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Acting Commissioner
Australian Charities and Not-for-profits Commission
GPO Box 5108 MELBOURNE VIC 3001

(Submitted by email: cis@acnc.gov.au)

Public consultation on updated Commissioner's Interpretation Statements: Public Benevolent Institutions

Justice Connect welcomes the opportunity to comment on the redraft of the Commissioner's Interpretation Statement for Public Benevolent Institutions (**PBI CIS redraft**).

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 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 an ACNC registered charity.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist, national Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit organisations and social enterprises, many of whom are registered charities endorsed as, or eligible for, endorsement as a Public Benevolent Institutions (**PBIs**). We handle more than 1,700 enquiries annually from a diverse range of groups, primarily small-medium sized and mostly volunteer run. We focus our 1:1 services (in house and pro bono legal advice) on those that are (or are eligible to be) PBIs.

Not-for-profit Law was at the forefront of the campaign for the ACNC, and supports the ACNC's mission of maintaining, protecting and enhancing public trust and confidence in the not-for-profit sector. We see this public consultation as an opportunity for the ACNC to fulfil its mission to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector.

Our submission

We are a member of the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (**LCA Committee**). We contributed to and endorse the LCA Committee's submission (**LCA Submission**) dated 30 August 2022.

Our overall recommendation: The ACNC should not proceed with the PBI CIS redraft. Instead, the ACNC should issue, with another period of consultation and the appointment of an expert working group, another PBI CIS redraft, which takes account the concerns of the sector voiced in this public consultation. Or, as a second preference issue a redraft of the current PBI CIS, that addresses the points made in the LCA Submission.

Our overall recommendation is based on the significant legal issues the LCA Committee has identified with the PBI CIS redraft. It is also informed by six key issues (below) that we have identified as being detrimental, particularly for the small to medium sized, volunteer run charities we work with.

1. The PBI CIS redraft (and the redrafted Introductory Statement) allows the ACNC to retrospectively apply changes in the law. We do not support this.

The current PBI CIS and the current Introductory Statement both make it clear that if there is a change in the law, the ACNC will apply the changes from the date of the change, **not** retrospectively in a way that could disadvantage a charity.¹ This protection, along with the promise that the ACNC will deal with organisations fairly has been removed in the PBI CIS redraft and the redrafted Introductory Statement. We cannot understand why.

Retrospectively applying changes to the law has the potential to threaten the very viability of charities, many of which heavily rely on their endorsement as a deductible gift recipient because of their PBI status. It also unfairly disadvantages small to medium sized charities that do not have the resources to respond to, or challenge these types of decisions by the ACNC.

We recommend that the protection in the current PBI CIS and the current Introductory Statement be carried over into the PBI CIS redraft and the redrafted Introductory Statement.

2. The PBI CIS redraft should be bolstered with more examples and guidance.

¹ Australian Charities and Not for Profits Commission, *Redraft Commissioner's Interpretation Statement: Public Benevolent Institutions for consultation* (June 2022), 1; Introductory Statement available at www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements

We regularly provide information, guidance, and training to charities. In our experience and from client feedback, using examples that clearly demonstrate the black, white, and grey of a decision-making process is the most successful way of helping organisations to understand a difficult concept.

Given the power of the ACNC to shape the meaning of benevolent relief,² the PBI CIS redraft must include robust guidance on the process used by the ACNC to identify conditions which arouse ‘compassion within the community’ in contemporary Australia (apart from judicial decisions).

While some examples are included in the redraft, we strongly recommend that it be populated with more real-life examples. Specifically, where the ACNC has considered cohorts to be in need, where they have considered the cohort not to be in need and, if a cohort is borderline, the factors that would be considered by the ACNC to reach a decision on whether the need would arouse ‘compassion within the community’.

We also strongly recommend further guidance and examples on where benevolence may be directed to an entire community. The PBI CIS redraft provides developing countries as an example,³ but it should also include examples of how (and whether) the ACNC would go about determining if an entire community in Australia is ‘in need’.

3. The PBI CIS redraft should address the extent to which prevention can constitute ‘relief’.

The current PBI CIS has a section dedicated to articulating how ‘prevention’ can constitute relief.⁴ This has been removed from the PBI CIS redraft. We do not understand why.

Preventing ‘need’ from occurring goes to the very heart of the work that many charities do. Charities will find it difficult to comprehend that they may not be able to undertake some forms of prevention work if they wish to be eligible to be endorsed as a PBI (and therefore DGR status).

