

16 October 2023

The Treasury

[charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Treasury

### **Australian Charities and Not-for-profits Commission secrecy provisions reform – new and ongoing investigations**

Thank you for the opportunity to provide a submission on the *Treasury Laws Amendment (Integrity 4 and Transparency) Bill 2023: ACNC 5 Review Rec 17 - Secrecy Provisions Bill (Bill)* to amend the secrecy provisions in the *Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act)*.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises and the government sector.

The policy positions in this submission have been informed by engagement with AICD members of the AICD NFP Chairs' Forum (**Forum**). The membership of the Forum represents the diversity of the Australian NFP sector and includes responsible persons of some of the largest charities in Australia.

### **Executive Summary**

Consistent with our submission to the Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review (**ACNC Review**) and Treasury consultation on ACNC secrecy provisions in 2021, the AICD supports targeted measures to improve the transparency of decision-making by the ACNC.<sup>1</sup> However, we have significant concerns with the provisions of the Bill that would provide the ACNC Commissioner (**Commissioner**) with broad discretion to disclose new and ongoing investigations.

The AICD considers that, as currently drafted, the Bill could prejudice a charity's access to natural justice, pose serious long term reputation risks and result in negative impacts on the viability of charity that has been subject to disclosure. The Bill also limits an impacted charity's access to procedural fairness and has few checks on the Commissioner's discretion.

To address these concerns we recommend:

1. the public harm threshold be amended to specifically account for the impact of a disclosure on the financial viability of the charity and its related parties;

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<sup>1</sup> AICD submission to ACNC Review, February 2018, available [here](#). AICD submission to Treasury consultation on ACNC secrecy provisions, August 2021, available [here](#).

2. the Commissioner must consult with the relevant charity on the proposed disclosure, including to obtain information on the impact on the financial viability of the charity from any disclosure;
3. consideration be given to establishing an independent oversight mechanism where the Commissioner must consult with an external panel or body on a pending disclosure decision; and
4. the Commissioner's decision to disclose should be subject to an independent merits review.

We understand these concerns are shared by the Law Council of Australia (**Law Council**) and we also support the Law Council's recommendations to improve the drafting of the core provisions of the Bill.

### Disclosure of new and ongoing investigations

This section responds to draft provisions contained in the Bill.

The AICD supports separate measures to enhance ACNC transparency on charity registration decisions and finalised compliance investigations. We look forward to future consultations in these areas.

#### ACNC Commissioner discretion

We have significant concerns with the proposal to allow the Commissioner to disclose new and ongoing ACNC investigations. Informed by feedback from AICD members we consider that disclosure of new and ongoing investigations, in many instances, could prejudice a charity's access to natural justice and pose serious long term reputation risks.

As recognised by the ACNC Review, the NFP sector is unique in that the reputation of a charity is central to its ability to carry on its purpose.<sup>2</sup> Public standing and reputation is fundamental to a charity not only obtaining donations from the general public but also other sources of funding available from governments or private sources (e.g. charitable foundations) and in recruiting key staff and volunteers.

The disclosure of a new or ongoing investigation would likely have significant negative impact on public confidence in a charity, its access to funds and volunteer participation. In some cases, it may detrimentally impact its ability to continue operations. These are significant considerations in any disclosure decision making process and are not generally shared by other Australian regulators, including the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, which primarily regulate for-profit organisations.

We also note that investigations, particularly for complex matters, regularly have very protracted timeframes over months or years before there is a resolution and all avenues for review are exhausted. The extended timeframe from disclosure through to resolution would exacerbate the significant reputational damage to a charity.

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<sup>2</sup> The Treasury, Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review, May 2018, page 74.

As outlined below our view is that a modified public harm test, strengthened notification and consultation obligations and independent oversight are appropriate to allow disclosure in exceptional circumstances.

