

NSW GOVERNMENT COMMENTS
CHARITABLE FUNDRAISING REGULATION REFORM
DISCUSSION PAPER AND DRAFT REGULATION IMPACT STATEMENT

General comments

- 1.1 The NSW Government is committed to working closely with and supporting the Not-for-profit (NFP) sector to deliver vital social, education and health supports to our community. It is in governments' and the community's interests that we have a capable and viable NFP sector that can deliver quality services in a flexible way that responds to local and individual needs.
- 1.2 NSW is committed to reducing the regulatory burden on the NFP sector to allow organisations to focus resources on the important services they deliver. As such, the NSW Government needs to carefully consider the impacts of any proposed reform to ensure that it produces better outcomes for entities operating in NSW and the broader community.
- 1.3 Charities that conduct fundraising appeals in NSW are currently regulated by the Office of Liquor, Gaming and Racing (OLGR) under the *Charitable Fundraising Act 1991* and associated regulation. The OLGR regulates approximately 5200 licensees in NSW, the largest sector in Australia.
- 1.4 NSW legislation registers and exempts entities, prescribes regulatory obligations such as keeping of specific records, audit requirements and public disclosure conditions, and provides powers of investigation and sanction to ensure compliance with the regulatory obligations imposed. NSW notes that the proposals in the Discussion Paper have significant duplication with NSW's legislative regime.
- 1.5 The primary objective for NSW is to maintain effective and proportionate regulation of charitable fundraising while ensuring public confidence in charitable giving. While it would appear that this objective could be achieved under a national system, it is imperative that a robust and collaborative regulatory impact assessment (RIS) is conducted in the first instance.
- 1.6 NSW notes that the Commonwealth paper is subtitled as being both a discussion paper and draft regulation impact statement. It is unclear whether the paper has been assessed by the Commonwealth Office of Best Practice Regulation against COAG's best practice regulation requirements. However, NSW is concerned that the level of analysis offered in the discussion paper is limited, and, overall, the paper does not offer a sufficient basis for regulatory decision-making.
- 1.7 In particular, the paper does not identify or quantify the scale of the problem to be addressed through the proposed regulation, or the costs and benefits of a range of regulatory responses, including the possibility of greater harmonisation combined

with mutual recognition between States and Territories (the model proposed by the Productivity Commission in its 2010 report).

- 1.8 NSW is concerned that it is unclear how the proposed approach could meet its stated goal of reducing costs to the sector (page 7) if it is developed without regard for the existing State and Territory frameworks or their associated costs. NSW is also concerned that such an approach risks ignoring opportunities to draw on the experience of States and Territories in administering regulation in this area, opportunities to identify best practice and opportunities to consider improvements to the current system.
- 1.9 In this regard, the Productivity Commission noted in its 2010 *Contribution of the Not-for-profit Sector* report that some States had undertaken recent reviews and reforms to reduce the burdens of their regulatory arrangements for charitable fundraising. These reforms should inform the development of any national scheme.
- 1.10 Despite advocating 'principles and outcomes-focused rules', NSW notes that a number of prescriptive requirements are suggested in the paper, e.g. that fundraising collectors must carry identification in the form of a badge or that charities must state their ABN on all public documents. The burden that such requirements would impose on businesses or other entities is not assessed, either in absolute terms or in comparison to existing regulatory regimes.
- 1.11 NSW strongly supports continued consultation with stakeholders, including governments. Discussion with States and Territories regarding the proposed interaction of any national regulation and existing state-based regulation would be appreciated.
- 1.12 NSW further anticipates that, over time, a more comprehensive RIS will be produced to inform decision-making, preferably in consultation with States and Territories. However, in the absence of any detailed analysis and a comprehensive RIS, it is difficult to properly analyse the proposed fundraising framework.
- 1.13 The following comments on the discussion paper are provided with this caveat in place.

Chapter 2 – Defining the scope of regulated activities

- 2.1 NSW considers that proportionate regulation that deals with charitable fundraising is critical to support a strong, effective and trusted charity sector (question 2.1). NSW legislation is designed to protect the charitable sector and the public against misrepresentation. Existing recordkeeping and reporting requirements for charities are designed to promote trust and confidence in fundraising by ensuring transparency.
- 2.2 Limited information has been provided to clearly identify the intended breadth and scope of the proposed national system, or the scale and nature of the problem the proposed national system is intended to address. A more thorough RIS assessment of proposed changes may assist in determining the suitability of exemptions.