We recommend the PBI CIS redraft including guidance on how and when prevention can constitute relief. As with the above point, this should include (decided) examples of where the ACNC has considered prevention activities to be acceptable, where they have considered them unacceptable, and if borderline, the factors that would be considered by the ACNC to reach a decision.

² The PBI CIS redraft acknowledges that the meaning of PBI will evolve over time and while the ACNC must follow past judicial statements, it is not appropriate to apply them mechanically (see *Ibid* [58]).

³ *Ibid* [28].

⁴ Australian Charities and Not for Profits Commission, *Commissioner’s Interpretation Statement: Public Benevolent Institutions* [CIS 2016/03](#) (December 2016) [5.9].

4. Website and social media posts should not be a determinative factor in assessing whether a charity meets the requirements to be registered as a PBI. Charities should also be given notice and a fair chance to respond.

The PBI CIS redraft lists ‘website and other publicly available information about the charity, including social media posts’ as one of the types of information that the ACNC will use to determine if a charity is eligible for PBI registration.⁵ The current PBI CIS lists ‘website and other communications.’⁶

A charity’s website and social media presence are marketing tools that often use language and approaches reflecting modern approaches to social welfare. It does not mean that the charity is not providing benevolent relief. In fact, if a charity used words like ‘sickness, suffering, helplessness or other distress or misfortune’, it would probably discourage people from using its services.

We support the LCA’s recommendation that charities be given notice and an opportunity to respond when its website and social media posts are being used to assess PBI eligibility.⁷ It should also be made clear that a charity’s website and social media presence is not a determinative factor; rather it is just one part of the overall eligibility assessment to be considered in light of the modern purpose of a website and a social media presence.

5. The PBI CIS redraft should clarify that it is acceptable for information and advice to be accessible by the general public (for example, through a website or a podcast).

The PBI CIS redraft states that a charity’s benevolent relief must be targeted or directed to people in need and not the broader general community.⁸

Just because information and advice are accessible by (and potentially useful for) the general public, does not mean that it is not targeted at people in need.

The publication of information and self-help resources on a website is often the most effective and financially efficient way to ensure information is available to those in need of benevolent relief. It is a modern form of service delivery that broadens reach and accessibility with key information available 24 hours every day across the country; during the Covid pandemic lockdowns it was often the only way of delivering services. For example, information on a

⁵ Australian Charities and Not for Profits Commission, *Redraft Commissioner’s Interpretation Statement: Public Benevolent Institutions for public consultation* (June 2022) [57].

⁶ Australian Charities and Not for Profits Commission, *Commissioner’s Interpretation Statement: Public Benevolent Institutions CIS 2016/03*, December 2016 [7.1.9].

⁷ Law Council of Australia, Submission to Australian Charities and Not for Profits Commission, *Commissioner’s Interpretation Statement: Public Benevolent Institutions* (30 August 2022) (unpublished), [48(b)].

⁸ Australian Charities and Not for Profits Commission, *Redraft Commissioner’s Interpretation Statement: Public Benevolent Institutions for consultation*, June 2022) [26].

website can be critical for someone considering escaping domestic violence who cannot not safely make an appointment or ring a helpline.

We strongly support the LCA Submission that the PBI CIS redraft should clarify that a PBI which provides information and advice, which can be accessed by the general public, is still a PBI if the reason that it provides that information and advice is to assist people in need of benevolent relief.⁹ As with our above points, this should be accompanied by the provision of clear examples that demonstrate the decision-making process by the ACNC.

6. The PBI CIS redraft should recognise that a PBI can have more than one charitable subtype.

In addition to the multiple legal arguments set out in the LCA Submission about this issue,¹⁰ the selection of multiple sub-types is often a confusing 'trap' for many small to medium seized charities who believe they are doing a 'good thing' by selecting more sub-types. It can also be extremely difficult for charities who do not have legal representation to understand the difference between 'activities' and 'purposes', leading to an over-selection of sub-types.

For the reasons outlined above and in the LCA Submission, **our overall recommendation** is that the ACNC should not proceed with the PBI CIS redraft. Instead, the ACNC should issue, with another period of consultation and the appointment of an expert working group, another PBI CIS redraft, which takes account of the concerns of the sector voiced in this public consultation. Or, as a second preference issue a redraft of the current PBI CIS, that addresses the points made in the LCA Submission.

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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⁹ Law Council of Australia (n 6) [84].

¹⁰ Ibid [95]-[138].



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