



Law Council
OF AUSTRALIA

Legal Practice Section

19 August 2021

Transparency Code Working Group
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: charitiesconsultation@treasury.gov.au

Dear Working Group

Voluntary code to improve the transparency of the use of charitable donations during natural disasters

This submission has been prepared by the Charities and Not for Profits Committee (**the Committee**) of the Law Council of Australia's Legal Practice Section.¹ The Committee welcomes the opportunity to make a submission in response to the Treasury's Consultation Paper on the proposed voluntary code to improve the transparency of the use of charitable donations during natural disasters (**the Transparency Code**).

Executive Summary

1. The Committee has had the benefit of reading the submissions of Justice Connect and The Australian Centre for Philanthropy and Nonprofit Studies (**ACPNS-QUT**) to the Consultation Paper and supports the content of those submissions.
2. In particular, the Committee commends the extensive background and contextual information (including learnings from past fundraisings for natural disasters) and the commentary on a widely accepted proposal to reform regulation of fundraising.
3. It is wholesale improvements to the regulation of fundraising (via one set of nationally consistent and streamlined fundraising requirements) which are necessary and would be more effective than piecemeal adjustments in reaction to specific issues only. This is what charities have sought over many years.
4. As those submissions point out, there are existing codes which address the issue of transparency of the use of charitable donations towards natural disasters and as Justice Connect's submission point out, the Australian Fundraising Principles have already been developed and await consideration and adoption.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

Responses to consultation questions

Question 1: Would an appeal intent similar to the example provide sufficient information for donors? What additional information should be included?

5. The Committee submits that one size will not fit all. The Consultation Paper does not disclose what study or research may have been taken to understand donor expectations that informs the two examples as good options.
6. Charities raise funds for different resources and activities that respond to disasters in different ways. Those that are engaged in humanitarian relief (addressing immediate needs of food, water and shelter and also safety) will need funds raised very quickly and will deploy funds and resources immediately while those focussed on long term recovery (such as rebuilding and re-establishment of communities and economies) or which address slow on-set and/or long impact disasters (such as famine and pandemics) will raise funds over a longer term and use them for resources and activities over a longer term too. The examples both presume, and create the impression, that funds would be raised and should be expended over a short term of a year. This would not be helpful.
7. Donors to different appeals for disaster relief will have different expectations of what reporting they want. In the Committee's view it is efficient and sufficient that charities report in whatever manner and with the frequency that their donors require or expect of them. In the increasingly competitive fundraising environment, many charities are now sophisticated on what and how they communicate to their donors; if donors are unhappy, they will not donate to that charity again.
8. Charities will be informed and led by what their donors demand and expect of them in terms of reporting. For example:
 - (a) It is common practice for the annual reports of charities to contain stories of impact (in narrative form) as a way of reporting to their stakeholders, of which their donors will be one of the most significant.
 - (b) There are instances where donors do not seem to require reporting once they know which organisation(s) their funds have been provided to. For example, while there was widespread interest in the Celeste Barber appeal for bushfire relief in the summer of 2019-20, once there was certainty that all funds raised were to be provided the NSW Rural Fire Services, there has not been widespread concern about reporting from the NSW Rural Fire Services about use of the funds. For such charities, it would be unnecessary for them to provide detailed reports to their donors and they should not be compelled to do so. In many cases (where the fundraising has been conducted by or involving an intermediary) charities will not know who the donors are and will not be able to provide such reports to them.
 - (c) Charities in specific sectors have become adept at working together cooperatively to meet what their donors expect of them. For example, all of Australia's international NGOs have been able to agree on always disclosing their overhead expenditures (commonly referred to as administration costs), how funds raised will be disbursed and how any funds which are surplus to immediate needs will be used since the Asian tsunami appeals of 2004. And very recently, 16 of them have formed the Emergency Action Alliance

(<https://emergencyaction.org.au/what-we-do>) to fundraise more efficiently and peer review how the organisations have responded.

Question 2: Do you think the reporting elements proposed are appropriate?

9. The Committee suggests it is better to provide a set of principles (for example, about what could be disclosed) rather than be prescriptive about what must be disclosed and how the items are disclosed. It should be up to the charities to decide if they wish to report on additional items. They will make the choices that their donors expect of them.

10. Australian Fundraising Principles 7, 8 and 9 provide a better balance between specificity and flexibility:

We will be open and honest in our annual reporting about our fundraising strategy, results and costs, and why they are appropriate for our cause at this time. (AFP 8)

To justify the trust shown by donors in the efficient and effective use of the resources given to our organisation, when fundraising (and in our reporting) we will clearly explain the purpose to which funds raised will be, or have been, applied. (AFP 9)

11. Further, the Fundraising Institute of Australia's Code of Conduct (already in place) contains the following:

Members will be open about the work they do, including how funds are raised, managed and disbursed. (clause 3.6).

