



everyone's family

The Smith Family's submission on the *Charitable fundraising regulation reform* Discussion Paper

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Background on The Smith Family

The Smith Family (TSF) is a national, independent children's charity committed to increasing the educational participation and achievement of Australian children and young people in need. Our **vision** is a better future for young Australians in need. Our **belief** is every child deserves a chance and our **mission** is to create opportunities for young Australians in need, by providing long-term support for their participation in education.

The Smith Family provides holistic and long-term support from pre-school, through primary and secondary school and on to tertiary studies. In 2010-11, The Smith Family supported over 44,000 children, young people and parents/carers through its suite of *Learning for life* programs, including around 33,000 young people on an educational scholarship, approximately 4,500 of whom were of Aboriginal or Torres Strait Islander background. A further 73,000 children, young people and parents/carers participated in programs facilitated by The Smith Family, such as the Commonwealth Government's *Communities for Children* initiative.

The Smith Family has a strong focus on sustainability and draws its income from a range of sources. In 2010-11, its annual income was just over \$68.5 million. Just under a quarter of this was sourced from Government funding, over 60% from fundraising (donations and corporate support) and bequests, around 8% from the VIEW (Voice, Interests and Education of Women) Clubs of Australia and just over 3% from The Smith Family's commercial enterprise.

The Smith Family was established in 1922 and is a company limited by guarantee. As such, it is required to publish audited financial statements on an annual basis. The Smith Family has Public Benevolent Institution and Deductible Gift Recipient status and is an Income Tax Exempt Charity. As a national organisation which seeks to raise funds in each state and territory, it is registered as required, under existing state/territory fundraising legislation in each state and the Australian Capital Territory.

Principles underpinning reform and a regulatory approach in the NFP sector

The Smith Family welcomes the opportunity to provide some comments on the *Charitable fundraising regulation reform* Discussion Paper. These comments complement our previous submissions made on the *Exposure Draft: Australian Charities and Not-for-Profits Commission (ACNC) Bill 2012*, the *Review of not-for-profit governance arrangements* Consultation Paper and the *ACNC Implementation design* Discussion paper.

The not-for-profit sector has historically enjoyed strong public confidence as evidenced in part by their significant community fundraising and volunteer base. One of the reasons that governments, of all political persuasions, have increasingly contracted out to the not-for-profit sector a diverse range of services previously provided by government, is in part, the public confidence and trust in which the sector is held. The Smith Family is cognisant however, of the growth in the not-for-profit sector and that this has occurred at the same time as a range of new fundraising vehicles, including but not limited to internet and electronic fundraising, have grown in popularity. It is therefore appropriate that as part of

the range of reforms occurring in the not-for-profit sector, that attention be given to the area of fundraising.

As The Smith Family has previously submitted, reforms in the not-for-profit section should build on the complementary principles of:

- Transparency and public accountability;
- Certainty, consistency and workable compliance regimes; and
- Maximising the contribution of the charities and not-for-profit sector to the Australian community.

Introductory comments and assumptions

The Smith Family is assuming that the *Charitable fundraising regulation reform* Discussion Paper is one step in a multi-phase process to examine the issue of fundraising regulations, with other steps including the development of an Exposure Draft of the legislation for any new arrangements and a consultation process whereby interested parties can provide commentary on that Draft and the government's approach. While this submission provides responses to a number of the questions contained in the *Charitable fundraising regulation reform* Discussion Paper, it is difficult to answer some definitively without seeing the draft legislation. This is particularly the case given the uncertainty of what would be included in any Commonwealth legislation from the existing state/territory fundraising legislation and the diversity of current legislative arrangements.

Responses to specific questions raised in the Discussion paper

Is regulation necessary?

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

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.

The Smith Family supports specific regulation in relation to charitable fundraising in light of its foundational principle identified above namely, *transparency and public accountability*. It also sees this as a pillar for increasing public contributions to the sector and in turn helping to realise another foundational principle, namely *maximising the contribution of the charities and not-for-profit sector to the Australian community*. Such regulation however, should also be in line with the second foundational principle of *certainty, consistency and workable compliance regimes*.

