



## Response to Discussion Paper Charitable Fundraising Regulation Reform

### Overview

Sparke Helmore is an integrated national law firm that provides legal services to business and Government. In addition, we routinely provide advice to charities and other not-for-profit organisations, as well as people and groups who wish to establish such entities, through our Commercial practice and via pro bono work that we undertake as part of our national pro bono and community engagement scheme called 'SHARE'.

Sparke Helmore welcomes the Federal Government's commitment to exploring charitable fundraising law reform. In principle, the writer supports the necessity of a national approach to charitable fundraising regulation to reduce regulatory burden and enhance transparency. Ultimately, a truly centralised system, which affords some discretion to cater for the individuality of organisations in the sector and is not administratively burdensome, will create consistency and aid the functioning of the sector in the public interest.

The views contained in this response paper to selected questions of the consultation are the views of the writer and our Pro Bono Lawyer, Katy Mooney, who has kindly assisted in the preparation of this paper. The views in this paper do not necessarily reflect the views of Sparke Helmore Lawyers generally and is not intended to constitute legal advice.

A handwritten signature in blue ink, appearing to read 'M Rosenfeld'.

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*We contribute to law reform processes through 'Share',  
Sparke Helmore's pro bono & community engagement scheme*



# Consultation Questions

## Chapter 2 – Defining the scope of regulated activities

### **2.1 Is it necessary to have specific regulation that deals with charitable fundraising? Please outline your views.**

We consider that it is widely accepted that there is a need to have specific regulation of charitable fundraising. This does not arise from a distrust of the not-for-profit sector, but an expectation that regulation will enhance transparency and public confidence in fundraising activities – specifically that those activities will be undertaken in compliance with certain standards of conduct. Regulation will also make it easier to identify scam situations and empower donors to know which organisations are compliant with regulatory requirements. Increasingly, charities are using fundraising intermediaries that solicit donations for them and it will be important to ensure that regulation also requires their role to be transparent to donors and ensure that standards expressly apply to their conduct and activities.

In our experience, most charities do not begrudge fundraising licensing requirements, but are simply frustrated by the lack of harmonisation of regulation and the administrative burden of separate State and Territory requirements.

### **2.2 Is there evidence about the financial or other impact of existing fundraising regulation on the costs faced by charities, particularly charities that operate in more than one State or Territory? Please provide examples.**

Some of our clients, particularly those with a national focus and operation, experience frustration and administrative burden with having to understand and comply with multiple regulatory instruments and bodies. We see this especially at the time of establishing a new national charitable entity where multiple regulatory requirements contribute to the legal and administrative costs associated with establishment.

### **2.3 What evidence, if any, is available to demonstrate the impact of existing fundraising regulation on public confidence and participation by the community in fundraising activities?**

It is our view that jurisdictions that require regulation and permit donor checking of licences enhances public confidence in, and transparency of, the charitable sector. What needs to be improved is the calibre of information available to the public about a licensed charity, such as their usual methods of solicitation and whether intermediaries are utilised.

### **2.4 Should the activities mentioned above be exempted from fundraising regulation?**

We agree that the definition of fundraising for the purpose of regulation should be confined as proposed. However, whilst raffle and lottery fundraising may continue to be regulated at State or Territory level, we would recommend that there be information sharing arrangements to ensure that any database accessible to the public regarding licensing integrates compliance information with all regulatory requirements pertaining to charitable fundraising and any vehicles of such fundraising, such as raffles and lotteries.

**2.7 Should national fundraising regulation be limited to fundraising of large amounts? If so, what is an appropriate threshold level and why?**

We are not necessarily opposed to a threshold to limit the burden on smaller charities. However, there is also an argument that regulation would be most effective if it applies to charitable fundraising activities broadly, irrespective of the amount of fundraising achieved. Whether charitable fundraising is undertaken for small amounts or large amounts, there is a strong argument that the activity should be undertaken in compliance with the same standards and expectations.

**2.8 Should existing State or Territory fundraising legislation continue to apply to smaller entities that engage in fundraising activities that are below the proposed monetary threshold?**

The benefits of adopting a national regulation framework would be significantly diluted if the States and Territories were to maintain their current regulatory regimes for smaller entities. We would suggest that such a situation would only contribute to unnecessary complexity of regulation and detracts from the stated aspiration of the reform process. Rather than defer regulation of smaller entities, perhaps different reporting mechanisms may be adopted to reduce administrative burden for such entities.

