CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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Charitable Fundraising Regulation Reform Discussion Paper
Infrastructure, Competition and Consumer Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: NFPReform@treasury.gov.au

Dear Treasury

Charitable fundraising regulation reform: discussion paper

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body in Australia delivering authoritative accredited education and the most practical training and information in the field, CSA is focused on improving organisational performance and transparency.

Our members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act). Many of our members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with companies limited by guarantee. CSA itself is a company limited by guarantee, formed to serve the interests of its Members, who are governance professionals.

CSA welcomes the opportunity to comment on the *Charitable fundraising regulation reform: discussion paper* (the discussion paper) and draws upon the experience of our Members in formulating our submission.

Uncertainty concerning the NFP reform agenda

CSA commends the Australian Government's intention to reduce red tape for the NFP sector and to streamline the regulatory and reporting framework that guides NFPs in their operation. It is well recognised that the current regulatory framework for NFP entities is onerous and burdensome. The development of a coherent regulatory framework, therefore, is integral to ensuring confidence and trust in the NFP sector.

CSA, however, has serious concerns about the NFP reform agenda. In particular we are concerned with the fragmented manner in which the consultation process has been undertaken. CSA notes that there have been multiple and intersecting consultations about fundamental regulatory reform to the NFP sector. It is unclear how these separate consultations interact, as various of the issues dealt with in these papers overlap. To date, no overarching regulatory reform plan has been made available that clarifies for the sector how the reform process will align. Further, there has also been a lack of clarity as to the coordination between the three separate organisations involved in the consultation process, that is, the ACNC, Treasury and the Australian Taxation Office (ATO)

This has been compounded by the unreasonable timeframes being offered for consultation on major legislative reform for charities. NFP organisations are staffed or managed by volunteers, who are required to address the issues canvassed in the relevant consultation papers as part of their extra-curricular responsibilities. They have not been provided with sufficient time to meet, discuss the bill and formulate considered responses. Given that there have been multiple consultations of relevance to the NFP sector recently; the tight time frame for response on each occasion is even more worrying.

There have been numerous examples of reform consultation periods not meeting the criteria specified in Part 3.6 or Appendix C of the Office of Best Practice Regulation (OBPR) Handbook, in particular with respect to timelines. Moreover, CSA notes that part 2.1 of the *Best Practice Regulation Handbook* (the Handbook) clearly identifies that the OBPR is mandated to require a government agency to utilise a Regulatory Impact Statement (RIS) unless the regulatory impact of a proposed reform is of a 'minor or machinery nature and does not substantially alter the existing arrangements[1]'.

Despite this requirement, none of the previous consultation documents on reform to the NFP sector included a RIS and, alarmingly, the current discussion paper which purports to contain a draft RIS, does not in fact contain a clearly marked RIS.

The result of these timing and strategic coordination issues is a piecemeal approach to the reform process which hinders clarity as to how the reform proposals will achieve the objective of reducing and streamlining the compliance burden for the NFP sector. The resource-rich private sector has never been asked to deal with so many reform proposals that go to the heart of how it is regulated at any one time. Moreover, many of the reform proposals place a higher compliance burden on the NFP sector than on publicly listed companies, take a highly prescriptive approach to reporting obligations that is counter to the aim of reducing the compliance burden and contain an implicit suggestion that the NFP sector is not to be trusted and should have hardline legislative obligations to make it 'do the right thing'. Together, these strands diminish confidence that the reform process will achieve its aims.

Commencement of the ACNC

The fragmentation of the reform process has been exacerbated by the decision to delay the commencement of the ACNC to 1 October 2012.

CSA believes that the decision to delay the commencement of the ACNC constitutes a fundamental misunderstanding of what is required to support a reduction in the compliance burden for the NFP sector. The sector does not require further regulation or reporting obligations, but greater clarity as to how to provide transparency through reporting on the governance arrangements of NFP organisations, including how they raise funds. The sector also needs assistance in understanding its governance obligations and how to report to stakeholders in order to provide greater transparency and accountability. A fundamental role of the ACNC is to provide such education and assistance, with its enforcement capacity being an additional part of its raison d'etre, rather than its sole purpose.

In supporting the commencement of the ACNC, however, CSA is not asking for any special concessions — rather we would only seek to put the NFP sector on the same footing as the private sector when it underwent similar root and branch reform. The private sector has one Act that establishes the framework for regulatory enforcement through ASIC and a separate Corporations Act that deals with the duties, governance arrangements and operation of companies that ASIC regulates. The staged introduction of these measures, taking full account of the private sector's capacity to deal with the changes, has resulted in a sensible, sustainable regulatory framework for private companies.

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[1] Australian Government 2010, 'Best Practice Regulation Handbook', Canberra

Establishing the ACNC, and providing it with time to first deal with charities and progressively expand the reform process to include other types of NFP organisations, one at a time, will genuinely fulfil the promise of a new regulatory framework for the NFP sector, rather than just charities.

The current position, however, is less than optimal. The fragmentation of the reform process has led to confusion around the reporting and auditing obligations on charities with uncertainty as to whether they will be required to report under the new law by 1 July 2013. The announcement declaring the delay to the commencement of the ACNC did not clarify whether the delay would also result in a delay to the implementation of the reporting framework for charities.

