



Australian Government

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Australian
Charities and
Not-for-profits
Commission

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Better Regulation Division
Department of Customer Service
New South Wales

Via email: policy@customerservice.nsw.gov.au

Our reference: ACNCSUB2021/7

ACNC submission – Consultation on the Public Inquiry provisions of the NSW Charitable Fundraising Act 1991 (NSW)

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide feedback on the public inquiry provisions of the *NSW Charitable Fundraising Act 1991 (NSW)* (**NSW Act**).
2. The ACNC has limited its feedback to those matters contained in the Discussion Paper that are relevant to the ACNC because of its jurisdiction, legislation or experience.

About the ACNC and the charity sector

3. The ACNC is the national regulator of charities established by the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (**ACNC Act**). The objects of the ACNC Act are to:
 - a. maintain, protect, and enhance public trust and confidence in the Australian not-for-profit sector; and
 - b. support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - c. promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.
4. There is an overlap between the objects of the ACNC Act and the intent of the public inquiry provisions of the NSW Act. The ACNC welcomes any state-based legislation that complements the Commonwealth regulatory framework and leads to better governance by Australian charities.

Questions 2-4 – appointment of inquirers

5. We agree that given the limited circumstances in which inquiries are to be conducted, restricting potential public inquirers to current and retired Judges ensures that the inquiry process is rigorous, evidence-driven, and fair, and that any outcomes are regarded as legitimate.





Question 5 – disclosing reports

6. The ACNC Act contains strict secrecy provisions – we are generally prevented from disclosing the outcome of our investigations, and even the fact that an investigation has occurred. We acknowledge that there may be benefits in greater disclosure, including promoting transparency and trust and confidence in both the sector and the inquiry process. A recent review of the ACNC’s legislation recommended amending the ACNC Act to give the Commissioner greater discretion to disclose information about ACNC investigations. The Commonwealth Government supports this recommendation, and the Treasury is currently consulting about possible change.
7. We agree that vesting discretion about publishing inquiry reports in either the Minister or an independent office holder is an appropriate way to promote transparency without impeding the lawful operations of charities.. There will be cases where the public interest in publishing such a report may be the paramount factor. There will be other cases where publishing the report will cause unintended consequences. For example, where an entity has been compliant, publication an inquiry report could unfairly damage the entity’s reputation by suggesting to the public that there are questions about the entity’s conduct.

Question 8 – public and private hearings

8. We understand that a public inquirer may conduct a hearing in private for any reason but must consider the effect of a public hearing on any person’s reputation when making that decision. We suggest that the reputation of any entity may be a factor that warrants consideration when making that decision. Theoretically, the entity of a compliant registered charity could be unreasonably damaged in a public hearing, which may have a related impact on donors and beneficiaries.
9. We note the factors listed in section 41F of the NSW Act that may be included in any guidelines that are issued about how an inquiry is to be conducted, although guidelines themselves are not required. We tend to favour a more prescriptive approach to ensuring that procedural fairness is both applied and seen to be applied. In our experience, it is important that charities under investigation are treated fairly and given a reasonable opportunity to explain their conduct.

Next steps

10. If you have queries about this submission, or if you believe we can assist further, please contact Mitchell Tucker, Policy Officer, on (03) 8632 4662, or at mitch.tucker@acnc.gov.au.

Yours sincerely

The Hon Dr Gary Johns
Commissioner
Australian Charities and Not-for-profits Commission