



Law Council
OF AUSTRALIA

Office of the President

16 September 2020

Counsel Assisting
Royal Commission into
National Natural Disaster Arrangements
Locked Bag 2000
MANUKA ACT 2603

By email: RCNDA.enquiries@royalcommission.gov.au

Dear Counsel Assisting

Royal Commission into National Natural Disaster Arrangements: Draft Propositions by Counsel Assisting

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide comments on the Draft Propositions (**Draft Propositions**) by Counsel Assisting the Royal Commission into National Natural Disaster Arrangements (**Royal Commission**).
2. The Law Council is grateful for the contributions to this submission of the Queensland Law Society, the Law Council's Access to Justice Committee, the Charities and Not-for-profits Committee and Australian Environment and Planning Law Group of the Law Council's Legal Practices Section and the Military Justice Committee of the Law Council's Federal Litigation and Dispute Resolution Section.
3. While the Law Council has endeavoured to ensure that its responses are as concise as possible, it has not been possible to confine the responses to the Excel template and word limit as requested. The Law Council apologises for any inconvenience caused.

Provision of legal assistance

Draft Proposition H9 – Pre-agreed recovery programs

4. The Law Council strongly supports Proposition H9. A wide array of legal issues arises as a result of disasters such as bushfires or floods, including in relation to insurance claims, accommodation, debt and family law (among others). Effective, co-ordinated and properly funded legal assistance services are essential to disaster recovery. Services such as outreach to recovery centres, 'on-the-ground' advice, lawyer and client triage, telephone advice services and dedicated online and physical resources are vital following disaster events and must be linked to long term support.
5. Additionally, these measures must be complimented by 'pre-agreed' support services including extensive community legal education, to ensure that communities are prepared for, and can minimise, the impact of disaster events. Legal assistance sector organisations such as Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services must be properly funded at

all times to provide these necessary services. The Law Council also recommends that a task force of all key stakeholders be established to develop a national legal profession disaster plan (similar to the plan established in Victoria).¹

Charities and not-for-profits

Draft Proposition H7 – Fundraising reform

6. The Law Council supports the principle that the Australian, state and territory governments should work together so as to reduce charities' costs of regulatory compliance and maximise distribution of donated funds. However, the Law Council considers that this is best done in the manner outlined in Justice Connect's *#FixFundraising* campaign, in preference to harmonisation of the existing regulatory framework.² The proposal of the *#FixFundraising* campaign involves repeal, rather than harmonisation, of the state and territory fundraising laws and amendment of the Australian Consumer Law (**ACL**) to clarify its application to charitable and not-for-profit fundraising.
7. The Law Council notes that since the release of the Draft Propositions, the Charitable Fundraising National Working Group has issued a Discussion Paper *Charitable Fundraising in Australia: Proposed cross-border recognition model for charitable fundraisers*.³ The Law Council suggests that Draft Proposition H7 should be reworded to acknowledge this work but also notes that further work is required and that harmonisation is unlikely to address the issues arising in the face of a natural disaster. The Law Council recommends that Draft Proposition H7 be reworded as follows:

The Australian, state and territory governments should work together as a matter of priority to reduce charities' costs of regulatory compliance and maximise distribution of donated funds. The steps being made to centralise licencing and reporting (via Australian Charities and Not-for-profits Commission registration), while useful in reducing some red tape, do not address the issues which arise in the face of a disaster.

The issues which arise in relation to charitable and community fundraising in the face of a natural disaster require a strengthened application of the Australian Consumer Law and a set of regulatory principles about the conduct of fundraising activities. A nationally consistent regulatory system will reduce confusion, red tape and costs.

Current simplification steps

8. Under the proposed cross border recognition model for charitable fundraisers released by the Charitable Fundraising National Working Group, the application and reporting processes are to be simplified. An Australian Charities and Not-for-profits Commission (**ACNC**) registered charity can be deemed to hold a fundraising authority in each participating jurisdiction by virtue of its registration as a charity with

¹ Victorian Legal Assistance Forum, *The Victorian Legal Profession's Disaster Plan: Disaster Legal Help Victoria* <<https://www.vicbar.com.au/sites/default/files/Documents/disaster.pdf>>.

