South Australian Council of Social Service
Submission on the Proposed Charitable Fundraising Regulation Reform Discussion Paper

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Introduction

As the peak non-government representative body for the health and community services sector in South Australia, SACOSS believes in justice, opportunity and shared wealth for all South Australians. We have a strong membership base representing a wide range of interests in the social services arena. Our core activities include analysing social policy and advocating on behalf of vulnerable and disadvantaged South Australians; providing independent information and commentary; and assisting the ongoing development of the health and community services sector.

SACOSS's membership spans a range of organisations within the health and community services sector—from large charities that operate across state boundaries to small not-for-profit organisations that do little, or only informal, fundraising and may not have charitable status. Our submission attempts to address issues in regulatory reform that may arise for all these groups, as well as what we see as broader principles for a fair and efficient regulatory system.

In this context, we thank you for the opportunity to respond to the Discussion Paper and would like to say at the start that we support a system that provides transparency and accountability, and also welcome the attempt to reduce red tape and the duplication of regulation and compliance inherent in the current multiple state and territory laws. Indeed, for organisations operating across different states and territories, ***a single fundraising regulatory regime may be one of the most significant positive outcomes of the current reform of the not-for-profit sector***.

That said, some of the proposals in the Discussion Paper raise some concerns, which are discussed below under the Chapter headings in the paper.

Chapter 2 – Scope of regulated activities

As noted above, SACOSS welcomes the goals of a single national fundraising regulatory regime, but are concerned by two aspects of the scope that are fundamental.

Firstly, we note that the scope of the fundraising activities to be regulated is limited to charities, rather than the rest of the not-for-profit sector. This is a concern partly because of issues of the transparency and accountability and public credibility of the whole not-for-profit sector, but more particularly ***it will be important to ensure that any regulations imposed on charitable fundraising do not constrain or disadvantage those charities in comparison to non-charitable fundraisers***. While there may not be direct fundraising competition between charitable and non-charitable causes, it would be disappointing if higher compliance costs were placed on charities than non-charities, or if opportunities for fundraising for charities were more constrained than for non-charities.

Secondly, in the scoping chapter the Discussion Paper canvasses options for how a unified system might be implemented, given state and territory powers and laws, and notes that a national approach should not duplicate existing state and territory fundraising regulation. Alarmingly though, the paper can only suggest that "State and Territory governments *may* decide to exempt those charities covered by the national law from State and Territory fundraising laws" (para 25, emphasis added). Put most bluntly, if there is no exemption from state and territory laws then there is no single *exclusive* nation regulation system (for those above the threshold), and the proposals simply add another regulatory layer and increase rather decrease the regulatory burden. The proposed reforms will have failed in a key goal and would not be supported by many charities. ***Having agreement from all governments to one system and one layer of regulation is fundamental to the reform project***.

Beyond these broad framework concerns, we make the following specific comments in relation to some of the questions asked.

Question 2.4, 2.5 Exemptions

The establishment of exemptions is designed to limit the scope of the law and therefore the regulatory burden. *The exemption for soliciting government grants makes good sense and is supported*. However, the proposed list seems to be built on the assumption that knowledge or lack of knowledge on the part of the donor is a crucial determinant of what needs to be regulated. It assumes the only issue is one of deceit and "value for money", rather than a broader transparency. If a broader transparency logic were used, then corporate donations should potentially be regulated, but even within the logic being used, *other fundraising activities should also gain an exemption.* For instance:

- Fundraising from any organisation's members (not just religious organisations) – because they can be assumed to have knowledge and ways of getting more information
- Fundraising from supporter databases which may often be similar to member-based fundraising, but without the actual membership.

Q2.6 – 2.9 – Thresholds

The other attempt to limit the scope and regulatory burden is by having a threshold so that national regulation would only apply above an annual fundraising amount of $50,000. It is not clear whether this threshold applies just to regulated activities or to total fundraising (including through exempt activities). *The level of the threshold appears to be low, but not unreasonable*.

