is no public benefit in the disclosure of an ongoing investigation that is sufficient to outweigh the harm from such disclosure, except in the very limited circumstances where it is required to prevent serious harm to legal or natural persons.
- 43 We are also concerned that 'investigation' is not a term used in the ACNC Act. The ACNC Act refers to information gathering and monitoring powers. Without clarity as to what is meant by an investigation, we are unsure of what might be disclosed under the Treasury proposals.
- 44 For the ACNC Commissioner or the relevant ACNC officer to be satisfied that a disclosure is required because of the public interest in preventing harm, they would need to have a reasonable basis for that satisfaction. For this to be the case, at a minimum the ACNC Commissioner would almost always have used information gathering powers and received information upon which to form a reasonable view before the disclosure is made.

*Disclosure that there is no investigation being undertaken*

- 45 There is no basis for the ACNC secrecy provisions to be amended to allow a disclosure that there is no investigation being undertaken. The ACNC Act already allows such disclosures with the consent of the relevant charity. Presumably such consent would not be difficult to obtain.

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

- 46 No.

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

- 47 Only in the very limited circumstances outlined in paragraphs 19 and 20.

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

- 48 Yes. It is suggested in the Treasury Report that the publication of the outcome of an investigation where a charity has been cleared of any misconduct would be beneficial for a charity. In our view, this misunderstands the importance of a charity's reputation which is described above.

- 49 Further, if a charity believes that it would be beneficial to disclose that it had been investigated by the ACNC and cleared of any misconduct, then it already has the option both to do this itself and to consent to the ACNC making such a statement. Reform is unnecessary.

**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?**

50 Further publication is not warranted. However, if this reform is pursued, then we recommend it is strictly limited to disclosing information only of the particular condition of section 35-10 of the ACNC Act that was met and forms the basis for the revocation. Any further detailed reasons should not be allowed to be disclosed beyond the current secrecy provisions as they are fact-specific and usually involve highly confidential information.

**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?**

51 No. If an exception to the secrecy provisions is made to allow limited disclosure of the basis for a revocation, then it should be applied to all revocations. There is no public benefit that would support the selective publication of the legislative basis for a revocation.

**C Conclusion**

52 We submit that there is no need at all to amend the ACNC secrecy provisions.

53 While holding this view, we have still considered the Treasury Consultation Paper in detail to assist Treasury if it proceeds with amendments to those secrecy provisions.

54 In summary:

- (a) Publication of registration decisions is not required. If it is nevertheless pursued, it should be strictly limited to decisions not to register a charity, and all such decisions should be published on a deidentified basis with clear guidance that the decisions are fact specific and not of precedential value.
- (b) Disclosure of information about an ongoing investigation would likely cause significant harm to the charities involved, their responsible persons, and to trust and confidence in the sector overall. If it is nevertheless pursued, it must be strictly limited to only disclosure that is absolutely necessary to prevent serious harm to persons (legal or natural), provided there is a reasonable basis for that view.
- (c) Publication of the outcome of investigations is not required. If it is nevertheless pursued, any exception to allow publication should only strictly relate to decisions adverse to the charity and be strictly limited to the legislative basis for a revocation. All such decisions should be published, rather than merely a selection.

If you would like to discuss this submission further please contact Peter Seidel on **9229 9769** or Bridgid Cowling on **9229 9746**. We consent to this submission being published on the Treasury website.

Yours sincerely  
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