**2.9 Should a transition period apply to give charities that will be covered by a nationally consistent approach time to transition to a new national law? If so, for how long should the transition period apply?**

Yes, charities should be afforded appropriate time to review any new regulation, assess how it applies to them and if necessary, seek advice. They will need time and adequate guidance for familiarisation and training and so that their regulatory obligations may be incorporated into their governing documents and their policies and procedures. We consider that a 12 month transitional timeframe would be adequate; however there may be a need for additional transitional time if States and Territories retain certain regulatory responsibility in addition to the national framework.

**2.10 What should be the role of the ACNC in relation to fundraising?**

We agree with the propositions in paragraphs 27-29 regarding the role and powers of the ACNC. The ACNC should also be a source of clear guidelines, support and education,, particularly with respect to any self-assessment that charities may need to undertake for compliance. Given the diversity of the sector, it will be necessary for the ACNC to have discretion in undertaking its regulatory authority.

**2.11 Should charities registered on the ACNC be automatically authorised for fundraising activities under the proposed national legislation?**

Automatic approval to fundraise, upon registration as a charity with the ACNC, would be a sensible approach provided, firstly, that those entities that do not undertake charitable fundraising are not unnecessarily burdened and secondly, that there are clear guidelines, support and education as referred to in our response to 2.10.

## **2.12 Are there any additional conditions that should be satisfied before a charity registered with the ACNC is also authorised for fundraising activities?**

We recommend that, in some circumstances additional ‘special conditions’ may be required, for example, where the entity will be undertaking extensive direct marketing campaigns and will be using intermediaries (e.g., for-profit call centres that undertake direct marketing for charities) to implement their charitable fundraising activities. There is a case that additional special regulatory conditions and conduct expectations should be applied to such relationships.

## **2.13 What types of conduct should result in a charity being banned from fundraising? How long should any bans last?**

Endorsed misleading, fraudulent or other adverse activity within the knowledge of the charity and consistent non-compliance with regulatory requirements are two circumstances that come to mind in relation to this question. For the latter, the ACNC should adopt an educative and supportive approach, but in circumstances where there is no reasonable indication that non-compliance is to be corrected, banning should be a power available to the ACNC. The duration of such action, should be a discretion of the ACNC, but reviewable by a Court after an administrative review process has been undertaken.

A system that allows for a right of appeal is essential; however it must be kept in mind that most charities will not be in a position, financially or in terms of resources, to challenge the ACNC’s determinations in a higher jurisdiction. It is therefore vital that a system of administrative review be available. Also there should be clear and certain guidelines in respect of complaints processing, investigation and determination..

## **Chapter 3 – Regulating the conduct of fundraising**

### **3.1 Should the aforementioned provisions of the ACL apply to the fundraising activities of charities?**

Yes.

### **3.2 Should the fundraising activities of charities be regulated in relation to calling hours? If so, what calling hours should be permitted?**

We would not recommend the extension of calling hours regulation to the activities of charitable entities as this may unduly restrict charities in what is already a very competitive sector for the solicitation of donations and support. However, the regulations should require charitable entities to be responsible in their campaigns and solicitation activities and to consider any burdensome or deleterious impact on people and communities by their activities.

### **3.3 Should unsolicited selling provisions of the ACL be explicitly applied to charitable entities? Alternatively, should charitable entities be exempt from the unsolicited selling provisions of the ACL?**

We consider that the ACL adequately regulates unsolicited selling and charities that undertake activities that are caught by such provisions should not be exempted. However, education and support should be given to the sector so distinctions and obligations are understood.

## Chapter 4 – Information disclosure at the time of giving

### **4.1 Should all charities be required to state their ABN on all public documents? Are there any exceptions that should apply?**

We consider that specification of an ABN will aid ease of identification and contribute to accountability.

It should be remembered that just as the charitable sector is comprised of a diversity of organisations, consumers or donors are also very distinct in their values and information requirements. Therefore not every donor can be catered for without placing unrealistic expectations upon charities. Some onus needs to remain with the donor to request information to suit their particular needs.

### **4.2 Should persons engaged in charitable fundraising activities be required to provide information about whether the collector is paid and the name of the charity?**

Yes. This is substantiated because of the increasing use of charitable fundraising intermediaries who do not necessarily disclose their status and sometimes it can be reasonably assumed that they are more directly involved in the charity and its work.