- 2.3 In NSW, a number of fundraising activities are not defined as fundraising appeals (questions 2.4 and 2.5), including:
- a request for, or receipt of a genuine membership renewal fee, money or benefit from an organisation's members, funding provided by a registered club under the ClubsGRANTS scheme, a bequest or a grant or benefit from any Commonwealth, state or local government authority;
 - an appeal among people with the same employer or same workplace (the appeal must be for a charitable purpose directly connected with a work colleague or their immediate family); and
 - requests or payments for educational facilities or services, childminding services, goods and services by a supported employment service for people with a disability, nursing and medical services, and other care or welfare services.
- 2.4 A specific example is contributions made to Community Transport Organisations (CTOs) funded by Transport for NSW to provide services to people with disabilities. Under the Home and Community Care (HACC) Guidelines, CTO operators are required to ask clients to make a contribution to the cost of their service. Importantly, CTOs cannot refuse service where a client is unable to make a contribution. Financial accounting and reporting provisions and audit requirements are in place to provide transparency and accountability in the collection and application of clients' contributions.
- 2.5 NSW considers the existing NSW provisions outlining exempt activities to be appropriate and could be used as a basis for further discussions regarding a potential national system.
- 2.6 NSW would appreciate more information about the number and nature of organisations that would be impacted by the proposal to exempt single entities or a group of closely related organisations that collect less than \$50,000 per year from proposed national regulation (paragraph 22). It may not be unusual for a successful school fete to raise funds of more than \$50,000, for example.
- 2.7 In addition, the quantum of an organisation's fundraising income can shift rapidly on a year to year basis for charitable organisations, regardless of their size. A thorough assessment would be required to determine the appropriateness of any proposed threshold.
- 2.8 NSW seeks clarification regarding paragraphs 24 to 26 in relation to options for a nationally consistent fundraising regulation for charities that register with the ACNC. It is unclear from the paper whether the Commonwealth envisages:
- National legislation for charities that fundraise (mirrored or applied in the States and Territories), jointly enforced and administered by States and Territories and the ACNC; or
 - National legislation as above, but State and Territory laws also applying to other fundraisers not captured nationally; or
 - National legislation as above, with existing State and Territory laws continuing to apply to other fundraisers not captured nationally.

- 2.9 Consultation question 2.8 asks if existing State and Territory fundraising legislation should continue to apply to smaller entities that engage in fundraising below the proposed, still undetermined, threshold.
- 2.10 NSW notes that the cessation of any existing fundraising regulation by States and Territories has not been considered by the Council of Australian Governments (COAG), nor has such a proposal been subject to a regulatory impact statement. NSW seeks detailed analysis as to how such a system would work.
- 2.11 NSW considers it appropriate for graduated transition periods to apply whenever significant regulatory change is introduced (question 2.9). However, a more thorough RIS would be required to gauge what length of time would be required to transition to any proposed national system.
- 2.12 NSW would like further information before commenting on a potential role for the Australian Charities and Not-for-profits Commission (ACNC) in relation to fundraising regulation (questions 2.10 – 2.12).
- 2.13 NSW considers that a fundraising ban should be an action of last resort at the end of a graduated chain of regulatory responses (question 2.13). Given the potential impacts of such a ban include the significant potential to cause a charity to close, it is appropriate that review, including judicial review, of the decision be available.
- 2.14 In NSW, a decision to ban an entity from fundraising is only made in extreme situations and usually only after all other available regulatory responses have been exhausted.
- 2.15 In NSW, an authority to fundraise may be revoked by the Minister if:
- any fundraising appeal has not been conducted in good faith for charitable purposes; or
 - any persons conducting or associated with a fundraising appeal are not fit and proper persons to administer or be associated with a fundraising appeal for charitable purposes; or
 - any fundraising appeal has been improperly administered; or
 - a fundraising appeal has been conducted in contravention of regulatory obligations under the *Charitable Fundraising Act 1991* and its associated regulations; or
 - a fundraising appeal has not been conducted within the previous 24 months; or
 - it is in the public interest.
- 2.16 NSW considers existing NSW provisions are appropriate and could be used as a basis for further discussions regarding a potential national system.

Chapter 3 – Regulating the conduct of fundraising

- 3.1 NSW notes that the outline of the application of the Australian Consumer Law (ACL) to charitable fundraising in paragraphs 35 and 36 is inaccurate. The prohibitions on misleading and deceptive conduct, unconscionable conduct, false or misleading

representations and harassment or coercion already apply to an organisation, including a charitable fundraiser, if there is a supply of goods and services in the course of trade or commerce. The supply can be to any person, not just a consumer.