Members will make readily available, on request, information about the Cause for which they are Fundraising, including:

- a) its objects and how it intends to use the Donated Funds;*
- b) its capacity to use Donations effectively for their intended purposes;*
- c) its most recent annual report and/or financial statements; ... (clause 4.4).*

12. The Committee also draws attention particularly to the cautionary note about the 'starvation cycle' in the submission of ACPNS-QUT.

Question 3: Is there additional information that should be reported under the Transparency Code?

13. See comments above in response to question 2.

Question 4: Would your charity have the capability to publish the proposed reporting content during a natural disaster?

14. This will vary across the charity sector. While there are many charities focussed on (and therefore adept) at running disaster relief appeals and reporting on them, there will be many (including new ones that will be formed in direct response to disasters when they happen) who would be ill-prepared to adopt quickly to the requirements of Transparency Code.

15. The Transparency Code will not help when a charity is unaware of an appeal launched in their name.

16. The proposed reporting periods will also be inappropriate for those charities focussed on medium-long term disaster relief rebuilding.

Question 5: Should administration costs be included in the Transparency Code? Do you have suggestions for what should be included in the definition of administration costs?

17. Any amplified focus on 'administration costs' would be unhelpful for many charities. The Committee draws your attention to the useful information provided to donors by the Australian Charities and Not-for-profit Commission (**ACNC**) about charities and administration costs.² The key point, well made by the ACNC is that 'while it is reasonable to want to ensure that each dollar you give will be used well, assessing and comparing charity administration costs is difficult and it can be misleading'.
18. The ACNC also recognises that what constitutes administration costs for one charity will not be the case for another.
19. Additionally, the Committee notes that the Transparency Code does not consider what reporting may usefully be made by intermediaries who are common actors in contemporary on-line fundraising. They are often not engaged by the charities; the fees they collect from donors do not form part of the administration costs of charities.
20. The Australian Fundraising Principles would assist here:

When we incur costs for our fundraising, such as using paid fundraisers or other contractors or agents, we will explain this as clearly and simply as possible to the public, before they choose to donate. (AFP 7)

Question 6: Do you consider the quarterly minimum reporting will meet donors' expectations of transparency? Would you suggest a different approach?

21. Charities should report as frequently (or infrequently) as their donors demand or expect of them. The Committee does not believe that it is necessary or appropriate that minimum reporting intervals be introduced.

Question 7: Should there be an expectation that charities who receive donations in excess of \$3 million from a disaster specific appeal should be a signatory to the Transparency Code?

22. The Committee does not understand the rationale for the \$3 million threshold and reject it as a threshold. Instead, a single set of nationally consistent and streamlined fundraising laws that apply to all charities is supported.
23. As was shown very starkly by the Celest Barber NSW RFS situation, it can be almost impossible to predict the size of the donations received when an appeal is launched.

Question 8: Are there sufficient incentives for charities involved in disaster responses to adopt the Transparency Code voluntarily?

24. In the Committee's view, charities which see it as advantageous (and competitive) to be transparent about use of funds raised are generally being transparent. The Committee does not see that another code would incentivise them towards greater transparency.

² See <<https://www.acnc.gov.au/for-public/understanding-charities/charities-and-administration-costs>>.

Question 9: Do you see any risk with allowing signatories to self-regulate compliance with the Transparency Code?

25. It is important to note that many charities are already effectively self-regulating against principles of ethical fundraising and being transparent about use of funds – not doing is damaging to reputation and may render them uncompetitive
26. Self-regulation via a new code will undermine existing self-regulation by fracturing the efforts of the bodies for those codes (the Public Fundraising Regulatory Association, the Fundraising Institute of Australia and the Australian Council for International Development). These bodies currently work to provide education and support for their members, and have mechanisms in place monitor compliance.
27. The risk of significant non-compliance that could go to public trust and confidence in donating can be best mitigated by adopting the Australian Fundraising Principles as the nationally consistent fundraising licence conditions instead of the existing mishmash or out of date rules. This would provide a regulatory basis for ethical and transparent fundraising practice such that action could be taken by the state regulators in the event of significant or ongoing breaches.

Conclusion

28. The Committee would welcome the opportunity to discuss this submission with Treasury. In the first instance, please contact Charities and Not for Profits Committee Chair, Seak-King Huang on shuang@milnerhuang.com.au.

Yours sincerely



Michael Tidball
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