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T +61 2 9223 5744 F +61 2 9232 7174

E [info@governanceinstitute.com.au](mailto:info@governanceinstitute.com.au)

Level 10, 5 Hunter Street, Sydney NSW 2000

GPO Box 1594, Sydney NSW 2001

W [governanceinstitute.com.au](http://governanceinstitute.com.au)

Transparency Code working group  
Individuals and Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
By email: [charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Sir / Madam,

## **Developing a voluntary code for charities to improve the transparency of charitable donations during natural disasters**

### **Who we are**

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted, public, not-for-profit and charity sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

### **Our activities in this area**

Governance Institute members are involved in governance, corporate administration and compliance with the *Corporations Act 2001* (Cth). Many of our members serve as officers of charities, or work for, or are involved with charities and are therefore involved in compliance with the requirements of the Australian Charities and Not-for-profits Commission (ACNC). Governance Institute is itself a charity operating in the legal form of a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information.

### **Executive summary**

- Governance Institute members commend the Government's intention to enhance public trust in larger charities involved in natural disaster response and recovery without imposing additional and mandatory compliance burdens on the entire sector.
- We note this consultation is not in response to any adverse findings by the ACNC in relation to the disbursement of donations by the charitable sector during the 2019-20 bushfires and that the intention of this scheme is to raise public awareness and understanding of the highly valuable work the sector does to support vulnerable

Australians affected by natural disasters. The issue is not widespread misconduct by charities, but a mismatch between public expectations and the practical realities and challenges of natural disaster aid.

- Our members support in principle the proposal of a voluntary code supported by statements of intent and transparent reporting to the extent that it benefits the sector by enhancing public awareness and trust, and make several recommendations aimed at enhancing the scheme's effectiveness.
- Our members' primary concern is encouraging simplicity and minimal regulatory compliance burden under this voluntary scheme.
- As a founding member of the '#fixFundraising' campaign, Governance Institute advocates for further harmonisation of charitable fundraising laws across all jurisdictions. We are pleased that the proposed code is being developed at the national level by Commonwealth Treasury and that there is a proposed role for the national regulator, the ACNC, to incentivise participation. A nationally consistent approach is needed to avoid creating greater inconsistency in fundraising regulation between the State and Territory jurisdictions.

## **Recommendations**

### **Recommendation 1: Address the issue of third-party fundraising promotion.**

A critical first step in any public policy development process is defining the problem to be solved.<sup>1</sup> In this instance, it appears the consultation paper has defined the policy problem narrowly. The proposal for a voluntary code is targeted at addressing donors' expectations and the public's concerns about how charities disburse funds during and after natural disasters. However, it does not address what Governance Institute members view as the crucially important issue of the distinction between regular charity fundraising and third-party (especially celebrity) fundraising during natural disasters. The ACNC's recent review of the bushfire fundraising response of three major charities found that all three encountered issues created by third-party fundraising beyond their control, and that despite these issues all three had taken a 'strategic and reasonable approach' to the disbursement of funds.<sup>2</sup>

Governance Institute members support in principle the proposal of a voluntary code, provided Government and the parts of the sector likely to be signatories to it are convinced it will assist in raising public awareness and increase confidence in charities and the integrity with which they manage funds. However, our members urge Government to consider other additional policy measures to support charities in addressing the issue of third-party fundraising promotion, including but not limited to:

- Additional guidance from the ACNC on third-party fundraising and considerations for charities on how to better align public messaging to their charitable purposes.
- A voluntary promoter's code.
- A requirement for charities that are the subject of third-party fundraising during a natural disaster to take reasonable steps to engage with the promoter to inform them of the entity's charitable purposes and any potential fundraising issues. To be effective, the scope and threshold of this policy setting would need to be carefully considered, as it would be impractical and costly for charities to engage with smaller promoters.

### **Recommendation 2: Promote public awareness of the realities and challenges for charities disbursing funds in natural disasters.**

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<sup>1</sup> Bardach, E 2012, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving*. Fourth Edition. CQ Press, pp. 1-3.

<sup>2</sup> ACNC 2020, *Bushfire Response 2019-20: Reviews of three Australian charities*, pp. 7-9.

Our members encourage the Government and the regulator in its public messaging on the voluntary code to continue to acknowledge that charities may, for various legitimate reasons, choose not to or be prevented from disbursing all funds immediately in a natural disaster. The ACNC has acknowledged some of these considerations and challenges in its report on the 2019-20 bushfire season. They include: difficulty identifying eligible recipients, the time required to manually verify grant requests, strategic reasons to not overcommit resources early in the recovery process, and the reality that the need for donations emerge gradually over time.<sup>3</sup> It is important that the public is educated on these realities, otherwise there is a real possibility that the voluntary code, especially its statements of intent and regular reporting, will only invite further public criticism of charities that are acting legitimately and strategically in the disbursement of funds. It may be helpful for the implementation of the voluntary code to be supported by a media campaign or similar public awareness raising efforts to ensure it meets its intended purpose.

**Recommendation 3: Regularly review the administrative burden of the scheme to ensure it does not exceed its intended scope and is consistent with State and Territory fundraising law.**

The proposed reporting regime should be restricted to its intended purpose of providing '*the benefits of enhanced trust*' for '*charities heavily involved in response activities and receiving substantial amounts of donations*'.<sup>4</sup> There should be no pressure from Government or regulators for it to be applied beyond this scope. Smaller and medium-sized charities should be free to make their own decision whether to sign up to and comply with the code.

As noted in the consultation paper, it is intended that the regime will '*target the administrative burden to those charities with the greatest capacity to absorb it*'.<sup>5</sup> If the code is put in place, it should be regularly reviewed and evaluated to ensure it is being used only for its intended purpose and that it is not imposing administrative burdens on a wider than intended group of charities.