While the ACNC has expressed the view in public forums that charities will not be required to make substantial changes to meet any new reporting obligations, CSA takes a different view. Many charities will need to:

- implement changes to their accounting methodologies and systems should they find themselves subject to IFRS where previously they were not subject to these complex accounting standards
- introduce new accounting software to manage their new reporting obligations
- face the expense of an audit where previously they were not subject to an audit requirement, and
- turn the attention of senior members of staff to meeting their new compliance obligations which will divert them from attending to their responsibilities to provide charitable services.

The proposed approach and time frame is in fact more onerous than was required of the private sector. Comparative corporate law reform in the private sector was introduced over a decade or so. To expect charities, who tend to be less well resourced, to be able to adapt to swift regulatory reform within a short time is unreasonable, particularly in light of the importance of this sector to the Australian economy and its contribution to the community.

CSA notes that comparative changes to the superannuation and financial planning industry are also proceeding at present, but at a much slower pace, in recognition of the internal resourcing and system changes that will need to be put in place within these industries to ensure they meet their new compliance obligations. CSA is very concerned that the NFP sector is being treated in a less favourable manner than other sectors, with fundamental changes being introduced without sufficient time to properly assess their impact. The pace of reform and the desire to meet arbitrary deadlines will have major consequences for an under-resourced and largely volunteer-staffed sector that contributes around $43 billion to the national GDP per annum as well as immeasurable social value to Australia.

Reframing the manner of regulatory reform

CSA understands that the government is keen to progress reform for the NFP sector, as after multiple inquiries the sector has clearly expressed a need for reform. However, CSA is of the view that it is also important to ensure that the reform is appropriately formulated.

CSA notes that many of the consultation proposals have purported to articulate a ‘light-touch’ regulation and a principles-based approach. But that has not been what is being proposed. Instead, much of the proposed regulation has been highly prescriptive and proposes to place a higher compliance burden on the NFP sector than on publicly listed companies.

The charitable fundraising discussion paper is a good example of this underlying theme. Charities which are also incorporated associations will be subject to a dual reporting regime after 1 July 2012, with obligations to both the ACNC and the relevant state department in their jurisdiction if reporting commences as of 1 July 2013. If national charitable fundraising regulation is also legislated, these organisations will similarly be required to manage both state and federal laws

simultaneously with respect to fundraising. This is an appreciable increase in the compliance burden.

CSA believes that a fundamental aspect of the reform process for charitable fundraising must be the agreement between the states to refer powers to the Commonwealth to allow fundraising to be regulated nationally, or for the states and territories to apply a national fundraising law as a law of each jurisdiction (the application of laws approach). Furthermore, without a definition of charity, the reform process is effectively operating in a vacuum.

Of great concern is the seeming mistrust of the NFP sector which is implicit in the approach taken in many reform proposals. While charities would benefit from educational and guidance materials encouraging greater understanding of the benefits of transparency in reporting, which in turn leads to better governance practice, the options being presented to the sector seek to apply black-letter law compliance models.

CSA notes that the Australian Charities and Not-for-profits Commission: Implementation Design discussion paper itself states that:'...overwhelmingly most (charities) aim to comply with their regulatory requirements'.[2] It also notes that Treasury recognises that non-compliance by NFP entities largely results from a lack of knowledge or capability, rather than deliberate refusal.

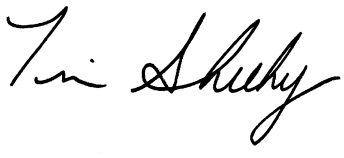
Therefore, the right approach to reform in the NFP sector, in our view, is to highlight the importance of governance and reporting frameworks, that is, disclosure, in order to provide transparency and accountability to stakeholders. It is clear from reform to the private sector that disclosure has improved governance arrangements — sunlight being the best disinfectant. Disclosure by charities and other NFP organisations can be improved without increasing red tape or compliance obligations. It allows those charities and other NFP organisations that have good governance arrangements already in place to show their stakeholders that they are well governed. It provides an opportunity for the stakeholders — including the ACNC — of those charities or other NFP organisations which require improvement in their governance arrangements to provide input and feedback on why and where improvement is required.

The regulation of charities through prescriptive and rules-based approaches will lead to greater compliance burdens and increased administrative and associated costs. The alternative, however, is to utilise the goodwill of the sector, and to maintain the public confidence and trust in charities and other NFP organisations, through a principles-based approach that encourages greater transparency in reporting, supported by education and guidance from the ACNC.

With these considerations in mind, CSA provides the following submission addressing the questions posed in the discussion paper on fundraising.

We would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE

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[2] Australian Government Treasury 2011, 'The Australian Charities and Not-for-Profits Commission Discussion paper' Downloaded on 9 December 2011 from http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=communityengagement/discussionpapers/functionsandops.aspx; at pg 5

Discussion paper questions

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

CSA accords with the view that charitable fundraising will require regulation to ensure that protection exists for the charitable sector and public against persons who may falsely identify themselves as charities or as acting on behalf of charities, or misrepresenting the purpose of their entity or fundraising activities. CSA notes that there may also be public nuisance and invasion of privacy considerations which might require regulatory intervention.