As a national organisation fundraising in each state and territory, The Smith Family currently has to register and comply with seven different fundraising regimes. These regimes differ in a number of ways, including the frequency in which registration needs to be renewed (eg in some states annually, in others it is ongoing) and reporting requirements (eg accounting, use of contractors etc). The current range of

fundraising registration processes impose an additional and substantial resource burden on national organisations such as The Smith Family. The differences in the compliance regimes also add complexity and potentially a level of confusion, not just for charities themselves, but also for current and potential donors.

In line with the principles identified above, The Smith Family submits that there should be **consistency** and **certainty** in the compliance regimes that apply to charities and this should include the fundraising area. The Smith Family therefore supports the development of a national approach to fundraising regulation. Such an approach however, should **not** be in addition to, existing state/territory regulation, otherwise this would obviously result in an increase in compliance and as a consequence a likely reduction in the contribution the sector makes to the Australian community. In moving from the existing state/territory based regime to a potentially national one, it will be important that the transition is staged so as not to increase the burden of compliance, even in the short term.

Defining fundraising activities that are to be regulated

2.4 Should the activities mentioned be exempted from fundraising regulation?

2.5 Are there additional fundraising activities that should be exempt from fundraising regulation? If so, please provide an explanation of why the relevant activities should be exempt.

2.6 Is the financial or other effect of existing fundraising regulation on smaller charities disproportionate?

2.7 Should national fundraising regulation be limited to fundraising of large amounts?

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 Smith Family agrees that certain activities should be exempted from fundraising regulation, including those referred to in paragraph 18 of the Discussion Paper. The Smith Family has significant experience working with both the government and corporate sectors. Around a quarter of our overall income in the 2010-11 financial year was secured from the former, and 17.5% of our fundraising income originated from the latter. Both sectors have a range of due diligence, contractual arrangements and accountability mechanisms for the allocation of funds which certainly warrant them being exempt from fundraising regulation.

In addition to the activities identified for exemption in paragraph 18, The Smith Family would support the recommendation made by Philanthropy Australia that donations *to* (and not just from) private ancillary funds (PAFs) also be exempt. PAFs are prohibited under item 45 of the *Private Ancillary Fund Guidelines 2009* from engaging in the solicitation of public funds. As Philanthropy Australia has noted 'the donors to private ancillary funds are generally closely associated to the PAF and are also involved in the distribution of funds from the PAF to direct service Deductible Gift Recipients' (Philanthropy Australia, 2012).

In relation to the impact of fundraising regulation on smaller charities and whether a limit should be applied before the regulations take effect, The Smith Family would argue that the **principles** underlying a national fundraising regime should be common across **all** organisations, regardless of size, with the **reporting requirements** varying and being proportionate to the quantum of funds raised. This approach is in line with The Smith Family's response to the Commonwealth's 2012 *Review of governance arrangements*, in which we argued that "the **level** or **standard** of care and diligence required by directors/persons responsible [for not-for-profits] ought not to be seen as variable, but that what can and should vary is the amount of **reporting**, including financial reporting, which is required of organisations. ...factors [such as the size of the entity] should be consideration for the **type** and **amount** of reporting required by organisations but not the standard of responsibility of individuals taking key roles within NFPs". This is in line with the notion of proportionality of risk management. It is anticipated that the ACNC will play a key educative role, once established, in areas such as risk management and building organisational capability across the charitable and wider not-for-profit sector. In the absence of a consistent principles based approach to fundraising regulation, there is some likelihood that the goals of *transparency and public accountability* and *maximising the contribution of the charities and not-for-profit sector to the Australian community* will not be fully realised.

Question 2.8 will not directly apply to The Smith Family given the scale of its fundraising activities. However The Smith Family would note that to move to a national regime for *some* charities while simultaneously keeping state/territory fundraising regulations but having the latter only apply to certain sized charities, is likely to result in increased confusion and inconsistency both for the sector and the wider community. This is particularly the case if the national framework adopts a compliance regime which is less 'onerous' than that imposed by some states/territory. Such an approach should be avoided.

The role of the Australian Charities and Not-for-profit Commission in relation to fundraising

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

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

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

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

In a number of recent submissions The Smith Family has welcomed the establishment of the Australian Charities and Not-for-profit Commission (ACNC). In line with the goal of the ACNC being, over time, a 'one stop shop' for the sector, TSF would support it being the entity which authorises charities to engage in fundraising activities across Australia. TSF would support that this authorisation be automatic once a charity has been registered as such by the ACNC, with no further documentation or process being required.

