



Submission to The Treasury

Reform of the Australian Charities and Not-for-profits Commission secrecy provisions

August 2021

Introduction

This submission outlines key areas of opportunity and concern for the Community Council for Australia (CCA) in relation to the secrecy provisions of the Australian Charities and Not-for-profits Commission (ACNC).

CCA welcomes the opportunity to engage with The Treasury on this important issue.

CCA has also consulted with our members (see listing in Appendix 1) in framing this submission, however, it is important to note that this submission does not override the policy positions outlined in any individual submissions from CCA members. The issue of transparency of the ACNC and the public naming of charities is controversial amongst our members, and while we know this submission is supported by many of our members, some of our members take alternative positions.

The content of this submission includes a brief background to CCA and the current context for the broader charities and not-for-profit (NFP) sector. Following this context setting, this submission outlines some of the key issues relating to the Treasury's discussion paper 'Reform of the Australian Charities and Not-for-profits Commission secrecy provisions – Recommendation 17 of the ACNC review 2018'; and offers a conclusion.

CCA welcomes this opportunity to provide input into this Treasury consultation and look forward to ongoing discussions about how transparency of the ACNC decision-making processes might be further enhanced.

The Community Council for Australia

The Community Council for Australia is an independent non-political member-based organisation dedicated to building flourishing communities by enhancing the extraordinary work undertaken by the charities and not-for-profit sector in Australia. CCA seeks to change the way governments, communities and NFP organisations relate to one another. It does so by providing a national voice and facilitation for sector leaders to act on common and shared issues affecting the contribution, performance and viability of NFPs in Australia. This includes:

- promoting the values of the sector and the need for reform
- influencing and shaping relevant policy agendas
- improving the way people invest in the sector
- measuring and reporting success in a way that clearly articulates value
- building collaboration and sector efficiency
- informing, educating, and assisting organisations in the sector to deal with change and build sustainable futures
- providing a catalyst and mechanism for the sector to work in partnership with government, business and the broader Australian community to achieve positive change.

Our success will drive a more sustainable and effective charities and not-for-profit sector in Australia making an increased contribution to the well-being and resilience of all our communities.

Background: Current state of the charities and not-for-profit sector

COVID-19 highlighted the critical role played by charities and Not-for-profits (NFPs) in Australia. The government acknowledged this role in extending a modified form of JobKeeper payments to charities as well as supporting increased giving during the pandemic. These measures have been important to many charities, but 2021 continues to be challenging for the charities and NFP sector.

While the history of the NFP sector is framed by growth and reform, the current situation is that many charities are struggling to survive. Research conducted by the Centre for Social Impact (CSI) and Social Ventures Australia suggests around 30% of all charities are now facing serious questions about ongoing viability. CSI's latest survey of the for-purpose sector ([Pulse of the For-Purpose Sector | CSI](#)) found that while 8 in 10 organisations had increased demand, 77% of organisations agreed or strongly agreed that the recent events have put considerable strain on their organisation's finances, 85% reported a reduction in revenue even with JobKeeper, and 52% were worried about their ability to continue to provide services in the current environment.

Some charities have had to hibernate programs and services in the hope of being able to re-establish their income streams in the coming years. For many charities, COVID-19 has meant increased costs, a decline in revenue, reduced access to volunteers, and increased demand for community-based services. While generalisations across all charities are very difficult within the COVID-19 context, the one certainty is that COVID-19 will have a negative impact on thousands of charities and thousands of workers within the charities sector.

The charities and NFP sector encompass over 600,000 organisations - from large to very small. Australia's 55,000+ charities employ over 1.38 million staff (around 11% of all employees in Australia), collectively turn over more than \$166 billion each year and hold around \$350 billion in assets.

These facts tell only a small part of the story. The real value of the charities sector is often in the unmeasured contribution to Australian quality of life. Charities are at the heart of our communities, building connection, nurturing spiritual and cultural expression, and enhancing the productivity of all Australians. Collectively, they make us a more resilient society.