All the charities involved will be subject to one or more fundraising laws in the States and/or Territories in which they operate and fundraise, as charity fundraising is governed by State and Territory law. For this reason, there is a need to ensure that any requirements applicable under the voluntary code are consistent with the statutory obligations the charity may have in these jurisdictions.

**Recommendation 4: Consider if overseas natural disasters affecting Australians are sufficiently covered by the code.**

Governance Institute members support the declaration of a state of national emergency under the *National Emergency Declaration Act 2020* (Cth) as an appropriate triggering mechanism for the voluntary code. However, the case studies of the 2002 Bali bombings and the 2004 tsunami that struck the coast of the Indonesian island of Sumatra may suggest the trigger mechanism requires further consideration. Similar factors such as a strong emotional response from the Australian public, a rush of fundraising, and high donor and public expectations about fund disbursement may be present in extraterritorial disasters that affect large numbers of Australians. It is unclear if such an overseas emergency would comply with the requirements of *National Emergency Declaration Act 2020* (Cth) s 11(1).

The Explanatory Memorandum to the Bill states that s 11(1) is intended to capture '*emergencies that occur both in and outside of Australia*' provided the overseas emergency '*causes, or is likely to cause, nationally significant harm in Australia*' and gives the example of '*a pandemic that is spreading out of control overseas and is likely to reach Australia at some future point in*

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<sup>3</sup> Ibid, pp. 6-7.

<sup>4</sup> Commonwealth Treasury, *Developing a Transparency Code: A consultation paper*, p. 7.

<sup>5</sup> Ibid.

*time*.<sup>6</sup> It is unclear if an overseas emergency affecting Australian citizens in a foreign jurisdiction, but which has no direct impact on mainland Australia, such as an isolated terrorist attack or natural disaster in a foreign country, would fall within the requirements of the Act. We note that, under the proposal, nothing would prevent charities from reporting on a tsunami or similar disaster outside Australia if they choose to do so.

**Recommendation 5: Align reporting frequency with annual reporting requirements.**

Our members consider that quarterly reporting for two years under the code may be an unnecessary imposition on charities who are expected to be signatories, and may deter additional charities from voluntarily signing up to the code. Enhanced reporting in the annual financial statements or reporting under fundraising laws that charities already produce, rather than creating a separate reporting requirement, would impose less onerous compliance burdens, be more aligned to the reporting cadence of charities, and be more likely to encourage voluntary compliance. For these reasons, our members support annual reporting.

**Recommendation 6: Avoid undue emphasis on administration costs.**

While our members support the inclusion of an agreed definition for administration costs in the voluntary code, they urge Government to ensure it considers this definition very carefully and that it does not put undue emphasis on levels or benchmarks of administration costs. We endorse the ACNC's summary on this point: *'It costs money to run a charity. It requires infrastructure and staff to deliver programs. The ACNC Act and Regulations do not set benchmarks for charities' administration costs because, as every charity operates differently, they are not reliable measures of effectiveness. Focusing on what a charity achieves gives a better understanding of its work than its financial information alone.'*<sup>7</sup>

The extensive work of the late Professor Mark Lyons at University of Technology Sydney and Professor Myles McGregor-Lowndes OAM at Queensland University of Technology has demonstrated how difficult it is to determine an accurate assessment of administrative costs for charities.

We therefore encourage Government to consider how it may focus the public's attention through voluntary code reporting on outcomes achieved, not administration costs.

**Recommendation 7: Adopt a data-informed approach to determining the donation threshold for reporting.**

Governance Institute members agree there should be a notional fundraising threshold for signing up to and reporting under the code, and that this amount should be substantial enough to restrict the code's intended application to the largest charities or appeals. The Government has proposed the amount of \$3 million in donations as the threshold at which charities fundraising for a natural disaster appeal would be expected to become signatories to the voluntary code.<sup>8</sup> There is no indication in the consultation paper as to how this figure was derived. Governance Institute members consider that public policy should be informed by objective and rigorous evidence and data where possible. If the \$3 million figure is not evidence based, we would encourage Treasury to work with ACNC to conduct a time series analysis of natural disaster fundraising appeal data reported by the largest charities to the regulator in recent years to determine an appropriate threshold amount based on the average size of large appeals. The perception of our members is that this evidence would inform a threshold figure that is higher than \$3 million.

**Recommendation 8: Align with ACNC program reporting requirements.**

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<sup>6</sup> Explanatory Memorandum, *National Emergency Declaration Bill 2020* (Cth), para 32.

<sup>7</sup> ACNC 2020, *Bushfire Response 2019-20: Reviews of three Australian charities*, p. 10.

<sup>8</sup> Commonwealth Treasury, *Developing a Transparency Code: A consultation paper*, pp. 6-7.

Governance Institute members understand that from late 2021 the ACNC intends to make it compulsory for all registered charities required to prepare Annual Information Statements to report on at least one program as part of their annual reporting, in order to enhance the Charity Register. The ACNC will define a program as '*an activity or service that a charity runs (whether it be ongoing or temporary, small or large) to pursue it [sic] charitable purpose for its beneficiaries*'.<sup>9</sup> Natural disaster appeals are likely to fall within the definition of large, temporary appeals and thus be eligible to meet the regulator's reporting requirements. To avoid duplication, we would encourage the Government to ensure that reporting requirements under the voluntary code are consistent with any new ACNC guidelines and requirements for program reporting.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M Motto', written in a cursive style.

Megan Motto  
CEO

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<sup>9</sup> ACNC, *AIS Program Previewer*, viewed 10 August 2021, <https://www.acnc.gov.au/ais-program-previewer>