The Smith Family notes that the ACNC will initially focus on the regulation of charities before, over time, moving to a focus on the wider (and much larger) not-for-profit sector. TSF is mindful that the number of not-for-profits is around 10 times the number of charities. In moving to a national fundraising regulation regime, it is important that the requirements on charities be no more onerous than on other fundraising organisations. It will be particularly important to ensure that this occurs in the early start up phase of the ACNC.

In its submission on the *Australian Charities and Not-for-profits Commission: Implementation design* discussion paper, The Smith Family was pleased to note the paper's comments that 'the evidence suggests that non-compliance largely results from a lack of knowledge or capability, rather than deliberate refusal' (p. 5). As noted above, it is anticipated that the ACNC will take on an educative role to strengthen capability and compliance in the sector as well as developing a staged and proportionate response when there are compliance breaches. Notwithstanding this, there are types of behaviour, such as fraud and misappropriation of funds, which should result in a charity being banned from fundraising, in the interests of public accountability and maximising the contribution of charities and the not-for-profit sector to the Australian community. It is not in the sector, or more importantly, the community's interest, if there are not clear repercussions of unacceptable behaviour. The sector is one in which the poor behaviour of one organisation can have a knock-on effect to other unrelated organisations. For example public profiling in the media of a charity identified as behaving poorly can undermine confidence and damage the reputation of the sector generally or of charities operating in a similar area. This is not fair on the other charities and it is also very difficult for them to individually combat the undermining of public confidence when this occurs, as it does on occasion. Therefore the sector and the community should be confident that unconscionable behaviour such as fraud and misappropriation will be appropriately dealt with by the ACNC.

Organisations that have been banned from fundraising should be identified on the ACNC portal and as with the Australian Business Register, an historic register should be maintained on this portal. This will enable the community to have greater visibility on how a charity has operated over time. The Smith Family does not recommend identifying a set period for which such a ban should operate. It would instead suggest that having been struck off the charities' register, an organisation should be required to go through the whole registration process again and in that process be required to demonstrate to the satisfaction of the ACNC that it is justified in being re-registered as a charity.

Regulating the conduct of fundraising

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

The Smith Family would support the inclusion in national fundraising regulations, of provisions covering misleading or deceptive conduct, unconscionable conduct false or misleading representations and harassment and coercion. As the discussion paper notes these provisions could either be included in legislation that establishes the ACNC or by amendment of the ACL (paragraph 37). The Smith Family is cognisant that the legislation to establish the ACNC has yet to be pass through the Federal Parliament

and that there were significant sections that were still awaiting drafting when the Exposure Bill was put out for discussion in January 2012. The Smith Family's preference regarding the provisions referred to above is that they be included within the legislation covering the ACNC rather than having the ACL apply to charities. For simplicity, it is preferable that one rather than two pieces of legislation apply to the sector. The Smith Family would recommend that charities be exempt from the ACL and that instead mirroring provisions (in line with those included in paragraph 36) be included within the legislation covering the ACNC.

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

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?

The Smith Family understands paragraph 39 to relate to 'face-to-face calling hours' which involve an 'unsolicited offer to supply goods and services' and therefore it does **not** apply to telephone calling or to other face to face contact such as a door knock appeals or collections in a public place such as a shopping mall, which seeks donations and where there is no supply of goods or services. We also understand that the paragraph is **not** seeking to make any changes to the current Do Not Call Register arrangements which are administered by the Australian Communications and Media Authority and from which charities are exempt. On this basis, The Smith Family supports calling hours being restricted to those set out in paragraph 39.

In relation to the unsolicited selling provisions, The Smith Family recognises the need for consumers to be protected regardless of the type of entity they are dealing with. However, in the context of *fundraising by charities*, regulation of these activities should be excluded from the ACL and be included in the fundraising legislation to be regulated and administered by the ACNC. This reinforces the "one stop shop" concept and more importantly ensures that charities are directly aware of their obligations. The provisions in the ACL in relation to unsolicited selling provisions should therefore be mirrored (and potentially tailored/simplified) by way of inclusion in the draft legislation for comment and consultation.

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?

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?

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

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

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

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

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

The quantity and type of information disclosed to donors at the time of giving should be accurate, proportionate and enable the donor to easily access more detailed information if they require it. The ABN has become a well recognised and unique identifier for organisations – including charities, not-for-profits and businesses across Australia. As such, and in the interests of transparency and accountability, The Smith Family supports the position that all charities be required to state their ABN and name on all public documents.

