



Law Council
OF AUSTRALIA

Legal Practice Section

Charity Fundraising in the 21st Century

Senate Select Committee on Charity Fundraising in the 21st Century

6 August 2018

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	3
About the Section	4
Acknowledgement	4
Introduction	5
Comments	6
The existing regulatory regime	6
The need for clarification of the policy objectives.....	7
The proposed solution	7
Bringing the regulatory regime into the 21 st century.....	8
Third party fundraising.....	8
Conclusion	8

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities; and
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Mr Philip Jackson SC, Chair
- Ms Maureen Peatman, Deputy Chair
- Mr Michael James, Treasurer
- Ms Tanya Berlis
- Mr Dennis Bluth
- Mr Mark Cerche
- Dr Leonie Kelleher OAM
- Mr Geoff Provis

Acknowledgement

The Law Council is grateful to the Not-for-profit Legal Practice and Charities Committee (**the Committee**) of its Legal Practice Section for preparing this submission.

The Committee was established in March 2016 and comprises leading practitioners in the not-for-profit area from around Australia:

The objectives of the Committee include:

- to engage with financial accountability and taxation laws and policies that affect NFP organisations;
- to promote the administration of justice and the development and improvement of laws and policies affecting NFP organisations; and
- to contribute to the implementation of the Law Council's International Strategy.

Introduction

1. The current legal framework for the regulation of fundraising in Australia requires urgent and substantial reform.
2. This is not a new observation:
 - calls to action for major reform have been made for decades, and have been getting louder in recent years;
 - charities, other fundraisers, relevant peak bodies from the not-for-profit sector and the legal/accounting professions have consistently produced data and reports highlighting the issues, and the cost and frustration experienced by charities; and
 - there have been numerous previous inquiries by various Governments that have also examined the regulation of fundraising, all of which have recorded concerns about compliance costs, complexity, frustration, and confirmed the need to achieve uniformity, greater efficiency and effectiveness of fundraising regulation.¹
3. However, significant issues remain unaddressed.
4. The current mantra of all Australian governments – Federal, State and Territory – is to reduce red tape and to enact laws and regulations that address the core policy criteria of *simplicity, efficiency, equity (fairness) and integrity*.
5. Charities (small and large) rely on fundraising. Indeed, many charities would not be financially sustainable without the generosity of the Australian public through donations and other fundraising initiatives, particularly given continuing pressure on government's budgets.² However, the cost of compliance with each of the myriad of archaic, duplicative (yet often conflicting) fundraising laws across Australia is unjustified and unsustainable. Every dollar spent by a charity on administrative costs is a dollar that is not applied in pursuing the core purpose of the charity.
6. The Committee asks that the Senate Select Committee recognise, as a fundamental observation in its report, the significant contribution that is made by charities and the not-for-profit sector to the great benefit of Australia and the world. The purposes of the sector reflect the cares and concerns of the Australian public – benevolent relief, the environment, aged care, disability services, the arts, health and research, scientific innovation, education and many more. There are approximately 57,000 charities registered with the Australian Charities and Not-for-Profits Commission (**ACNC**), and around 600,000 Australian not-for-profit organisations in total, which have been estimated to contribute around \$129 billion to the Australian economy.³
7. The Committee has had the benefit of reading the submission prepared by Justice Connect and commends Justice Connect for the extensive work and consultation it has undertaken to address the areas of concern in respect of fundraising under the

¹ The Committee refers to the submission of Justice Connect to this Inquiry which references previous inquiries dating back to 1995.

² Australian Charities and Not-for-profits Commission, *Economic contribution of the Australian charity sector* (November 2017) <http://www.acnc.gov.au/ACNC/Publications/Reports/Economic_contribution_report.aspx>.

³ Ibid.

banner of *#fixfundraising*. The Law Council is a supporter of the *#fixfundraising* campaign.⁴

8. The time for action is now. A plan for reform is not only available to the Committee, but is fully considered, robust, policy-focused and legally sound. It provides an opportunity for all Australian governments to demonstrate that they are unified in their commitment to deliver the reform that the sector requires.
9. The Law Council also supported the call by Justice Connect for a proposed introduction date of **1 July 2019** for a new regulatory regime and is happy to participate in any further meetings for the purpose of achieving implementation by this date. The cost of postponing the reform is too high given the clear benefits that will flow to charities from the required reform.
10. The Committee does not intend to address all of the Terms of Reference individually. Rather, the Committee addresses several broad topics which it suggests require particular focus.

Comments

The existing regulatory regime

11. The members of the Committee comprise a range of lawyers – barristers, academics, charity law specialists from major legal firms and advocates – and have experienced first-hand the frustrations of navigating (and explaining) the regulatory fundraising regime. There is also an unjustifiable strain on lawyers acting pro bono in dealing with queries relating to this area. The time spent on this area would be much better directed toward outcomes-focused legal matters.
12. Fundamentally, the regime is out of date. The 21st century is unquestionably the digital age, and the regulatory regime must reflect modern society and the shift to on-line borderless (national) fundraising appeals through the internet and social media. However, as highlighted in the submission of Justice Connect to this Inquiry, the current regulation is 'face-to-face centric', which requires compliance with a raft of conflicting requirements across each State/Territory.⁵ The compliance burden is a labyrinth of different registration, compliance and reporting requirements, which are not only time-consuming and costly from a resources perspective, but are also obsolete (and increasingly questionable) in many respects. As noted in the submission by Justice Connect, fundraising is the cause of the greatest amount of regulatory burden, at a cost of more than \$15 million annually for the charity sector alone. A nationally consistent approach under the established *Australian Consumer Law (ACL)* multi-regulator framework would avoid wasting precious regulatory resources and allow the publication of national guidance documents.
13. The Committee agrees with the submission by Justice Connect that the complexity of the current fundraising laws often results in compliance breaches arising from

⁴ As listed on the *#fixfundraising* supporter page: Not-for-profit Law, *#fixfundraising supporters* (10 August 2017) Justice Connect <<https://www.nfplaw.org.au/supporters-stories>>.