- 3.2 Given the complexity of the proposal to extend conduct provisions of the ACL to the charity sector (question 3.1) NSW seeks further information about the potential impact of the proposal.
- 3.3 It is not clear whether the Commonwealth is proposing that the generic ACL provisions will supplement or replace more specific provisions in fundraising legislation. Clarification is sought.
- 3.4 Of particular concern is the statement “misleading or deceptive conduct, unconscionable conduct, false or misleading representations and harassment and coercion provisions do not require any positive action by regulated entities, instead involving the avoidance of certain behaviours and therefore involve a very minor or no compliance burden” (paragraph 38).
- 3.5 In order to comply with ACL conduct provisions, organisations may incur additional costs in a number of areas, including but not limited to:
 - needing to engage legal consultant to determine risk under ACL;
 - developing additional terms and conditions; and
 - setting up procedures to deal with potential complaints/investigations.

Chapter 4 – Information disclosure at the time of giving

- 4.1 NSW has a number of requirements in place to provide an appropriate level of disclosure and assurance to members of the public. These include:
 - in fundraising operations using telemarketing, a paid telemarketer must disclose that they are employed and the name of their employer for the purposes of the appeal (question 4.2);
 - in face-to-face fundraising appeals, paid collectors must wear an identification badge that includes the words “paid collector” and the name of their employer (question 4.3);
 - unattended collection points, such as collection bins for clothing, must be clearly labelled with the name and contact details of the relevant charity (question 4.4);
 - if such collection points are jointly operated with a commercial operator - known as a trader in NSW - the label must include the trader’s name and contact details, and the benefit to be received by the charity and the trader (question 4.4);
 - written and printed materials must clearly and prominently disclose the name of the relevant charity (question 4.4); and
 - if such written and printed materials are for a fundraising appeal jointly run by a charity and a trader, the label must include the trader’s name and contact details, and the benefit to be received by the charity and the trader (question 4.4).
- 4.2 NSW considers existing NSW provisions are effective and could be used as a basis for further discussion for a broader national system.

Chapter 5 – Information disclosure after the time of giving

- 5.1 NSW has a number of requirements in place to provide an appropriate level of disclosure and assurance to members of the public. These include:
- annual financial accounts of an authorised fundraiser must contain an income statement that summarises the income and expenditure of each fundraising appeal conducted during the financial year (question 5.2);
 - a requirement that annual financial accounts are audited and presented to an entity's annual general meeting (question 5.3); and
 - in relation to each fundraising appeal, an authorised fundraiser must maintain such books of account and records as are necessary to correctly record and explain its transactions, financial position and financial performance (question 5.4).
- 5.2 NSW considers existing NSW provisions are effective and could be used as a basis for further discussion for a broader national system.

Chapter 6 – Internet and electronic fundraising

- 6.1 NSW considers the proposal that internet and electronic fundraising be prohibited unless conducted by a charity registered with the ACNC (question 6.1) problematic as no analysis has been provided, particularly of the estimated quantum of charities that this proposal would impact upon.
- 6.2 Furthermore, the potential reach of the proposal is unclear without the provision of a definition of internet and electronic fundraising. For example, does the definition include listing on a fundraising facilitation website such as GoFundraise and Everyday Hero, or the use of social media such as Facebook and Twitter?
- 6.3 Given the increasing prevalence and acceptance of electronic communication, greater analysis is required before such a prohibition could be considered.

Chapter 7 – Fundraising by third parties on behalf of charities

- 7.1 NSW supports the regulation of third party fundraisers, that is, individuals or businesses that jointly conduct an appeal with a charity in connection with the supply of goods or services in the course of any trade or business carried on by them (question 7.1).
- 7.2 NSW considers that existing NSW requirements, as outlined above, are appropriate and could form the basis of discussion for a broader national system.
- 7.3 In NSW, the definition of a trader includes an individual or business that conducts a fundraising appeal partly for their own benefit (question 7.2). This would include businesses described as “private participators” in the discussion paper, as they receive a marketing benefit from aligning their corporate reputation with that of the charity they are supporting.

- 7.4 In NSW, traders are required to state the name and contact details of charities for which they are collecting (question 7.4).
- 7.5 In NSW, traders are required to disclose on all printed advertisements, notices and information, the details of the basis on which the benefit to be received by the trader is to be calculated or provided (question 7.5). NSW considers such disclosures a reasonable reporting burden in terms of ensuring transparency.
- 7.6 In NSW, paid face-to-face fundraisers are required to wear identification badges which prominently display the words "Paid Collector" while paid telemarketers are required to disclose to the person being solicited that they are employed and provide the name of their employer for the purposes of the appeal (question 7.6).
- 7.7 As noted above, NSW considers that its existing requirements are effective and could form the basis of discussion for a broader national system.