Of more concern is that it is not clear how the threshold will operate. Paragraph 22 of the Discussion Paper says that an organisation's annual fundraising up to $50,000 is exempt. Paragraph 25 says the national laws will only apply to charities that raise over $50,000. These are different formulations with the former suggesting the first $50,000 raised is exempt for all organisations, while the latter suggests that all fundraising of big fundraisers is regulated. Both have implementation problems. In the first version, the first half of the year's fundraising may take place under state law, then a charity exceeds the threshold and comes under the national law – possibly for the same continuous fundraising program. If the second approach is adopted there will be some charities whose annual fundraising is around the threshold level – which may mean that it is not clear which law covers them. For instance, they may budget to fundraise an amount less than the threshold, but exceed expectations and have to come under the federal law, perhaps only to drop below the threshold the following year – effectively bouncing from one jurisdiction to another and not reaping benefit from a single national law.

This problem is inherent in any threshold, but providing one clear, single regime without a threshold may undermine the attempt to tread lightly on the small players.

Q2.10 – 13 Registration

SACOSS is of the view that registration as a charity with the ACNC should be enough for an organisation to automatically be authorised for fundraising activities. If an organisation is registered with the ACNC as a charity, then it will have been deemed to have charitable purposes and be acting (solely) to fulfil those purposes. This should constitute the "reporting once" stage of the process and no further tests should be required in order to be allowed to fundraise. If there are problems in the way that these organisations fundraise, these should be dealt with later in the regulatory process, rather than at the registration stage.

Fundraising is the lifeblood of many community organisations, but it is often undertaken by volunteers or staff whose interests and expertise lie elsewhere (such as in the provision of support services of the organisation). Consequently, many breaches of fundraising guidelines and regulations are unintentional rather than fraudulent and so we believe that only serious breaches of the law or agreed codes of practice should lead to an organisation being banned from fundraising.

Chapter 3 – Regulating Conduct

Q3.1 ACL Provisions

SACOSS supports the application of the provisions from the ACL in that misleading, deceptive or unconscionable conduct or representation, or harassment and coercion from any charitable fundraiser, is unacceptable both as behaviour in itself and because it brings the sector into disrepute.

However, SACOSS does have an important query over the implementation of this scheme and in particular over who would prosecute any such breaches. This is important due to a history of commercial organisations using consumer protection legislation to sue and silence political opponents in so-called SLAPP suits (Strategic Litigation Against Public Participation).[1] This issue particularly affects charities engaged in advocacy, but can be relevant to other organisations. The fact that most charities are not engaged in trade and commerce (or are not sued over activities done in the course of trade or commerce) has given charities some level of protection from the use of, for instance, the old *Trade Practices Act*. However, if these provisions are picked up in national fundraising laws, then charities could be targeted for making statements in the course of fundraising which a commercial/political opponent may regard as misleading. The threat here could largely be avoided by ensuring that *the enforcement authority for any such provisions is the ACNC and that there is no possibility of private prosecution or civil action in relation to breaches of the guidelines*. (Civil torts would of course still be available). This would enable the ACNC to pursue genuine cases of fraud and misrepresentation and filter out SLAPP-style claims.

Q3.2 Calling Hours

Calling hours is one area where *consideration needs to be given to ensure that charities are not disadvantaged relative to other not-for-profit fundraising*. In the current proposal, the regulation of calling hours would apply to charities and, through the ACL, to commercial sales, but depending on the relevant state laws, the limitations may not apply to sporting clubs and other fundraisers. SACOSS believes that if any entities are to have a competitive advantage in this space, it should be charities rather than other entities and certainly charities should not be disadvantaged by new guidelines.

Q3.2 Unsolicited Selling

SACOSS is mindful that many charities, particularly small groups, fundraise through stalls and other outreach at festivals and community events. Such stalls are often done on a local basis by volunteers who cannot be expected to be conversant with the ACL or national fundraising legislation. *Accordingly, we believe that these charities and these activities should be exempt from the unsolicited selling provisions of the ACL, or at a minimum that the threshold should be much higher than $100*.