CSA is of the view that specific regulation is required for charitable fundraising, and notes that it needs to be national legislation in order to reduce the compliance burden on charities. This can only be achieved by a referral of state powers or the application of laws approach as currently there is fundraising legislation in place in every state. Each piece of state legislation differs in its requirements and exemptions. National fundraising then becomes a question of to whom should it apply and at what level, to ensure that smaller charities are not burdened with an onerous compliance framework.

Moreover, if national legislation is not put in place, charities will be subject to dual legislation, which increases rather than reducing the compliance burden. This is counter to the aim of the NFP regulatory reform program.

CSA is also of the view that regulation of fundraising requires a public interest element, that is, if fundraising is not for public benefit, but for internal use, then it is not charitable fundraising. The forthcoming definition of charity will inform the public interest element of any fundraising legislation.

However, CSA does not agree that regulation is required with respect to improving the transparency and accountability of charities. While it is acknowledged that information asymmetry is a concern which needs to be addressed, CSA does not believe that further regulation in any legislation attached to fundraising is the correct approach to rectifying this imbalance.

While the Australian Charities and Not-for-profits Commission: Implementation Design discussion paper (the ACNC discussion paper) did not offer any real guidance with respect to fundraising reporting obligations, CSA notes that questions of reporting by charities, that is, the transparency and accountability of charities through disclosure, has been dealt with under separate consultations.

CSA has previously recommended that charities should be required to undertake full governance disclosure which should include:

- the statement of objectives of the charity
- the amounts and sources of funding for the activities that the fundraising supports
- the expenditure of the funds (which would assume a portion of the funding going to administration and marketing, as well as to the fulfilment of the objectives of the charity)
- the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support and expenditure on staff and volunteers
- details of directors and secretary(s) or other relevant responsible individuals and their remuneration (including information on whether non-executive board members are paid and whether there are board committees or equivalent), and
- disclosure of all related-party interests.

CSA believes strongly that the ACNC, as the national regulator, is the most appropriate body to implement and oversee registration and governance and financial reporting, and provide

educational and support-based measures to assist charities to meet their compliance obligations. The value of the educational role that the ACNC will need to play in providing the sector with guidance should not be understated.

CSA recommends, therefore, that regulation of the charitable sector in relation to fundraising needs to be comprised of several different aspects, including:

- legislation relating to the conduct of illegal activities
- reporting obligations for charities which are weighted to ensure that smaller charities are not unfairly burdened by further compliance and that are aligned with any governance reporting, rather than being additional to them
- education and guidance materials from the ACNC which provide charities with advice about what they need to do to meet their requirements under any proposed regulation.

A regulatory framework which considers only the legislative framework will not achieve this process. While legislation within a regulatory framework can ideally regulate behaviours, for example, deceptive and misleading conduct, questions of transparency and accountability are better addressed through reporting. The implementation of disclosure of governance frameworks will also similarly require the provision of education and guidance materials to support charities in their bid to comply with the regulatory scheme.

CSA also notes that all existing charities will be automatically registered with the ACNC when it commences in October 2012. CSA is of the view that charities should be therefore be enabled to carry on fundraising, with that capacity reviewed as the ACNC undertakes a relicensing program of existing charities (during a transition period) as it also registers new charities.

While CSA notes that the definition of charity has not yet been settled, the finalisation of this will enable the ACNC to decide which existing charities and which applicants for the status of charity meet the definition and therefore are enable to undertake charitable fundraising.

CSA points to the financial services regulatory framework in which existing financial services organisations were 'grandfathered' in the transition period to the new framework, with ASIC having the power to revoke a financial services licence after review and make decisions as to the provision of any new financial services licences as a model for how the registration of charities and their fundraising capacities should proceed.

CSA is of the view that the charitable (and NFP) sector should not receive different treatment in relation to the establishment of a new regulatory framework from the treatment offered to the private sector.

CSA recommends that all existing charities that will be automatically registered with the ACNC when it commences in October 2012 should be enabled to carry on fundraising, with that capacity reviewed as the ACNC undertakes a relicensing program of existing charities (during a transition period).

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 current regulation regime across Australia is burdensome and onerous for many charities which take a national approach to fundraising. CSA notes that the fundraising activities of charities are subject to state and territory government regulations, and some Commonwealth and local government regulations as well. In some instances, CSA notes that there are also separate regulators to administer some of the discrete activities involved in fundraising in different states. The net effect is significant administrative pressure on charities costing them time inefficiencies and the burden of duplication of information in reporting.

Many charities incorporate because they want to be able to reach the widest audience possible. Through better infrastructure and increased communication channels, charities are now part of

the national economy and no longer constrained by state boundaries in their operations. However, while none of the states require a fee with respect to charitable fundraising, time and informational costs can be a heavy burden on many charities. CSA notes that different states require documentary hurdles, procedures and fundraising approvals of different standards to be met. For example, the process can take four days in some states and 40 days in others and state approval boards may meet according to very disparate schedules throughout the year and be unable to approve fundraising status where approval is required urgently.

While time and resource costs are important to many charities, there are also wider social costs associated with the provision of inefficient processes. For example, a child in need of treatment for cancer may require urgent access to a wheelchair and a small charity wanting to use the internet to quickly raise funds for this purpose may meet the public benefit test. Approval for fundraising needs to be fast. However, while disparity exists between different state legislation, and there is no overriding national fundraising legislation, the current inefficiencies will hinder such charitable fundraising.