² Justice Connect Not-for-profit Law, *Fundraising Reform* <<https://www.nfplaw.org.au/fundraisingreform>>.

³ Charitable Fundraising National Working Group, *Charitable Fundraising in Australia: Proposed cross-border recognition model for charitable fundraisers* (Discussion Paper, August 2020) <https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0017/901160/CFNWG_Charitable-Fundraising-Discussion-Paper.pdf>.

the ACNC. However, it would still be required to notify the state and territory regulators when it intends to undertake a charitable fundraising appeal in that location and other conditions under state and territory fundraising laws would still apply. This leaves in place the complex and differing regulatory compliance requirements if a charity is fundraising on the internet or across two or more states or territories. This also only applies to ACNC registered charities and much of the fundraising done in the face of a natural disaster is done by community groups.

Fundraising issues arising in a natural disaster

9. Predominantly the fundraising issues arising in the occurrence and aftermath of a natural disaster do not relate to application processes or reporting but to scams and misleading conduct. While the Law Council welcomes any reform that reduces red tape and compliance costs for charities, the Law Council's recommendation is for the repeal of the inconsistent and cumbersome state and fundraising laws and the amendment of the ACL, for the following reasons:
 - (a) The differing registration, licencing and authority requirements in current fundraising laws did little to prevent charity scams and misleading representations during the bushfires, which is the type of conduct that damages public confidence in the charitable sector. Harmonising the state and territory fundraising laws would not solve this issue. However, having one clearly understood regulator with experience and expertise in misleading conduct would assist in addressing this issue.
 - (b) During the recent bushfires, the Australian Competition and Consumer Commission was the first regulator that provided guidance on scams and misleading representations, analysed in real-time how scams were being conducted using Scamwatch 'Fake Charity' reports, provided a dedicated scam phone line for the public and examined scam reports twice daily with real-time follow up. This is the type of regulator action that is necessary during a natural disaster when circumstances change rapidly and donations are made in the height of emotion.
 - (c) The legal framework for fundraising would be far more effective if there was a single regulator communicating and enforcing the message to fundraisers that they must not be misleading, they must check with the charity they are fundraising for before commencing fundraising and they must apply the money they receive in the way they told the donors they would.

Coordination of charitable and not for profit responses

10. Draft Proposition H5 proposes that national forums for charities should plan for, and facilitate, coordination of charities' involvement in recovery support. The Law Council supports this Draft Proposition and recommends that philanthropic foundations also be involved in these forums going forward. This approach would increase the scope of assistance available, including the pool of resources, and improve the coordination of assistance across a wider cross-section of the not for profit sector.

Legislative scheme for disaster fundraising oversubscription

11. The Law Council recommends that the Royal Commission should specifically address disaster fundraising reform and the effectiveness of current legislative

frameworks in disaster fundraising, management and schemes for disaster fund oversubscription. The Law Council raises for consideration the option of a legislative scheme under which a disaster fund can be taken over and administered by the Government department responsible for community services to provide financial assistance and other relief to the victims of declared disasters. For examples, see the *Community Welfare Act 1987* (NSW) sections 3 and 39 and the *Collections Act 1966* (Qld) section 35B.