### **Public harm test**

To address the concerns detailed above, the AICD recommends that the public harm test that is set out in subsections 150-52 (3-4) of the Bill be strengthened to specifically account for the impact on the financial viability of the charity.

As currently drafted, our members consider that such a test would be interpreted in a manner where the potential for harm or impact on public trust, as assessed by the Commissioner, would always take precedence over a charity's access to natural justice and the impact on its viability. In particular, the arm of the test that allows the Commissioner to account for the potential 'risk of significant harm to the public trust and confidence in the Australian not-for-profit sector' is very broad and highly subjective. It is unclear from the Explanatory Materials how the Commissioner would interpret this provision and what constitutes 'public trust'. Absent clarity on the parameters or threshold of the test there is likely to be a regulator bias to conclude that it has been met and disclose in most cases. We recommend that the Explanatory Materials be clarified to detail what may encompass 'harm to the public trust and confidence'.

The AICD recognises that subsection 150-52 (4) of the Bill is seeking to ensure the Commissioner accounts for the potential impact on the charity from disclosure, including impact on its service provision and volunteers. The AICD recommends that this drafting be amended to specifically account for the impact on the financial viability of the charity and its related parties (i.e. parent entity and subsidiaries). For example, financial viability would entail situations where the entity relies on private funding sources, such as donations or private philanthropic foundations, and disclosure may severely impact its reputation and access to funding. The Commissioner would obtain information on the financial viability of charity through mandatory consultation, as discussed below.

### **Notification to impacted charity**

The AICD does not support the current limited provisions under subsections 150-52(5-7) relating to the Commissioner having the option of notifying a charity of a pending disclosure. Our view is that the Commissioner having the voluntary option to notify and engage with an impacted charity provides very limited benefit in respect of due process and ensuring the charity has procedural fairness. It also limits the ability of the Commissioner to reach an informed view on the impact of the charity from a disclosure as required under subsection 150-52 (4).

The AICD recommends that, at a minimum, the Commissioner *must* provide the charity with a notice that the Commissioner is considering making a disclosure. We also urge consideration of expanding this section such that the Commissioner is required to consult with the relevant charity prior to making a disclosure. A formal consultation obligation would provide the Commissioner with the relevant information to assess the impact on the charity, including its financial viability, as a key step in meeting the requirements under subsection 150-52 (4).

As a matter of procedural fairness, our strong view is that the Commissioner should be obliged to undertake this consultation process *prior* to reaching a view on disclosure. As currently drafted, the sequence of the provisions implies that the Commissioner provides an optional notice as a courtesy following a decision. We recommend this sequence be reordered such that the consultation step must come prior to a discretionary determination.

### **Independent oversight and merits review**

The AICD recommends Treasury consider whether a layer of independent oversight, or formal involvement in Commissioner disclosure decision-making, is necessary.

We consider that a structure where an independent panel or oversight body must at least be consulted on in respect of the Commissioner's pending decision to make a discretionary disclosure would provide greater rigour and enhance charity sector confidence. Crucially, it would entail an arm's length examination of the soundness of the Commissioner's assessment, particularly in respect of the public harm threshold and the impact on the charity. The independent panel's advice to the Commissioner would be published at the time of the decision, albeit non-binding.

We recognise that such an independent oversight structure would add complexity and extend the timeframes for making a disclosure decision. However, we consider that these costs would be outweighed by the benefit in ensuring that decisions are rigorous and consistent with the intent of the Bill.

We also support the Law Council's submission that a decision to disclose should be subject to an independent merits review. This could be enabled through the Administrative Appeals Tribunal provisions of the ACNC Act being extended to Commissioner disclosure decisions. Our view is that a merits review is necessary due to the potential for serious consequences on a charity and its beneficiaries resulting from a disclosure.

### **Next Steps**

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Simon Mitchell, Senior Policy Adviser at [smitchell@aicd.com.au](mailto:smitchell@aicd.com.au) or Christian Gergis, Head of Policy at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours sincerely,

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