With regards to whether there should be a **requirement** to provide information on whether the collector is paid, The Smith Family would recommend that this information **not be mandatory** but be provided if asked by donors and that information on fundraising costs be provided in annual reporting processes, which would be available in a range of formats, including on the charity's website.

In regards to whether the charity is a Deductible Gift Recipient and the gift is tax deductible, again The Smith Family would argue that this should **not be a mandatory requirement** at the time of giving, but that donors should be accurately advised if they ask this question, this information should be available on the charity's website, and in the case of tax deductibility provided on documentation in line with requirements under the Tax Act. It is highly likely that most charities who have DGR endorsement will provide this information to all potential donors as an 'incentive,' but it does not need to be a mandatory requirement.

The Smith Family supports the wearing of name tags for those involved in fundraising activities and that persons engaged in fundraising should have some means of indicating that they are authorised to collect on behalf of a named charity. The Smith Family also supports the view that donors be advised of the broad purpose for which the money raised will be used. The Smith Family does **not** support the inclusion of contact details of the ACNC on a charity's public documents. As a yet to be established organisation, it will be some while before the ACNC has significant visibility within the wider Australian community and inclusion of information on the ACNC on public documents is likely to confuse potential donors and be an unnecessary and unhelpful burden on charities. Over time, as the ACNC becomes more established and puts in place a system for resolving complaints (see below), charities may wish to disclose on their website the process by which complaints relating to fundraising are resolved.

The Smith Family, like a number of other charities, has a range of clothing bins (unattended collection points) in sites around NSW. Clothing from these bins is then sold or recycled as part of TSF's commercial enterprise, with all profits raised being applied to its charitable purpose. There are also a number of purely commercial entities which have similar bins in NSW and the current requirement is that these bins need to clearly state on them whether they are for a charity or a commercial entity. The Smith Family strongly supports the retention of this requirement within any national fundraising

regulatory system. It would also argue that the name and ABN of the charity also be required on these bins.

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?
- 5.2 Should charities be required to report on the outcomes of any fundraising activities, including specific details relating to the amount of funds raised, any costs associated with raising those funds, and their remittance to the intended charity? Are there any exceptions that should apply?
- 5.3 Should any such requirements be complemented with fundraising-specific legislated accounting, record keeping, and auditing requirements?
- 5.4 What other fundraising-specific record keeping or reporting requirements should apply to charities?

The Smith Family would firstly note that descriptions of ‘beneficiaries and outcomes’ can be reported in both quantitative and qualitative terms. That aside, in its submissions on the *Implementation Design of the ACNC* and the *Review of not-for-profit governance arrangements*, The Smith Family expressed the view that one of the keys to strengthening the sector and its contribution to the wellbeing of Australia is for it to have an increasing focus on reporting on the **outcomes** of its work (ie what difference did an organisation’s work make to the intended beneficiaries) rather than its **inputs**. TSF urged that over time, one of the key areas that the ACNC can contribute to is supporting a stronger sector focus on outcomes and that this work build on previous work undertaken by the Productivity Commission and many organisations across the sector. TSF therefore supported the **option** of including narrative descriptions in the Annual Information Descriptions that charities will provide to the ACNC. Its rationale was that this will contribute to enhancing the public’s understanding of the work of charities, which often involves a level of complexity not fully understood through the use of financial data alone. TSF would argue however, that the inclusion of this information should be at the charity’s discretion.

The Smith Family’s earlier submissions have also addressed the issue of reporting on fundraising activities. In these submissions, TSF recognised the value of not-for-profit organisations reporting on fundraising ratios as part of good governance and for encouraging charitable donations from the public. The Smith Family reports on this on a regular basis. TSF is also aware that this topic is one which is often publically discussed, including through the media. There is currently significant variation in the way in which ratios are calculated and reported in the sector, which does not lead to the desired level of transparency and accountability that would best serve both the sector, and more importantly, the wider community. The Smith Family therefore urges that the ACNC play a leadership role in developing guidelines for the calculation and reporting of fundraising ratios for the sector. Such reporting needs to be sophisticated enough to reflect the importance of building organisational capacity and the role investments in this area have in the long term effectiveness and sustainability of organisations. It also needs to be able to reflect the diversity of client groups and the operating environments of organisations across the sector. Reporting on fundraising activities should be included within the

broader financial reporting that charities will do to the ACNC, not be in addition to. This information should be provided through a charity's audited accounts. TSF would also reiterate as it did in its earlier submission, that without a significant level of clarity regarding what should be included by charities under the 'fundraising contributions' and 'fundraising costs' line items (included in the draft Income Statement at C.3 of Form 3 that was part of the *Implementation Design* discussion paper), then the goal of transparency and public accountability will not be achieved and there is the possibility that *less* transparency and accountability may occur.