Online fundraising challenges

12. The recent bushfires in Australia highlighted the challenges of online fundraising and the community's limited understanding of how such fundraising processes work (for example, the Celeste Barber Facebook fundraiser for Rural Fire Services).
13. Online fundraising laws are in need of reform across Australia. The Law Council suggests that the model legislation recently adopted by the (**ULCC**) may be a useful starting point for to the Royal Commission's deliberations. At its Annual General Meeting on 12 August 2020, the UCLCC proposed the Uniform Benevolent and Community Crowdfunding Act 2020 (**ULCC Act**).⁴ The ULCC Act provides for the application of trust law to all public appeals, with special guidance in relation to surpluses, and contains powers available to the fundraisers to properly administer the funds raised through the information public appeal.
14. The ULCC Act, if adopted, allows for judicial oversight where appropriate and recognises the important role of internet based crowdfunding platforms. There is a right to halt the appeal if the appeal was initiated without the consent of a qualified donee for whose benefit the appeal was initiated. The qualified donee through an authorised representative, would be able to demand that the appeal be halted and the organiser or intermediary would have to comply with the demand. In the event the appeal organiser or intermediary fails to comply with the objection by a qualified donee, the ULCC Act would provide the right to apply to the court for injunctive relief.
15. A similar legislative framework in Australia could allow for mechanisms for public appeal organisers to raise and transfer funds to the relevant services efficiently and in the spirit of which the funds were donated.

Coordinating volunteers

16. The Draft Propositions highlight some issues associated with the coordination of volunteers in response to national natural disasters. The Law Council recommends that consideration be given to a much wider range of challenges involved in the coordination of volunteers in this context.
17. The paper *Volunteer Ready? Preparing Queenslanders for the expected unexpected (Volunteer Ready Paper)* highlights that many of the legislative protections for workers do not apply to volunteers, particularly in times of disaster, when informal and 'spontaneous' volunteering is common.⁵ As volunteers may not

⁴ The Uniform Law Conference of Canada, *Uniform Benevolent and Community Crowdfunding Act 2020* (August 2020) <<http://www.unilaw.ca/home/about-project/>>. The Uniform Law Conference of Canada brings together representatives from each Canadian jurisdiction to promote harmonisation of legislation across jurisdictions. It produces 'model' legislation that has no force of law unless adopted by individual jurisdictions.

⁵ Julie-Anne Tarr et al, 'Volunteer Ready? Preparing Queenslanders for the expected unexpected (issues in insurance and risk management of volunteers)' (June 2012) *Australian Centre for Philanthropy and Nonprofit*

be controlled or directed by a community or government organisation, spontaneous volunteers may be fully exposed to liabilities for damage to property or injury to another person.⁶

18. Draft Proposition H3 suggests that '[s]tate and territory governments should improve arrangements for the coordination of spontaneous volunteers in relief and recovery from natural disasters, for example by adopting the Emergency Volunteering CREW model used in Queensland'. The Law Council supports consideration of the CREW model, under which Volunteering Queensland, in times of disaster, matches volunteers with response agencies or community organisations to assist the community.⁷
19. The Law Council also submits that any assessment of coordinating volunteers in times of disaster must necessarily include consideration of:
 - (a) the legislative protections available to volunteers;
 - (b) whether appropriate insurance coverage is available and, if not, what insurance coverage should be available and who should be responsible for providing/implementing it; and
 - (c) the benefit of training volunteers in advance of an emergency – in this regard, the Volunteer Ready Paper suggests the concept of a 'Volunteer Ready Card' system of advance registration and training, to provide a concrete, cross-organisational tool for disaster readiness and volunteer education more generally.⁸
20. In considering training and preparing volunteers in advance of an emergency, the Law Council also suggests:
 - (a) Establishing a national pool of volunteers (including lawyers, social workers and counsellors) who can be trained and prepared to assist those in emergency shelters with immediate needs. These volunteers could be trained in advance and accredited, in line with the Volunteer Ready Card system suggested above. These volunteers can also be partnered with existing support structures for longer term assistance to those impacted. The recovery process for individuals can take years, particularly where the victim has lost their home, and there is a need for ongoing legal and other assistance during this time.
 - (b) Investigating online referral options for connecting volunteers and expert assistance services. The Law Council is aware of the significant collaboration in Victoria between Victoria Legal Aid, the Federation of Community Legal Centres, the Law Institute of Victoria, the Victorian Bar and Justice Connect on the *Disaster Legal Help Victoria* initiative. The Law Council understands that Justice Connect also developed a Pro Bono Portal (through which law firms could register) and an online referral pathway so that legal aid commissions and community legal centres could easily refer people to Justice Connect.⁹ A

Studies, Queensland University of Technology

<https://eprints.qut.edu.au/202855/1/V6_Volunteer_discussion_paper_final.pdf> ('Volunteer Ready Paper').