In Australia there have been various initiatives seeking to: promote social enterprise; reduce compliance costs for NFPs; encourage a diversification of financing options to build a more sustainable funding base; streamline and refine the regulation of NFPs and charities; establish less bureaucratic reporting requirements while building community transparency; increase philanthropy; promote impact investing; and increase sector performance measurement. CCA supports all these activities.

The establishment of the ACNC has proved to be a positive step towards red tape reductions, increased transparency, and trust in the community by prospective volunteers and donors. But there is still a lot of work to do in streamlining and improving the regulation of charities in Australia.

CCA response to The Treasury discussion paper ‘Reform of the Australian Charities and Not-for-profits Commission secrecy provisions – Recommendation 17 of the ACNC review 2018’.

Introduction

CCA believe the paper prepared by The Treasury sets out the issues associated with ACNC secrecy provisions well, and provides some useful comparative information in relation to the role of regulators and the application of various secrecy provisions. The data provided about the numbers of applications and investigations undertaken by the ACNC is also useful in considering the current secrecy provisions.

CCA is a strong supporter of transparency in relation to the role of the charity regulator.

Wherever possible without creating negative consequences, CCA believes the ACNC should be transparent in its activities. Transparency is critical to building trust and confidence not only in the regulator, but also in the charities sector it is required to regulate.

As noted in previous CCA submissions, the most important commodity that charities trade is trust. Trust is built upon clear and authentic communication – which is why charities enjoy high levels of trust compared to governments, insurance companies, and most other institutions.

Charities also have a strong interest in protecting the charities brand and therefore want to limit inappropriate behaviour by the very small minority of charities that behave badly and undermine community trust and confidence. This is why charities themselves have been very strong supporters of the ACNC.

CCA has experienced frustration from politicians, policy makers, charities themselves and the general public with the current levels of ACNC secrecy.

It is important to note that CCA’s response is partly informed by a high level of frustration from many different groups in relation to the secrecy provision of the ACNC.

Not many charities do the wrong thing, but if people do have concerns about the way a particular charity is behaving, and they cannot resolve their concerns directly with the charity, making a complaint to the ACNC can be an appropriate action to take.

CCA have on numerous occasions advised charities and others to lodge complaints where there were what appeared to be valid concerns about a charity not acting appropriately.

The current practice of not confirming or denying any aspect of the registration, investigation or enforcement action involving a charity can produce a level of mistrust in the ACNC, particularly from people who have made complaints (sometimes on the advice of CCA) and then can never find out what happened to their complaint.

CCA supports making the ACNC more transparent to address some of these concerns.

The three levels of secrecy / disclosure

CCA supports increased transparency around all three aspects of the ACNC's role from registration to removing a charity from the charities register, but within certain protections of privacy and reputation.

Registration decisions (Area 1)

The ACNC receives around 4,000 applications for registration per year, of which on average 35 applications are refused for reasons other than insufficient information.¹

CCA see no reason why the ACNC cannot note and name the charities that have successfully obtained charitable registration. This is in effect what happens given the newly registered charities will appear on the ACNC Charity Register.

As pointed out in the Treasury discussion paper; the UK Charity Commission and New Zealand Charities Services publish full statements about their registration and non-registration decisions, including identifying details about an entity and its application, where the decision is of wider interest and it may educate the charitable sector.²

For an applicant denied charitable status or who chooses to withdraw their application, it is appropriate for the ACNC to publicly note:

- the number of charities declined registration,
- the number who withdrew their application,
- the areas of activity the applicants were seeking charitable registration for,
- their geographic location,
- the reason the applicants were denied or withdrew their application, and
- other non-identifying information.

Individuals involved in unsuccessful applications should not be identified, unless they choose to identify themselves.

The names of the organisations denied registration should only be made public by the organisation itself unless it is in the public interest (see later in this submission for public interest considerations).

CCA believe increasing the level of transparency around charity registration applications at a non-identified level and allowing a specific case to be identified when it is in the public interest would improve trust and confidence in the registration decision-making process.