Internet and electronic fundraising

6.1 Should internet and electronic fundraising be prohibited unless conducted by a charity registered with the ACNC?

6.2 Should charities conducting internet or electronic fundraising be required to state their ABN on all communications? Could this requirement be impractical in some circumstances?

6.3 Are there any technology-specific restrictions that should be placed on internet or electronic fundraising?

Given the global nature and reach of the internet The Smith Family would question whether it will be possible to enforce limiting internet fundraising to charities registered with the ACNC, attractive though that may initially seem. As identified in our response to question 4.1, The Smith Family supports the use of the ABN on all printed communications issued by charities and on their website. The Smith Family also supports the exemption of SMS communications from the requirement to include an ABN, given that the *Spam Act 2003* already places 'identity requirements' on all organisations, including charities and not-for-profit organisations, which include:

- clearly and accurately identifying the individual or organisation who authorised the sending of the message.
- including accurate information about how the recipient can contact the organisation who sent the message, or the individual sender, for example, a physical or virtual address and a telephone number.

http://www.acma.gov.au/WEB/STANDARD/pc=PC_310533

Fundraising by third parties on behalf of charities

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

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

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?

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

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?

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

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

The Smith Family notes that the use of third party fundraisers has been an area of significant public interest, particular in relation to the fundraising ratios and expenses discussed in section 5 above. It also notes that some states already require third party fundraisers to be regulated. The Smith Family believes that it is appropriate to adopt a definition of third party fundraisers as entities that raise funds on behalf of a charity in return for a financial or other direct benefit and it supports the regulation of such fundraisers.

In line with previous responses, third parties should be required to provide the name and ABN of charities for which they are collecting. This will enable donors not only to clarify information on the charity being collected for, but will also enable those who wish to, to provide feedback on the third party directly to the charity. Also in keeping with previous responses, *if asked* by a potential donor if they are receiving fees for their service, then accurate information must be provided by third party fundraisers. In addition, the costs involved in fundraising should be reported via the annual reporting processes which will be required of charities by the ACNC. **Consistency** in how this information is reported (see section 5 above), not whether a charity uses a third party or not, is the critical issue if transparency is to be achieved. All charities who engage a third party fundraiser should be required to enter into a written agreement with such organisations.

In regard to private participators, The Smith Family would not recommend regulation, given that this may dissuade corporates from participating in fundraising initiatives and given the lower risk of them behaving inappropriately because of the reputational damage which might ensue from such behaviour. It is however important that potential donors have some means of checking on where funds raised will go. This could be provided through a range of communication media, including printed information, a link to the charity's website or a link to the ACNC identifying the charity's registration status.

Other matters: Complaints resolution

As part of a new national fundraising regulation regime, The Smith Family would urge that a clear complaints resolution scheme be developed for fundraising. This scheme should be developed and administered as part of the role of the ACNC. A consultation process and a review of good practice complaints resolution schemes should precede the finalisation of such a function.

Concluding remarks

The Smith Family welcomes the range of not-for-profit reforms that aim to reduce red-tape and duplication, implement more uniform regulatory arrangements across the nation, endorse existing good practice, contribute to sector-wide transparency and accountability, and support the sector to maximize the contribution it makes to the Australian community. The key in achieving these aims is in getting the balance right. We look forward to working closely with the Government and other stakeholders on these endeavours, including in the area of fundraising regulation.

References

Philanthropy Australia (2012), *Submission to the Charitable fundraising regulation reform discussion paper*

The Smith Family (2011), *Submission on the Commonwealth Government's Consultation Paper A definition of charity.*

The Smith Family (2012), *Submission on the Commonwealth Government's Implementation Design of the ACNC discussion paper.*

The Smith Family (2012), *Submission to the Commonwealth Government's Review of not-for-profit governance arrangements.*