

2 September 2020

Charitable Fundraising Regulation 2020
Policy & Strategy, Better Regulation Division
Department of Customer Service

(submitted by email: charitablereforms@customerservice.nsw.gov.au)

Submission on proposed *Charitable Fundraising Regulation 2020*

Justice Connect welcomes the opportunity to respond to Regulatory Impact Statement (**RIS**) and proposed *Charitable Fundraising Regulation 2020* (NSW) (**the Regulation**).

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 community thrive.

We work to ensure people and organisations can access the right legal help at the right time, to avoid the negative impacts on their wellbeing or organisational health due to legal problems. We believe in a fair and just world, where communities are supported to engage with and fully participate in our legal system.

We are a registered charity, operating in New South Wales for more than 25 years.

Our expertise – our Not-for-profit Law service

This submission draws on the experience of our specialist Not-for-profit Law service which provides free and low-cost legal assistance to not-for-profit community organisations and social enterprises. In the 2019/2020 financial year, we assisted 1,666 not-for-profits with 45% of these being NSW-based organisations. We help those involved in running not-for-profits to navigate the full range of legal issues that arise during the lifecycle of their organisation, including fundraising.

In the wake of the 2019/2020 Australian bushfires and the COVID-19 pandemic, we have seen an increase in enquiries from not-for-profits relating to fundraising via their websites and using online platforms. Groups that have previously relied on face-to-face events.

From this experience we advocate for an improved legal and regulatory framework for the not-for-profit and social enterprise sector, and to ensure law reform considers the impacts of

regulation (such as the Regulation), especially on small to medium sized organisations. Effective and appropriate regulation supports efficient and well run not-for-profits and social enterprises; a thriving ‘for purpose’ sector benefits all Australians.

Scope and structure of this submission

Our submission makes some overarching observations about how the Regulation fits within the regulatory regime for charitable fundraising both at the NSW and national level. We then consider some of the specifics of the Regulation but have not covered all areas of concern and, in this regard, **we support the submission of the Public Fundraising Regulatory Association.**

We are also responding to the ‘*Charitable Fundraising in Australia: Proposed cross-border recognition model for charitable fundraisers*’ Discussion Paper (issued by the Charitable Fundraising National Working Group, 1 September 2020) (**the National Proposal**) and are cognisant of its interaction with the Regulation.

Overarching policy goal to guide decision making

The remaking of the NSW Regulation needs to be viewed with a keen eye to a harmonised national approach, at the very least not to make it harder. This overarching policy imperative is critically important in the current COVID-19 crisis; an environment where online fundraising is an essential pivot beyond what is already a clear and fast-growing trend.

It would be a bad result if the Regulation served as a blocker to leveraging the National Proposal (about licencing) to a nationally consistent approach for reporting and the conduct of fundraising activities.

Preferred option

We are responding based on ‘Option 3 – Remake the Regulation’. We are concerned about the considerable cost burden for charities to understand and then implement the changes, the burdensome nature of some provisions, and that many of these ‘new’ provisions will detract from the goal of national harmonisation. But, on balance, Option 1 and 2 would be even ‘less preferred’.

We also acknowledge that Option 3 provides improvements, including simplification in language and removing confusion about the legal standing of the Standard Conditions of Authority by incorporating them into the Regulation.

Application of the Regulation – definitions, exemptions

Justice Connect commends the aim of ‘reducing regulatory burden’, which is pursued in part by the introduction of ‘principle-based obligations’.

We also commend the Government for allowing NSW incorporated associations to report once to the Australian Charities and Not-for-profits Commission (**ACNC**) via their Annual Information Statement. This approach should be extended to the reporting of charitable fundraising by NSW charities, as has been adopted by South Australia, the Australian Capital Territory, Tasmania and Western Australia.

It cannot be better or more streamlined regulation for a NSW charity to report for incorporated association purposes to the ACNC, but for its fundraising activities to be reported separately to NSW Fair Trading, when this regulator deals with both incorporated associations and charitable fundraising. The stated aim of reducing the regulatory burden supports this ‘report once’ approach. This approach will not reduce the NSW Fair Trading’s access to reporting data, as the ACNC Annual Information Statement already allows (and could have additional) questions added to it for any essential state-based requirements.

Recommendation 1:

That reporting for NSW charitable fundraising purposes should be to the ACNC, as occurs for charitable NSW incorporated associations, so NSW charities can report all their activities once to the same regulator (with the ACNC then securely sharing the data with NSW for incorporated association and fundraising compliance purposes).

(a) Charitable purpose

We note that the definition of ‘charitable purpose’ in section 4 of the *Charitable Fundraising Act 1991* (NSW) (**Charitable Fundraising Act 1991**) is retained. This definition includes ‘any benevolent, philanthropic or patriotic purpose’ and is wider than the common law meaning of charitable purposes.¹ It is also inconsistent with the definition of ‘charitable purposes’ contained in Division 3 of the *Charities Act 2013* (Cth) (**Charities Act**) – although the [NSW Fair Trading’s Charitable Fundraising Guidelines](#) list the purposes set out in the Charities Act, stating that it is ‘helpful to be aware of’ them.

This continued disjuncture between definitions is at odds with the aim of harmonisation and consistency with ACNC requirements. No evidence is given about the need for a broader definition of charitable purpose than that provided by the Charities Act. If there is a concern to

¹ Myles McGregor-Lowndes and Frances Hannah, *Fundraising Legislation in Australia: The Exemptions and Exceptions Maze*, The Australian Centre for Philanthropy and Nonprofit Studies QUT Business School https://wiki.qut.edu.au/download/attachments/118897665/Exemptions+and+exceptions_MML+and+FH.pdf?version=1&modificationDate=1302505357000

include additional groups, it would be simpler if the Charities Act definition was adopted and the additional groups added specifically.² This would promote greater certainty and support national alignment on licencing and reporting.