The discussion paper notes that, in some instances, donated funds may be used for purposes other than those intended by the donor. The paper includes examples where large administrative costs mean that only a small percentage of the donated fund is used for the charitable purpose. This is an untenable position for donors, the charities and many beneficiaries who will not realise the full benefit of the initial donation. A fragmented fundraising regulatory system will likely serve to compound these sorts of problems.

The solution is to ensure that charities are not subject to a dual compliance regime. Resolution of the state and proposed federal regulation needs to be at the top of the priority list for reform to the charity sector. It is well established that charities are the least well equipped to be able to manage multiple administrative obligations, yet this will be the result if state and federal harmonisation is not sought for charitable fundraising regulation.

CSA recommends that the government seek state agreement on the referral of powers or the application of laws approach to enable national regulation of charitable fundraising before subjecting charities to any further compliance measures. CSA notes that even where there is agreement between the states and the Federal Government, the process of national and state agreement on legislative reform can be slow. As occurred with the harmonisation of OH&S legislation, states can withdraw from the process, thus delaying implementation. As such, it is important that a strategic plan to address this situation is developed and consulted upon.

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?

CSA reiterates that much of the framing of the NFP sector reform intimates that the sector needs to be regulated through prescriptive legislation in order to ensure that NFP organisations are well governed. CSA is of the view that this critical approach misunderstands the value of the sector, and the reality of how many people of good character are involved in charitable work. These individuals wish to do the right thing but may need assistance and education to understand their compliance obligations. CSA believes that the proper question to ask is: how do we maintain public confidence and participation by the community in fundraising activities while reducing red tape compliance and administrative burdens on charities? CSA also believes that the main purpose of the reform process should be to support charities and other NFP organisations by making it easier for them to comply with their obligations rather than to impose further onerous regulation on it.

Charities that wish to operate at the national level need appropriate regulatory reform which removes the discrepancies between different state legislation and processes. This will facilitate better efficiencies within charities whose members can refocus their attentions from administrative compliance towards their public interest purpose.

It is self-evident that the current levels of public confidence and participation within the community are at high levels. The Productivity Commission Report on *the Contribution of the Not-for-Profit Sector* clearly articulates:

> This (NFP) sector has grown rapidly over the past decade, and now makes up just over 4 per cent of GDP (just under $43 billion), with nearly 5 million volunteers contributing an additional $14.6 billion in unpaid work.

There is sufficient evidence that the sector is doing well. However, in order for the NFP sector to progress, there needs to be consistency in the regulation of the sector to reduce the compliance burden, and greater transparency in reporting in order that the sector can demonstrate to the public how it is governed, how it manages funds and how it achieves its objectives.

The current approach to the reform process steers consistently to more regulation, rather than greater transparency of reporting, which shows a misunderstanding of what the sector needs. It is evident that consistency can only be achieved through the harmonisation of state and federal regulation, while the support of the national regulator, the ACNC, will also be required to educate and guide charities as to their reporting obligations. Disclosure of governance will reveal if there are shortfalls in understanding of compliance obligations, and then further education as provided by the ACNC and other external parties can assist charities to improve their governance.

CSA suggests that at present, neither of these considerations have been adequately addressed. CSA has previously recommended that the national regulator should be designed to regulate all NFP organisations regardless of size, whether they receive government funding, or whether they access tax concessions, and CSA continues to support this position. While CSA concedes that these processes will apply only to charities in the first instance, it is evident from the approach to reform that each consultation paper focuses on only a discrete area of concern, for example, tax concessions or charitable fundraising, without consideration for the overarching goal of the reform process, that is, to provide the sector with streamlined compliance obligations, greater transparency of reporting and a centralised information and regulatory system.

While maintaining trust and confidence in the charitable sector is essential to the reform process, the issue for many charities is the prevalence of multiple administrative and compliance burdens through fragmentation of the regulatory framework. The aim of the reform process, therefore, is to alleviate the burden for charities by removing some of the inefficiencies that currently exist.

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

CSA notes that the same principle applies to this question as explored above — that is, the issue is not one of imposing further regulation but of ensuring there is transparency of reporting. The reporting will disclose where funds are derived from and how they are spent.

CSA cautions against the implementation of a shopping list of exemptions to cater for activities which should be excluded from fundraising regulation. While CSA is cognisant that this approach derives from the current exemptions offered by the different state approaches, CSA believes that this approach offers the least efficient outcome.

Instead, CSA recommends that deciding on the policy which relates fundraising to the purpose of the charitable organisation and implements a minimum threshold amount will provide a much more certain approach for many charities. Exemptions should, therefore, be based on broader overarching principles, which could include an exploration of:

- whether it is in the public interest — this would automatically exempt workplace appeals and donations to religious organisations from their own members

- whether the amount of money collected through the fundraising is significant enough to be regulated — if it is less than $50,000, and not subject to fundraising legislation, any misconduct would be picked up under the misleading and deceptive conduct legislation
- whether the funds are from government grants in which case they are automatically exempt as reporting is already required
- whether the fundraising in question is already regulated, which would automatically exempt lotteries and raffles.

If the fundraising is not significant enough to be regulated, a test is required that can be applied on a case-by-case basis.

2.5 Are there additional fundraising activities that should be exempt from fundraising regulation?

See our comments in response to Question 2.4.

2.6 Is the financial or other effect of existing fundraising regulation on smaller charities disproportionate? Please provide quantitative evidence of this if it is readily available.