¹ The Treasury, *Reform of the Australian Charities and Not-for-profits Commission secrecy provisions*, p.12

² The Treasury, *Reform of the Australian Charities and Not-for-profits Commission secrecy provisions*, p.12

New and ongoing investigations (Area 2)

The ACNC Review concluded that the ACNC's inability to make any comment in respect of whether it is (or is not) undertaking an investigation regarding a complaint against a registered charity is harmful to the perception of the ACNC as an effective regulator.³

CCA supports the ACNC review finding that the ACNC should be able to release basic details about new and ongoing investigations.

The undermining of public trust and confidence is a real issue when the regulator cannot even acknowledge an investigation is taking place.

Complainants need to know that their complaints have been taken seriously by the regulator, or they will feel as though the regulator is not performing its role.

At the very least the ACNC should be able to acknowledge that a complaint has been received and is being considered. Both the charity that is the subject of the complaint and the person making the complaint should be informed that an investigation is underway.

In terms of privacy, CCA again believe that the regulator should not be naming any individual or responsible person.

In terms of broader public disclosure of the name of a charity that may be under investigation, this should only happen if the charity involved agrees to be publicly named, or chooses to name themselves, and where there is public interest in the complaint.

CCA understands that there are many spurious complaints about charities, and most complaints rarely progress to investigation stage, but it might be useful for the ACNC to provide more details about the complaints it receives including:

- the number of complaints received,
- the number that required further investigation,
- the nature of the complaints received, and
- other non-identifying information.

CCA believe increasing the level of transparency around complaint handling by the ACNC at a non-identified level and allowing a specific case to be identified when it is in the public interest would improve trust and confidence in the ACNC investigation process.

³ The Treasury, *Reform of the Australian Charities and Not-for-profits Commission secrecy provisions*, p.13

Finalised investigations (Area 3)

It seems difficult to justify the ACNC not being able to publicly identify why a charity has been removed from the charitable register.

Charities that have been the subject of an ACNC investigation and have had their charitable status revoked should be publicly identified and the reasons for the enforcement action should be noted.

The question of whether an enforceable undertaking should be publicly noted is a little more complex. As with the two previous areas, CCA believe it is not appropriate to publicly name any individuals.

It is, however, appropriate to name a charity that has been the subject of an enforcement action other than revocation provided the charity involved agrees to be publicly named, or chooses to name themselves, or where there is a public interest in the complaint.

As with previous areas, CCA believes the ACNC could provide more information on completed investigations in the following areas:

- the number of investigations completed,
- the nature of the investigations completed,
- the reason complaints resulted in no enforcement action,
- the reason complaints resulted in enforcement action, and
- other non-identifying information.

CCA believe increasing the level of transparency around completed investigations by the ACNC at a non-identified level and allowing a specific case to be identified when it is in the public interest would improve trust and confidence in the ACNC investigation process.

Public Interest Test

Drawing upon the examples of other regulators, circumstances where a disclosure of information could be necessary and in the public interest may include the following:

- *there is significant public discourse about an issue;*
- *the information may be of wider public interest or serve to educate the sector and the public;*
- *the public record may require correction or clarification;*
- *the regulator has made a decision or taken action that could be precedential or significant;*
- *there is evidence of misconduct; and*
- *a case raises issues that may pose a risk to other registered charities or the public.⁴*

CCA believes all the above factors are important in determining whether or not to publicly reveal information relating to ACNC decisions.

CCA would add to these considerations the question of materiality – the significance of both the issue or wrongdoing, the magnitude of money or assets involved, the size and reach of the charity involved. A lack of appropriate record keeping from a small local charity would not pass the materiality test.

CCA would also add the consideration of negative consequences. Where naming a particular charity might have flow on negative consequences for a significant number of charities or members of the community, the information should not be released.

CCA would question the inclusion of misconduct as a factor unless misconduct is defined as actual law breaking or the committing of an offence. Minor misconduct (like failure to keep a record) does not make a decision in the public interest or worthy of public disclosure.

Assuming a set of agreed definitions around these factors in determining public interest as it relates to the ACNC releasing information, the question that arises is what decision-making processes need to be satisfied to ensure a true test of public interest has been applied.

CCA is of the view that the ACNC Commissioner's discretion in applying the public interest factors to a particular instance is not a sufficient test of public interest.