Recommendation 2:

That the definition of ‘charitable purpose’ contained in section 4 of the *Charitable Fundraising Act 1991* (NSW) be amended to adopt the definition of ‘charitable purpose’ contained in Division 3 of the *Charities Act 2013* (Cth).

(b) Exemptions

Religious bodies and organisations

We note that clause 27 of the Regulation imports the current list of ‘Religious organisations’ which are exempt from having to obtain a fundraising authority, with little change.

This approach to religious organisations is at odds with the Regulation’s aim of harmonisation and consistency with ACNC requirements. The ACNC requires all charities, regardless of their charitable sub-type, to apply for registration. The ACNC Act does exempt some religious bodies from some regulation and reporting – namely ‘Basic Religious Charities’ are not required to answer certain financial questions on the Annual Information Statement or comply with the Governance Standards. But even Basic Religious Charities must be registered with the ACNC, and their definition (mostly) reflects the policy intent that the exemption only applies to small religious charities (eg, small parish bodies).

The list of exempt religious organisations in the Regulation (which is in addition to section 7 of the Charitable Fundraising Act 1991) contains some organisations with significant income and assets. As one example, according to the ACNC register, [Scripture Union NSW](#) is (under the ACNC’s definition) a ‘large’ charity with most recent figures showing a total income of over \$1.4 million and almost 84% of that from donations and bequests.

We cannot identify any valid policy reason for why a charity established for one charitable purpose (ie, advancing religion) should be granted an exception from obtaining a charitable fundraising authority while others are not, especially when it is not linked to the size of the organisation.

² As recommended by (then) ACNC Assistant Commissioner, David Locke “A common definition of charity?” 27 July 2016, The Tax Institute, <https://www.acnc.gov.au/media/news/benefits-single-definition-charity>

Recommendation 3:

The current exemption for religious organisations should be restricted to small religious bodies (see recommendation 4).

[P&C Associations in NSW Government Schools](#)

We note that clause 8 of the Regulation contains an exemption to make it clear that P&C Associations in NSW Government schools can conduct fundraising appeals without holding an authority.

The RIS states that the new exception is to clarify the position of P&C Associations in NSW Government schools, because:

“There is a great social benefit in reducing the administrative burden on P&C associations to apply for authorities, as members of P&C associations work on an unpaid or voluntary basis. Lessening the red tape for P&C Associations also means that there is great flexibility in running activities.”

Justice Connect agrees that NSW’s current fundraising authority and reporting regime imposes a significant burden on charities, especially those which are small and volunteer run (this extract from the RIS seems to accept that having to obtain an authority would be ‘red tape’).

We cannot identify a rationale for why P&C Associations in NSW Government schools are expressly exempted, when there are many other small, grassroots organisations that are also volunteer run, contribute greatly to their local communities and similarly struggle with the regulatory burden of applying for and maintaining a fundraising authority.

The argument for more broad-based exemption is supported by:

- other statements in the RIS that the majority (of the small number of) complaints “result from the complexity or differing requirements of various relevant laws” and “mostly from minor and unintentional mistakes made by good willed volunteers and paid charity workers”
- the most recent ACNC Charities Report which indicates that almost a third of all registered charities are ‘extra small’ with total revenue of less than \$50,000.

Recommendation 4:

That the exemption categories be rationalised by introducing a universal exemption based on the charity having an annual revenue of more than \$50,000 so that ‘extra small’ charities (based on ACNC data) are exempt from the *Charitable Fundraising Act 1991* (NSW) and the Regulation, noting they are still covered by the Australian Consumer Law.

Alignment with ACNC requirements

(a) Fit and property person test

We note that Clause 10 of the Regulation introduces a new 'fit and proper person test' intended to be in line with the ACNC's concept of 'responsible person'. However, it is not linked with the disqualification criteria in ACNC Governance 4.

Recommendation 5:

That the Regulation directly align the new 'fit and proper person' test with the ACNC 'responsible person' requirements so that disqualification under ACNC Governance Standard 4 becomes the underpinning for this requirement (supporting moves to national consistency).

(b) Record keeping

We are pleased that the updated record keeping requirements in clause 17 of the Regulation align with those of the ACNC Act.

Modern fundraising

Justice Connect reiterates its call for a nationally consistent and fit-for-purpose charitable fundraising regime. We refer to the work we have lead under the *#FixFundraising* banner: www.nfplaw.org.au/fundraisingreform.

We also refer to the Bergin Inquiry recommendation 14.8:

"It is recommended that consideration be given to the introduction of a single, unified Australian statutory regime for the regulation of charitable fundraising."

There were other more specific recommendations in the Bergin Report about reforms for the NSW fundraising regime, but we urge this overall recommendation to be given primacy.

While we understand the imperative of the automatic repeal (sunset) date, we are concerned the Regulation takes the goal of national consistency further away as they (re)-introduce (nationally inconsistent) granular detail about how fundraising activities can be conducted.

The Regulation does nothing to assist the burden that comes when a donate button is added to the website of a charity whose activities are based in, say, Tasmania as they will then need to comply with and report under the *Charitable Fundraising Act 1991* (NSW) and the Regulation. This is not, therefore, better regulation or even modern regulation.

Recommendation 6:

That, even if the Regulation proceeds, the NSW Government work with State, Territory and Federal governments to establish a set of core, nationally consistent regulatory principles to support modern forms of charitable fundraising and reduce the red tape burden on the Australian charity and broader not-for-profit sector.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signature redacted).

Yours sincerely,

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