CSA is cognisant that the existing fundraising regulatory system is severely disadvantageous for many smaller charities. While small businesses within the commercial sphere cannot achieve the economies of scale available to larger organisations where there are administrative burdens in corporate compliance, they generally have the benefit of a paid workforce to attend to administrative tasks. Small charities do not, usually, have this option as much of their workforce is unpaid and voluntary.

CSA is concerned that these problems will be magnified if a dual compliance regime is implemented which requires smaller charities to comply with both state and federal regulation. This would not be a satisfactory outcome for smaller charities and CSA notes that with no plan for the referral of state powers or the application of laws approach to ensure national fundraising legislation there is a real risk that the reform will result in further administrative burdens being placed on many smaller charities.

CSA's preference is therefore for the application of a national fundraising law as a law of each jurisdiction (the application of laws approach) in the first instance, to ensure there is no duplication of regulation and to reduce costs to the sector.

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

CSA agrees with the concept of limiting fundraising regulation to large amounts over $50,000, and thereby exempting smaller charitable fundraising activities. CSA notes that this would be an appropriate approach so as not to burden smaller charities and smaller fundraising exercises.

However, notwithstanding that fundraising under $50,000 would be exempt from fundraising regulation, CSA repeats that all fundraising should be subject to reporting as part of a governance report. The governance report should include:

- the statement of objectives of the charity
- the amounts and sources of funding for the activities that the fundraising supports
- the expenditure of the funds (which would assume a portion of the funding going to administration and marketing, as well as to the fulfilment of the objectives of the charity)
- the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support and expenditure on staff and volunteers
- details of directors and secretary(s) or other relevant responsible individuals and their remuneration (including information on whether non-executive board members are paid and whether there are board committees or equivalent), and

- disclosure of all related-party interests.

All stakeholders could therefore see what money had been raised, regardless of whether it was subject to regulation, and how it had been spent.

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?

CSA draws upon our earlier comments in relation to the harmonisation of state and federal regulation and notes that any unified regulatory system must include all charities in its composition. The proposal to allow smaller charities to continue to be regulated by state legislation will not assist in achieving red tape reduction, nor will it ease the administrative burden. CSA envisages that all charities should be registered with the ACNC and that state legislation should be repealed in order to ensure that multiple reporting or regulatory guidelines are not imposed on charities.

It is important that small charities are not excluded from raising funds nationally even if they raise amounts less than $50,000. This is only feasible if there is genuine national regulation and not a mixture of federal and state-based legislation.

As stated before, while funds of amounts less than $50,000 should be exempt from regulation, reporting should apply to all charities, regardless of size.

CSA strongly recommends that charities raising amounts less than $50,000 should not be subject to existing state or territory fundraising legislation when charities register with the ACNC.

CSA notes that a definition of a fundraising activity is required, as it is important that the $50,000 threshold cannot be abused by a charity undertaking multiple fundraising activities of $49,000 each.

CSA also recommends that any charity registering with the ACNC be automatically granted the right to raise funds through fundraising activities on condition that they report on their fundraising in a governance report.

CSA also notes that it is important that any charity registering with the ACNC not be required to raise funds — this should remain optional.

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?

CSA believes that a transition period is central to the success of the reform regime. The transitional arrangements are currently unclear and uncertain for existing charities. Coupled with this, CSA notes that there is as yet no statutory definition of a charity and a further delay to the establishment of the ACNC, which is charged with managing the registration and reporting frameworks for charities.

This creates a difficult situation for stakeholders in terms of providing comments on the appropriate transition period which should apply. Multiple consultations have requested stakeholder feedback on the issue of a transition period for both the registration and reporting obligations of charities to the ACNC. However, none of the consultation papers have provided a synopsis of the considerations which will determine how the transition period will be formed.

CSA envisages that the transition period will begin with the automatic registration of all current charities. During the transition period, charities will hold a provisional charity licence, and will be permitted to continue fundraising and undertake activities in support of their charitable purpose. However, all charities must provide an explanation to the ACNC as to why they satisfy the

definition of charity in order to attain full registration as a charity. The definition of charity is not, as yet, available, further complicating an understanding of what transition period should apply.

When the ACNC is satisfied that the charity meets the definition of charity, and upon the declaration of the end of the transition period, charities would become fully registered, abiding by the registration, governance and reporting framework of the ACNC. They would be obliged to disclose funds raised and expended as part of a governance report (see our earlier comments on what should be disclosed in a governance report).

CSA notes that the reporting framework will need to be finalised before a charity can be fully registered, and as such, it is likely that fundraising regulation would mimic any transition period implemented for the reporting process.

CSA believes that any transition period must extend to three years at the least, given that state approval for fundraising will run out in three years. All charities need to be provided with the opportunity to explain to the ACNC why they should be fully registered and enabled to undertake fundraising activities.

CSA also notes that companies limited by guarantee are already regulated and that many charities take this corporate form. The question of duplicate regulation and reporting requirements for such entities has not yet been addressed.

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

CSA is fully supportive of the ACNC as the sole regulatory body registering charities. This in turn provides charities with the capacity to undertake fundraising activities, and also provides the ACNC with oversight of all reporting obligations, including of funds raised and expended. Of equal importance is the ACNC's provision of guidance and education to charities to assist them to fulfil these compliance obligations. CSA notes that framework implemented for charities will need to be flexible and principles- based, so that it can be further applied to the rest of the NFP sector, if and when this further transition occurs.