### **4.3 Should persons engaged in charitable fundraising activities be required to wear name badges and provide contact details for the relevant charity?**

Yes. Alternatively, a fundraising authority card in standard terms may be issued by a charity to enable persons to demonstrate their association with the charity and their authority to undertake specified fundraising activities and for the period specified.

### **4.4 Should specific requirements apply to unattended collection points, advertisements or print materials? What should these requirements be?**

We agree that there should be specific requirements for unattended collection points, including a reference to where further information can be located, as the donor is not afforded the opportunity to request further information from the charity at the point of giving.

### **4.5 Should a charity be required to disclose whether the charity is a Deductible Gift Recipient and whether the gift is tax deductible?**

In our experience, a charity being able to confirm or provide a receipt for tax deductibility is often an important consideration for a donor, particularly when considering what amount to give. We therefore agree that this disclosure is necessary.

### **4.6 Are there other information disclosure requirements that should apply at the time of giving? Please provide examples.**

Yes, perhaps how much of donations are dedicated to the charitable cause and how much to administration. This may lead to greater efficiencies in the sector when such information is required to be disclosed. For example, charities that contract with fundraising intermediaries often agree to a fee and that fee that is linked to the quantum of fundraising.

Such intermediaries should be required to disclose their interest in the solicitation of donations.

#### **4.7 Should charities be required to provide contact details of the ACNC and a link to the ACNC website, on their public documents?**

We consider that, at least initially, this should be a recommendation rather than a requirement. This would enable charities to gradually incorporate the information into their websites, corporate documents and marketing material as they are updated. Perhaps registered charities of long-standing or other eligibility could be given a special ACNC logo that confirms their registration and compliance and this could be used in charities' communications, subject to the payment of a fee to the ACNC for its use. This may contribute to public confidence in charities that are permitted by the ACNC to display the logo and encourage charities to promote their compliance with ACNC regulatory requirements.

### Chapter 5 – Information disclosure after the time of giving

#### **5.1 Should reporting requirements contain qualitative elements, such as a description of the beneficiaries and outcomes achieved?**

We understand the argument calling for greater qualitative reporting, however as discussed above there is a fine balance to be struck between the benefits obtained and the cost of such reporting. We consider that qualitative information and may certainly be progressively introduced into a reporting framework, but it may be burdensome to include such requirements at the outset of significant reform. Effective charities would already be providing donors with information of a qualitative nature and perhaps such disclosure for ACNC purposes could be sought on a voluntary basis initially and reviewed to see how effectively such requirements have been embraced by the sector.

### Chapter 7 – Fundraising by third parties on behalf of charities

#### **7.1 Is regulation required for third party fundraising? If so, what should regulation require?**

We agree that fundraising by third parties who derive a direct financial benefit in undertaking the activity as a service to the charitable sector should be regulated and should be required to register with the ACNC and agree to certain standards of conduct and disclosure.

#### **7.2 It is appropriate to limit requirements on third party fundraising to those entities that earn a financial benefit?**

Yes, we consider that it is extremely important to limit obligations to those fundraisers who derive a direct financial benefit in providing a *service* as a third party fundraiser.

#### **7.3 Should third party fundraisers be required to register with the ACNC for fundraising purposes only? If so, what are the implications of requiring the registration of third party fundraisers?**

Yes, as specified in answer to 7.1.

**7.4 Should third party fundraisers be required to state the name and ABN of charities for which they are collecting?**

Yes, we consider that this is reasonable requirement.

**7.5 Should third party fundraisers be required to disclose that they are collecting donations on behalf of a charity and the fees that they are paid for their services?**

Yes, we agree that third party fundraisers who are providing a service and directly derive an income from such a service should be required to disclose that they are collecting donations on behalf of a charity and derive a financial benefit from soliciting donations. We do not consider that disclosure of actual fee details should be required.

**7.6 Should third party fundraisers (or charities) be required to inform potential donors that paid labour is being used for fundraising activities?**

Please refer to our response to question 7.5. We do not consider identification of this issue in particular is necessary.

**7.7 Is regulation required for private participators involved in charitable fundraising? If so, what should regulation require?**

Any private participator undertaking fundraising activities for a charity should be required to have a fundraising authority card or other document in a standard form from a registered charity that can be produced on request. They should also be required to indicate if all or the net proceeds of the fundraiser are to benefit the charity.