CCA believes a fairer and more balanced process is required where the ACNC Commissioner may recommend making certain identifying information about an ACNC decision public to an independent panel of representatives that would ideally include at least:

- one senior official from the Australian Taxation Office not connected to the ACNC,
- two representatives of the charities sector,
- one experienced independent charity lawyer.

Provided the application of a public interest test was amended to include the factors CCA believes are important, including materiality and potential negative consequences, and provided the process was independent and accountable rather than subjective or based on the views of the ACNC Commissioner, CCA would support release of additional identifying information by the ACNC in the public interest.

⁴ The Treasury, *Reform of the Australian Charities and Not-for-profits Commission secrecy provisions*, p.11

Conclusion

CCA has always supported the ACNC. Having an effective and respected charities regulator is critical to building and sustaining public trust and confidence in the charities sector.

There is no doubt, as the ACNC review panel found in 2018, the secrecy provisions of the ACNC have diminished the level of public trust and confidence in the ACNC, and thereby, in the charities sector.

CCA would go further and suggest frustration with the ACNC secrecy provisions has driven some politicians and policy makers to advocate for more powers for the ACNC when the proposed new powers were mostly already in existence.

CCA strongly support a more transparent ACNC in all three key areas of decision making: registration, investigation, and enforcement decisions.

At the same time, CCA believes the release of identifying information about an individual charity needs to be governed by the appropriate application of a public interest test. To this end CCA is proposing a two-stage process with the ACNC making their determination about what identifying information should be released, and an independent panel reviews this information by applying an agreed public interest test to any proposed naming of an organisation in the public domain.

CCA appreciate the opportunity to have input into this Treasury consultation and look forward to ongoing discussions about how transparency of the ACNC decision-making processes might be further enhanced.

Current Membership – Community Council for Australia *Appendix 1*

Adult Learning Australia

Alannah and Madeline Foundation

Arab Council Australia

Australian Conservation Foundation

Australian Council for International Development, Marc Purcell, CEO (CCA Board Director)

Australian Environmental Grantmakers Network

Australian Scholarships Foundation

Australians Investing in Women

Barnardos Australia

Beacon Foundation

Brotherhood of St Laurence

Camp Quality

Carers Australia

Centre for Social Impact, Prof Kristy Muir, CEO (CCA Board Director)

Chain Reaction Foundation

Christians Against Poverty

Churches of Christ Community Care Vic/Tas

Community Bridging Services (CBS)

Community Broadcasting Association of Australia

Community Colleges Australia

Connecting Up

Drug Arm Australia, Jody Wright, CEO (CCA Board Director)

Endeavour Foundation

Ethical Jobs

Everyman

Exodus Foundation

Feanix Foundation

Fitted for Work

Foundation for Alcohol Research and Education

Foundation for Young Australians

Fragile X Association of Australia

Good Samaritan Foundation

Good2Give

Hammondcare

Hillsong Church, George Aghajanian, CEO (CCA Board Director)

InfoXchange

Justice Connect

Kilfinan Australia

Learning Links

Life Without Barriers, Claire Robbs, CEO (CCA Board Director)

Lock the Gate

McGrath Foundation

Menslink

Mission Australia

Missions Interlink

Non Profit Alliance

Our Community

OzHarvest

Painaustralia

Philanthropy Australia

Pro Bono Australia

Queensland Water & Land Carers

Relationships Australia NSW

Ronald McDonald House Charities

RSPCA Australia, Richard Mussell, CEO (CCA Board Director)

Saba Rose Button Foundation

SANE

SARRAH

Save the Children, Paul Ronalds, CEO (CCA Board Director)

Settlement Services International

Smith Family

Social Ventures Australia, Suzie Riddell, CEO (CCA Board Director)

St John Ambulance

Social Leadership Foundation

Starlight Foundation, Louise Baxter, CEO (CCA Board Director)

Sydney Children's Hospital Foundation

Ted Noffs Foundation

The Centre for Volunteering

The Shepherd Centre

Volunteering Australia, Mark Pearce, CEO (CCA Board Director)

Wesley Mission

Workplace Giving Australia

World Vision Australia

World Wide Fund for Nature Australia

YMCA Australia