With respect to charitable fundraising, CSA believes that the ACNC should be responsible for the development and provision of educative and supportive materials to assist charities with reporting, governance and compliance with regulation through the provision of:

- fact sheets
- checklists
- case studies to illustrate compliance and breaches of compliance
- model rules
- podcasts
- YouTube videos
- online forum (this can provide an alternative opportunity for dialogue by like-minded individuals in the sector as well as a means for the regulator to canvass and understand the everyday challenges the sector will be dealing with)
- a help line.

There is great social and economic value in promoting and nurturing charitable fundraising activities. CSA believes that this needs to be recognised in understanding how the reform should be applied to the sector. The ACNC forms the core of this approach. While applying the regulatory framework to charities, the ACNC is also responsible for the education and guidance of the sector and ensuring that fundraising activities can continue to support charities and their beneficiaries.

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

CSA strongly supports an approach which automatically authorises an existing charity to undertake fundraising activity upon registration with the ACNC as part of its provisional recognition as a charity.

Charities raising less than $50,000 would not need to be regulated, but will have access to guidance on what is required if they intend to raise more than this amount.

All charities will need to ensure they have a constitution and apply for full registration as a charity, so that they can continue fundraising. Their application will be reviewed against the definition of charity.

Without consideration of how all of the elements of the reform process interrelate, it is difficult to properly address the interaction of reporting, fundraising and regulation.

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

CSA is of the view that if a charity meets the definition of charity (that definition is yet to be released) it can undertake fundraising activities.

CSA notes that issues such as monetary threshold amounts, furtherance of charitable purpose, establishment of a constitution, reporting obligations and compliance with legislation will form some of the components which comprise the automatic authorisation regime.

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

CSA believes that specific advice on the conduct which should result in charities being banned from fundraising is a matter for the ACNC as the regulator.

CSA's concerns lie with the focus on 'banning' behaviours rather than supporting the sector. This creates the impression that the policy will lean towards enforcement, rather than focusing on education and guidance in the first instance. CSA notes that the charitable sector is comprised of organisations who are predominantly concerned with doing the right thing by their beneficiaries and the wider public. Non-compliance within the sector is mostly driven by a lack of understanding or a lack of resources. CSA does not consider it appropriate to include a shopping list of offences, as breaches of regulatory obligations could well result from ignorance rather than intent to act illegally. Given the educational role of the ACNC, it is appropriate that the regulator have the discretion to either provide further guidance on compliance obligations or ban a charity.

The ACNC should be empowered to assist charities to rectify behaviours which might result in banning, where the conduct is based on either a lack of understanding of regulation, or the lack of resources to cope with compliance. These types of conduct are unlikely to be malicious or undertaken with disregard for beneficiaries or the public. CSA believes that the appropriate guidance in these situations and the ability to work with the sector to change practices will be integral to ensuring compliance with a charity's obligations.

CSA therefore recommends that the ACNC be provided with the discretion to ban charities from fundraising.

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

CSA endorses the application of some parts of the ACL to charitable fundraising activities. However, CSA accords only with the proposals outlined in paragraph 36 of the discussion paper, that is:

- misleading and deceptive conduct
- (s 18)
- unconscionable conduct (ss 20-22)
- false or misleading representations (s 29)
- harassment and coercion (s 50).

CSA also strongly recommends that compliance be by way of reference to the ACL provisions set out in paragraph 36 of the discussion paper rather than these issues being dealt with by being included as provisions in any regulatory framework enforced by 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?

CSA notes that s 73 of the ACL regulates permitted calling hours for dealers approaching a person face-to-face to make an unsolicited offer to supply goods and services. The permitted calling hours are default calling hours only.

Charities are seeking donations, which differs in kind from the offer to supply goods and services. While CSA agrees that calls seeking donations should be subject to some restrictions, CSA is of the view that face-to-face activity seeking donations should be able to be undertaken at any time and not be restricted. CSA points to the many charitable fundraising activities that are deliberately scheduled for weekends and public holidays, and which in some instances have become a tradition recognised by the community, for example, the Salvation Army's Doorknock Appeal.

CSA recommends that any restriction not be referred back to s 73 in the ACL as donation seeking is for a different purpose than considered by this provision. Otherwise CSA believes that there is a risk that the consumer law provisions will apply to charities in an unintended way. **CSA recommends** that there should be no restrictions on face-to-face calling and any restrictions on calling hours should be defined by the ACNC.

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?

CSA believes that charities should not be treated in the same way as companies with respect to the operation of all consumer law. CSA notes that charities interact with donors rather than consumers through fundraising activities, and the aims and operations of charities are not consistent with purely commercial objectives.

It is important, therefore, that when considering the regulation of charities and the application of external provisions, a sense of the objectives of these provisions is understood. For example, CSA notes that unsolicited selling provisions are enacted mainly with respect to the provision of 'goods and services', 'in trade or commerce'. Charitable fundraising often works without the provision of a good or service to the consumer, but in fact with the provision of a good or service to a third party beneficiary where the donor pays for the cost of that good or service.