Chapter 4 – Disclosure Requirements

Proper disclosure is an important part of transparency in fundraising, and the Discussion Paper suggests a list of requirements. *Disclosure of ABN, name tags, agency contact details, DGR status are all basic and are supported, but there are two proposed requirements that would cause harm to charitable fundraising and are not supported*.

The first is the proposed requirement that charities be required to provide contact details of the ACNC and a link to the ACNC on their websites and public documents. Our concern is that small charities won't know about this requirement, and large charities with professional communication

[1] Ogle, G. *Gagged: The Gunns 20 and other law suits* (Envirobook, 2009). Also, see list of SLAPP suits at www.sourcewatch.org/index.php?title=SLAPP's_in_Australia

and design strategies will be disadvantaged by having the ACNC clutter the “corporate look” and confuse the issue by having another agency ‘sharing’ the document. Commercial companies are not required to put ASX or ACCC details on their public documents. That said, it is less of an issue and is supportable if the information is provided on or along with formal receipts for donations (so that donors know about complaint paths), but the requirement should not apply to websites and all public documents.

The second proposal that is not supported is the proposed requirement to provide information about whether a charitable collector is paid or not. SACOSS does not believe this is *the* crucial information and believes that it is based on a false premise (volunteer = good, staff = bad). The community services sector relies on both dedicated volunteers and committed professional staff, but to single out whether one particular part of a fundraising operation is done by paid staff is based on and reinforces a prejudice against professionals in the NGO sector – the “shouldn’t we just be doing it for love” idea that undermines the sector as a whole.

If the concern is about where the money goes, then that should be asked and accounted for at an organisational level not at the level of the individual fundraiser – otherwise the results and the transparency could be skewed. For instance, an individual collector may be a volunteer, but if they are supported by a multi-million dollar advertising campaign to encourage donations or a large paid managerial staff to manage operations, the proportion of money going to the charitable purpose may be relatively low – despite the volunteer collector. It should also be recognised that charities engage professional fundraisers because the professionals are often better at the job and they are only engaged because the charity gets a return of funds which they may not otherwise get. Thus, compulsory disclosure would have a potential impact on the ability of charities to raise funds through professional fundraisers (because of misplaced potential stigma about where the money goes).

Of course, if charities see a market advantage in volunteers collecting, they are free to have a badge saying “Volunteer Collector”, but disclosure should not be mandatory. We believe that transparency is better served by registration and regulation of professional fundraisers, than by mandatory disclosure.

Chapter 5 – Report Requirements

After-giving reporting is also a crucial part of transparency in charitable fundraising, but it should not create unnecessary burdens or disadvantages for charities. Many agencies in our sector are concerned that ACNC reporting requirements will lead to “league-tables” that present a myopic or skewed picture of issues like fundraising and administration costs, and the amount and extent of “service provision”. Fundraising and administration costs vary across agencies and service types for a range of legitimate reasons that are not always immediately apparent or well understood, so fundraising and expenditure figures are not always comparable. Any reporting requirements and display of reporting by the ACNC needs to guard and warn against simplistic interpretations of expenditure or use of statistical comparisons.

One way to address this is by use of more qualitative reporting, but this itself has problems as such reporting is time-consuming and largely subjective. It also tends to be biased toward short-term programs rather than investment in programs whose outcomes may not be apparent for a long time. Other activities like advocacy are not necessarily amenable to outcome-based reporting (because cause-effect is not clear, and sometimes unsuccessful advocacy is still a public benefit). Thus, any qualitative reporting requirements need to ensure that reporting requirements adequately reflect the challenges and the work done in the sector, and do not bias fundraising by favouring particular sorts of programs.

A further difficulty around reporting is that some fundraising activities are integral to the core purpose of the organisation. Some social enterprises may fall into this category (for example, is the

remuneration of the Big Issue sellers a fundraising cost, or a core purpose?), but fundraising may also have a very real public information or advocacy function. For instance, if a charity puts out publicity material on an issue (such as homelessness), does it becomes a fundraising cost simply because there is also an appeal for money included? It is hard to draw lines between fundraising and core charitable activities here, making simplistic reporting and comparative statistics unreliable.