⁶ Ibid pt 7.

⁷ Emergency Volunteering CREW, *About* <<https://emergencyvolunteering.com.au/qld/about>>.

⁸ *Volunteer Ready Paper*, 42.

⁹ Justice Connect, *Pro bono response to bushfires* <<https://justiceconnect.org.au/bushfireprobono/>>.

key part of the model was to connect victims to local support services where possible, which allowed the work to be directed into the local communities. This approach assisted recovery efforts, built networks and better directed the victim to a suitability qualified expert. It is the Law Council's understanding that a similar system was also adopted and implemented in NSW and is worthy of careful consideration.

- (c) The need for preparing and maintaining helpful resources and training for volunteers, which are consistently and regularly updated. These resources could be used for the 'trained' pool of volunteers, but could also form the basis of emergency 'fast-tracked' training if additional volunteers were needed on an urgent basis.

Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)

- 21. Many of the Draft Propositions recommend the development of harmonised data collection and sharing of information.¹⁰ The Law Council notes that the Interim Report of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)* Review has made similar recommendations and that work done since the release of the Interim Report has been directed at developing these national concepts in more detail. The Law Council suggests that the Draft Propositions should cross refer to the EPBC Act Review recommendations. Further, governments in all Australian jurisdictions should be urged to embrace the proposed National Environmental Standards, particularly regarding data collection and information sharing, to ensure efficiency and limit duplication of effort.
- 22. An extensive number of the Draft Propositions suggest initiatives which should be led by national scientific bodies. The Law Council notes that it is critical that such initiatives be supported by adequate financial and human resources.
- 23. The EPBC Act Review Interim Report proposes a National Environmental Standard for Indigenous Engagement. Provided that this Standard is endorsed by Aboriginal and Torres Strait Islander organisations as an appropriate standard for engagement with Traditional owners, it should be adopted/used by governments to implement propositions F21-F25.

Australian Defence Force Assistance

- 24. The Law Council has no concern, in principle, with Draft Propositions C13, C14 and C15 to improve the agility and flexibility of Australian Defence Force (**ADF**) assistance in natural disaster response and recovery (among other emergencies).
- 25. The Law Council notes that the Australian Government has taken steps towards implementing the matters in Draft Propositions C14 and C15 concerning the arrangements for the 'call out' of ADF reservists, and privileges and immunities for ADF personnel and Defence staff acting in the course of their duties in responding to a disaster or other emergency, through the introduction of the Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 on 3 September 2020. The specific provisions of the Bill will require detailed analysis as part of the Parliamentary scrutiny of the Bill. Under any modified arrangements that may result in the more frequent use of call out powers in response to natural disasters, it will be important to implement adequate legal and

¹⁰ See, eg, Draft Propositions D1-D3, D5, D8-D9, D13, D23, H18, H21, and H24.

administrative mechanisms to ensure that each ADF member who is called out as part of a disaster response or recovery effort possesses appropriate skills and training for the particular tasks they are required to carry out.

Insurance arrangements

26. The Law Council suggests that when considering insurance issues, the Royal Commission carefully examine the Natural Disaster Fund in New Zealand as a potential starting point for development of a possible joint venture scheme with private insurers to provide a disaster insurance scheme available to all Australians.¹¹

Contact

27. Should you require further information or clarification, in the first instance please contact Mr John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President

¹¹ Earthquake Commission (NZ), *The Natural Disaster Fund* (Web Page, 18 October 2019) <<https://www.eqc.govt.nz/about-eqc/our-role/ndf>>.