However, charities may engage in fundraising in whatever manner suits their aims and objectives. Some charities receive donations or the support of major companies or institutions and are able to offer a good or service in return for a donation. The diversity of fundraising activity, therefore,

means that the unsolicited selling provisions in the ACL might apply differently across various charitable organisations.

CSA recommends that any regulation in relation to unsolicited selling not be dealt with by reference to the ACL but form part of any regulatory framework enforced by the ACNC, otherwise CSA believes that there is a risk that the consumer law provisions will apply to charities in an unintended way.

Centralised regulation through the ACNC will ensure that regulations are fit for purpose and relevant to the sector. However, this should be carefully determined and charities should be guided and educated on the relevant provisions which will apply to them. CSA notes that the role of the ACNC should be to ensure that charities are provided with a centralised place to obtain all information which relates to the operation of their organisation, whether or not those regulations are administered by the ACNC.

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

CSA believes that, where available, charities seeking to raise funds of less than $50,000 should be required to provide their ABN on all public documents. Not all such charities will have an ABN and they should not be required to have one if their fundraising is unregulated.

Any charity seeking to raise funds above the amount of $50,000 should be required to have an ABN for the purposes of fundraising and should be required to disclose it on public documents.

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?

CSA believes that disclosure in any interaction between the charity and the potential donor is crucial to any regulatory regime. CSA notes that information about whether the collector is paid is more appropriately contained in any reporting obligations, as this is predominantly a question of transparency and accountability of donations. Charities should be required to disclose in their reporting that ‘x’ amount of collectors were used to collect money, costing ‘y’ amount of funds. This information can be made available on the charity’s website and also on the ACNC website where governance reporting will be available.

The name of the charity, however, is paramount to any donation and CSA notes that, except for where there may be a public interest in not disclosing the actual name of the charity, for example, a women’s refuge, the name of the charity should be required during an interaction between a person engaged in charitable fundraising and a member of the public.

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

CSA notes again that identification is necessary to protect both the charity and members of the public from deviant behaviour. **CSA recommends** that name badges and contact details should be provided except where there may be public interest considerations which would allow some charities to provide their staff with identification numbers rather than their actual names.CSA strongly believes that the provision of the contact details for the charity is chief among concerns for members of the public.

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

CSA notes that at the state level there are currently differing requirements in legislation with respect to unattended collection points, advertisements, and print materials. **CSA recommends** that the minimum standards should be the provision of the name of the charity and an identification or serial number on an unattended collection point.

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

CSA recommends that charities should be required to disclose that a donation to a particular fundraising event is tax deductible on any receipt for donations. However, CSA does not believe that the Deductible Gift Recipient status should be required to be disclosed to persons during a collection event. Again, CSA believes that this is a matter for the reporting of the charity, for example, in its governance reporting.

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

CSA reiterates that it is important not to burden charities with heavy disclosure obligations at the time of collection of donations. Sufficient information which adequately identifies that the person purporting to represent the charity is in fact a representative of that charity, and contact details for the charity will provide enough information for a member of the public.

CSA does not believe that there are other information disclosures required at the time of giving.

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

CSA is strongly of the view that charities should not be required to provide contact details for the ACNC or a link to the ACNC on their public documents. CSA notes that private companies are not required to provide links to ASIC on any of their public documents, It would be counter to the objectives of the reform process should charities be burdened with more compliance obligations than private sector entities.

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

CSA notes that there is a strong public interest in the fundraising, record keeping and reporting of charities. Donors as well as the general public have a right to know how the funds they have donated have been spent and provided to beneficiaries.

CSA made the comment in our submission to Treasury on the Australian Charities and Not-for-profits Commission: Implementation Design discussion paper that:

> CSA believes that the information collected by the annual information statement form does not fully capture all of the information required for the purpose of achieving transparency and accountability to the public.
>
> The tier two annual information statement collects insufficient governance information. While CSA supports the requirement that tier two and tier three charities be required to disclose that they have risk management plans, we note that governance is more than simply risk management. Full governance disclosure would include:
>
> - the statement of objectives of the NFP organisation
> - the amounts and sources of funding for the activities that the fundraising supports
> - the expenditure of the funds (which would assume a portion of the funding going to administration and marketing, as well as to the fulfilment of the objectives of the NFP organisation)
> - the processes in place, including the risk management processes, to ensure the proper management of all fundraising, activity support and expenditure on staff and volunteers
> - details of directors and secretary(s) or other relevant responsible individuals and their remuneration (including information on whether non-executive board

members are paid and whether there are board committees or equivalent), and
- disclosure of all related-party interests.

It is important, therefore, that the qualitative elements, such as a description of the beneficiaries and the outcomes achieved, are captured in the reporting obligations of charities.

CSA is also cognisant of the reporting burden which this might impose on smaller charities, and reiterate our support for the $50,000 threshold so as not to unnecessarily commit small charities to reporting on small fundraising events.

CSA notes that the ACNC would be the responsible body for issuing the appropriate guidelines.

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?

See our comments in response to Question 5.1.

5.3 Should any such reporting be complemented with fundraising-specific legislated accounting, record keeping, and auditing requirements?

See our comments in response to Question 5.1.

CSA notes that accounting, record keeping and auditing requirements formed the basis of the Treasury consultation on the Australian Charities and Not-for-profits Commission: Implementation Design. As these issues are being dealt with in a separate consultation, CSA is of the view that it is not appropriate to also seek to deal with them in this consultation, without any guidance on how the proposals might interact.