Finally, there is an issue here about the regulatory role. While we believe that charities should be able to justify their programs to donors, this may be different to providing such information to a regulatory authority—lest we open the way for government regulation of NGO outcomes.

Given all this, SACOSS' preferred model is that *reporting should be top level organisation-based reporting, not activity based, and should not be unnecessarily over-focussed on fundraising costs*. Detailed record keeping for audit purposes is a different consideration to the requirements of government reporting, but the reporting should be fairly general and as non-judgmental as possible.

Chapter 6 – Internet and Electronic Fundraising

The internet provides a great opportunity for charitable fundraising and, while mindful of the problems of scams and misinformation/fraud, SACOSS does not share the view in the Discussion Paper that the internet is necessarily an area where less information on charities is available or where inter-activity of donor and collector is not possible. In many ways the internet is a vast hold of information which, when online, can quickly be checked; in a different way, perhaps, but arguably as reliably as checking the bona fides of a person in front of you during a transaction.

Given this, we believe that the proposed regulation of internet fundraising is heavy-handed and *we oppose the proposed prohibition on electronic fundraising for charitable purposes unless done by an ACNC registered charity*. The ban does not address the issues of spam or scams and there are a range of fundraising scenarios that may be reduced or banned under a blanket prohibition against non-charities e-fundraising. For instance:

- Organisations who may not be charities, but may be raising money for charitable purposes (for instance, by giving money to charities)
- A company or non-charity NGO with a web sales/membership form that then has a tick-box to donate a percentage to a charity.
- An organisation which is not a charity because it has dual purposes (one of which is not charitable), but uses the internet to raise money for its charitable activities (for example an ethical tourism provider supporting local projects in communities they visit).
- A commercial business may make a genuine response to an emergency/disaster, or a sports club may send an email around to raise money for its members affected by a disaster. They may not claim tax concessions, but it would still be electronic collection for a charitable purpose.
- "Crowdfunding" would be limited to only established organisations, yet arguably it has a key role to play as a start-up tool before any formal organisation is established.

In some of these cases, the situation could be changed or managed depending on the rules around third party fundraising, but these are not clear here. Paragraph 68 in the next section suggests e-fundraising for charities by professional fundraising agencies would happen, but these agencies (even when acting as third parties) are still not charities and would appear to be covered by the electronic fundraising prohibition.

SACOSS recognises that there may be concerns that the funds raised through non-charity e-fundraising for charitable purposes are not used for the charitable purpose, but that is a matter of

fraud/deceit and the same would apply to funds raised in face-to-face or snail-mail contact and to a registered charity that used funds raised for a non-charitable purpose. The proposed prohibition is not the answer.

Chapter 7 – Third Party Fundraising

This section of the Discussion Paper distinguishes three very different "third party" examples, and suggests that it is only intended to regulate professional third party fundraisers. *SACOSS supports third party fundraisers being required to disclose the name and ABN of the charities for whom funds are being raised*. This is obviously necessary, but for the reasons stated above in relation to disclosure of paid collectors, *we do not support a requirement to disclose that they are third parties*. Again, the proposal may limit charities' ability to raise funds and is based on wrong perceptions (that somehow internally paid or volunteer fundraising is better than professional third party fundraising). However, it may be the case that the third party fundraiser is more efficient and may secure a greater return on fundraising investment than the possibly less well trained or supported in-house fundraiser (which is why many charities outsource their fundraising). Alternatively, charities may not have the internal expertise to do professional level fundraising. In both cases, given that there may well be a stigma and potential loss of donations from disclosure of being a third party, the disclosure regime punishes the charity.

Again, SACOSS believes that transparency and regulation of third-party fundraising should be based more around registration of those fundraisers with the ACNC (as suggested in Q7.3). The registration should be fairly minimal, but include the names of the charities for which they are authorised to collect, to allow for easier and transparent checking of misrepresentation or harassment type issues.