⁵ With the exception of the Northern Territory, which does not have any fundraising laws or regulations. As noted in the submission by Justice Connect, the current regulatory regime across Australia involves more than 133,000 words and 400 pages of legislation and regulations, as well as extensive case law, policy and codes of conduct.

accidental non-compliance for ‘minor and unintentional mistakes’.⁶ In respect of serious breaches (which occur infrequently, but should be the main focus of compliance activity), the introduction of simple and consistent legislation brings the added advantage to focus on education and enforcement thereby providing better support for ethical conduct. Education and clarity are often the key to compliance.

14. When some charities make a decision not to fundraise in a particular jurisdiction due to administrative costs of compliance, then that is a clear signal that major reform is required.
15. The only option that should be considered is a national regime that provides for a single and streamlined fundraising regulatory framework.

The need for clarification of the policy objectives

16. There is a need for a clear statement of the policy of fundraising regulation to be re-established as the existing regulatory regime is focused on the minutiae and detail of “how to / how not to” of fundraising.
17. From a policy perspective, there are two key elements:
 - A statement of policy principle that recognises the requirement to protect the integrity of fundraising through ensuring transparency and ‘best practice’ by those seeking funds, and providing assurance and protection to donors.
 - In line with Government objectives – to ensure that the regulatory regime is simple, understandable, efficient and fair.

The proposed solution

18. The Committee supports the *#fixfundraising* campaign and the recommendations made in the submission to the Senate Select Committee by Justice Connect regarding the proposed solution with the following three elements:
 - (a) minor amendments to the ACL to ensure its application to fundraising activities is broad and clear;
 - (b) repeal of existing State/Territory laws and regulations relating to fundraising; and
 - (c) a core mandatory code of conduct for all fundraisers under the ACL, with accompanying guidance to improve conduct and ensure appropriate educational support.
19. It is also important to ensure that the ACNC, as the regulator of Australian charities (also becoming the regulator in respect of Deductible Gift Recipient (**DGR**) status formerly undertaken by the Australian Taxation Office) is closely involved in the drafting and consultation process that will be required to implement the new regulatory regime. The Committee considers that, since its inception, the ACNC has become a very relevant and central regulatory body which understands and supports the

⁶ Department of Finance, Services and Innovation (NSW), Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited (January 2018).

fundamental requirements of education, clear guidance and information-sharing for the benefit of Australian charities and the not-for-profit sector more generally.

Bringing the regulatory regime into the 21st century

20. The new regulatory regime should be able to deal with fundraising whatever the platform for solicitation and collection: digital and internet fundraising platforms or face-to-face appeals, fundraising events and the use of collectors.
21. The new regulatory regime should reflect best Governmental practice around on-line 'one stop' reporting for charities. The current ACNC system of registration and reporting for charities provides the necessary transparency and accountability to the public, including for current and prospective donors. Reporting under State-based fundraising Acts is now duplicative. Most jurisdictions have already acknowledged this by exempting charities from their State fundraising reporting (and in some cases fundraising registration) requirements.

Third party fundraising

22. The Committee notes that Terms of Reference 'i' asks specifically about suggested mechanisms to regulate third party fundraisers and to ensure the culture of third party fundraisers matches community perceptions of the clients they work with.
23. The Committee does not consider this area to be one which should be a key focus of the Senate Select Committee's Report. The use of third party fundraisers is covered by ACL. The choice by charities to use third party fundraisers is driven in part by the complexity of the current regulatory regime, although outsourcing models are also reflective of the modern workforce and is likely to become more prevalent in the future. The ACNC has also taken steps to address issues in this area in the context of information and guidance issued to charities in relation to how they engage and work with third party fundraisers. We also note that many of the concerns that are publicised around particular methods of fundraising should be able to be appropriately addressed by the ACL.

Conclusion

24. The Law Council is a supporter of the *#fixfundraising* campaign.
25. The Committee supports the detailed submission to the Inquiry by Justice Connect's Not-for-profit Law service, which outlines a proposal for reform. This reform proposal will achieve a modern and nationally consistent fundraising law regime. This reform is necessary to reduce red tape and to address core policy criteria of simplicity, efficiency, equity (fairness) and integrity.
26. The Committee supports a proposed introduction date of 1 July 2019 for a new regulatory regime and is happy to participate in any further meetings for the purpose of achieving implementation by this date.
27. The Law Council and the Committee looks forward to reviewing the Committee's report upon its release.
28. For further comment or clarification on any of the matters raised in this paper please contact Jennifer Batrouney QC, Chair, Charities & Not-for-Profits Committee on (T) 03 9225 8528 or at (E) Jennifer_batrouney@vicbar.com.au.