Notwithstanding that, CSA believes that reporting, and by extension, the functions that facilitate reporting such as record keeping, should be designed to all members and stakeholders of charities to be able to have access to information that allows them to know:
- the financial position of the organisation
- that the organisation is being managed prudently
- that the allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution
- who constitutes the governing body and
- what processes are in place to ensure the personal interests of directors do not override the interests of the organisation.

5.4 What other fundraising-specific record keeping or reporting requirements should apply to charities?

See our comments in response to Questions 5.1 and 5.3.

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

It is clear that internet and electronic fundraising have become popular ways in which to reach a more global audience with messages about a cause, and also to solicit donations from people in furtherance of a charitable purpose. CSA is aware that these avenues have been used inappropriately at times, but is of the view that to prohibit internet and electronic fundraising is an unsustainable approach. CSA notes that prohibition will be particularly difficult to police, and that there are already laws which prohibit fraudulent internet activity. Prosecution of these types of matters is largely difficult and CSA notes that the resources required to undertake these types of prosecutions will be burdensome and impractical for the ACNC to implement.

Further, CSA notes that some NFP organisations, who are not charities, may also wish to undertake charitable fundraising through the internet and by electronic means. CSA points to collaborations between charities and corporations and notes that in those instances, corporations who advertise on behalf of charities would not be registered with the ACNC, but would be participating in charitable fundraising.

CSA believes that it should it is the role of the public to educate themselves and make reasonable enquiries of any appeal for donations through the internet and by electronic means. CSA notes that legislation cannot stop all fraud and that the better approach is to inform the public of the risks associated with dealing with potentially unknown parties. Such guidance can be provided by the ACNC. The education materials can specify what questions member of the public should ask before donating online, and also identify what steps a person can take once it becomes obvious that a fraudulent fundraising activity is occurring through the internet or by electronic means.

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

CSA believes that, where available, charities seeking to raise funds of less than $50,000 should be required to provide their ABN on all public documents. Not all such charities will have an ABN and they should not be required to have one if their fundraising is unregulated.

CSA notes that while the internet provides the benefit of reaching a wider audience for many charities, it may be cost prohibitive for smaller charities. Some of their information may be maintained in hard copy and not available on the internet or through electronic means. It is important that charities with a small internet presence are not discouraged or disadvantaged by any requirement to structure their internet or electronic communications.

Any charity seeking to raise funds above the amount of $50,000 should be required to have an ABN for the purposes of fundraising and should be required to disclose it on public documents.

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

CSA noted in our submission to Treasury on the Australian Charities and Not-for-profits Commission: Implementation Design discussion paper that there may be several barriers to the use of online technology for some charities. These barriers might include a lack of technical knowledge or the cost associated with the purchase of specific software in order to manage a particular process.

CSA believes that it is inappropriate to impose on charities compliance obligations which encroach upon these aspects of the charities operations. Furthermore, the imposition of technology-specific restrictions might be short-sighted in lieu of the constant innovations of the technology industry. However, this also needs to be balanced with protecting the public from illegal activity which could compromise their financial security. While the use of standard secure portals for online donations are encouraged, it is for the public to check that such security is in place before making a donation.

CSA also notes that the Spam Act applies to the use of electronic fundraising, be it by charities or others.

CSA believes that it is important, therefore, that appropriate guidelines are published by the ACNC which assist charities with their use of technology.

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

CSA agrees with the imposition of regulation for third party fundraising. It is important that charities which utilise the benefits of third party assistance should be required to disclose these arrangements in their annual or governance reporting.

Some of the considerations for regulation include:

- clarity with respect to the responsibilities and obligations of each party
- clear details of the administrative costs involved in the process,
- the payment of funds to secure the third party services.

CSA notes that an approach which triggers better disclosure by charities seeking to utilise third party arrangements will ensure that smaller charities are not burdened with extra reporting requirements where they do not utilise third party fundraisers.

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

CSA reiterates that an approach which triggers better disclosure by charities seeking to utilise third party arrangements will provide a more transparent and accountable picture of charities to the public. CSA notes that reporting need not only be about 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?

CSA notes that there is potentially a diverse range of people and/or corporations who may be third party fundraisers with respect to a charitable fundraising event. Asking all these third parties to potentially register with the ACNC is unlikely to be feasible, nor is it likely to be practical. CSA believes that a better option is to require that charities disclose their third party fundraisers at their events. This should be subject to meeting a monetary threshold limit.

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

CSA notes that third party fundraisers should not be required to state the ABN of the charity which is fundraising, but rather provide the name and contact details for the charity, so as to allow members of the public to undertake their own due diligence with respect to particular fundraising events.

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?

CSA again notes that while third party fundraiser should be required to disclose for whom they are collecting donations and provide the interested donor with the appropriate contact details, the fees paid for their services are better disclosed in the charity's annual reporting.

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

CSA reiterates that the use of paid third parties, or paid labour to assist with fundraising activity, is a matter for reporting, rather than disclosure at the time of giving. CSA believes that the details can be adequately captured by a charity's annual or governance reporting obligations.

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

Similarly to 7.6 above, CSA notes that minimal regulation should be required for private participators involved in charitable fundraising. The monetary threshold will be applicable in this regard.