

Committee Secretary
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

29 July 2018

Dear Sir/Madam

Re: **Submission to the Select Committee on Charity Fundraising
in the 21st Century.**

Thank you for the opportunity to make a submission to the Select Committee on Charity Fundraising in the 21st Century.

Before responding in detail to the Terms of Reference, I wish to make the following general points:

1. The Committee needs to take into consideration that there is currently no commonly recognised Australia-wide definition of the term "fundraising". It is a cultural term which has different meanings in different communities;
2. One of the fundamental economic characteristics of the "charitable fundraising" market is that it relies on a high degree of "trust" in that the "buyer" (or donor) has little or no control over the quality of the "charitable goods" (charitable activity) purchased. This is why some sort of "badge of honour", such as a license to fundraise, is important public policy;
3. The historic rationale for regulating public fundraising is based on the perceived need to ensure that people who solicit funds from the public for a charitable or not-for-profit purpose do not mislead those who are solicited by diverting funds to their private profit;
4. Any consideration of the future regulation of "charity fundraising" needs to be considered in the light of the fact that there are large numbers of not-for-profit organisations in Australia that are engaged in fundraising but which are not "charities". Any regulation of "fundraising" need to take these organisations into account;

The key recommendation in this submission is for the development of National Model Fundraising legislation which would then be adopted by all States and Territories. State and Territory governments would continue to regulate the fundraising activities of not-for-profit organisations that are not registered with the ACNC but using a common regulatory framework and definitions.

Once such a uniform regulatory framework is in place, the ACNC would negotiate with the State and Territory fundraising regulators a “report-once” arrangement for charities registered with the ACNC to avoid duplicating reporting requirements.

Mutual recognition of licensed not-for-profit fundraising entities across all States and Territories would then be possible.

Once such arrangements are in place, charities registered with the ACNC would then be licensed to conduct fundraising activities in all Australia jurisdictions under a state-based uniform fundraising licencing scheme and other not-for-profit organisations issued licenses in any State or Territory would be recognised in all other Australian jurisdictions.

Detailed responses to each of the items in the terms of reference are attached.

Forwarded for your consideration.

Yours faithfully

Ted Flack

Profile:

Dr “Ted” E.D.H. Flack. Ph.D., B.Ec., EFFIA., JP (Qual) has 38 years’ experience as a practitioner in the not-for-profit sector, having held general management and senior communications and fundraising positions in a number of well-known charities. While completing his Doctorate he worked as a lecturer in Non-profit Studies, Faculty of Business, at Queensland University of Technology, Brisbane.

Later, Ted provided consultancy services to a wide range of non-profit organisations and to a number of Federal and State government inquiries. He retired in 2017 but remains a regular guest speaker on nonprofit governance, fundraising, regulation and ethics.

Submission to the Select Committee on Charity Fundraising in the 21st Century from Dr Ted Flack, Ph.D., B.Ec., EFFIA, JP (Qual)

The following responses are offered to the following question in the Terms of Reference

a. whether the current framework of fundraising regulation creates unnecessary problems for charities and organisations who rely on donations from Australian supporters;

The fundamental problem with the current framework of fundraising regulation is the multiple and inconsistent regulatory regimes that not-for-profit organisations must comply with across the seven different State and Territory jurisdictions in Australia (McGregor-Lowndes, et al. 2014.)

Six national inquiries on regulation of the not-for-profit sector have been conducted since 1995. Each of these inquiries found that it was necessary to simplify and harmonise regulation for the not-for-profit sector (and in particular charities) and recommended some form of independent national regulator as a solution.

The current complex regulatory environment imposes significant costs on organisations that must register in multiple state and territory regulatory regimes. The inconsistencies with what constitutes “fundraising” across these regimes also means that registered organisations must prepare several different versions of their financial reports. For example, in NSW, each “Appeal for support” must be reported separately whilst in other jurisdictions, this is not required. Similarly, income from bequests is not covered by the definition of fundraising in Victoria but in Queensland it is (McGregor-Lowndes et al. 2014).

One of the reasons for escalating of costs of compliance for not-for-profit organisations is the changing use by fundraisers of channels of communication with potential “buyers” for fundraising products. The use of the World Wide Web, social media and computerised messaging technologies mean that State and Territory boundaries are no longer suitable as boundaries for fundraising regulation. As a result, a fundraising organisation with a web site that solicits donations in South Australia may be properly registered and compliant in South Australia but may breach fundraising regulations in other States or Territories where its web site can be viewed (Lind, 2017).

b. whether current fundraising laws meet the objectives that guided the decision to regulate donations;

It is widely agreed that the current policy framework, based on street collections, is no longer appropriate as a model on which to base modern fundraising regulation because that framework no-longer is relevant to modern fundraising

practice. (Industry Commission. 1995; Productivity Commission. 2010; Council of Australian Governments. 2013; Commonwealth Department of Treasury. 2014; Department of Prime Minister and Cabinet, 2012.)

Much of the current framework of fundraising regulation in Australian States and Territories has its historical origins in the (British) Metropolitan Streets Act 1903, 3 Edw. 7, c.17. (McGregor-Lowndes, Myles. 2014). This Act and its derivatives in Australian States and Territories were designed to regulate the conduct of public fundraising activities that were largely conducted on the street. Such street fundraising now constitutes a very small part of modern fundraising practice.

c. whether current fundraising compliance regimes allow charities to cultivate donor activity and make optimal use of resources donors provide;

Given that the present regulatory environment for fundraising charities is overly complex and causes high compliance costs, it follows that, as a result, the current regulatory framework unnecessarily diverts scarce resources gained from fundraising. It is more difficult to identify examples of the ways in which the present regime prevents or inhibits charities in their efforts to cultivate donor activity.

One example of how a regulatory regime inhibits the cultivation of donors is the 50% cost of fundraising cap placed by the New South Wales regulation of appeals for support. The problem with this cap is that it is based on the costs and revenue generated by an appeal for support in a single accounting year. The successful cultivation of donors typically takes several years during which period the costs and revenue from a cultivation campaign can exceed 50% in the first year, but in subsequent years the percentage decreases as costs decrease and revenue increase. Measured over a three to five year period, for example, the cost ratio often decreases to around 12% and much less if a bequest were later to be made by a long-time donor. The imposition of such cost-of-fundraising caps can have the effect of inhibiting the cultivation of donors over time.

d. the loss in productivity for the thousands of charities who try to meet the requirements of the seven different fundraising regimes;

Refer to paragraph marked "a" above.

e. whether the current frameworks for investigation and enforcement are the best model for the contemporary fundraising environment;

The key issues that must be addressed when assessing whether the current frameworks provide the best model is to ask the question:

What kind of fundraising behaviours are to be regulated and who are the best placed regulators to regulate those behaviours?

At the highest level, the evidence suggests that it is necessary to license those organisations that are to be permitted to solicit funds from the public for a charitable or not-for-profit purpose. It is clear that the public want to have some mechanism to assure them that those that solicit funds are authorised agents of a genuine not-for-profit organisation. It follows that all not-for-profit organisations that solicit from the general public need to be licensed by some government or semi-government agency at either State or Commonwealth level to ensure their authenticity.

At present, charities that wish to solicit funds from the public and have access to charitable tax concessions including endorsement as a Deductible Gift Recipient, are regulated by both State/Territory fundraising regulators and by the Australian Charities and Not-for-profit Commission (ACNC). While the ACNC does not regulate fundraising, it does have oversight of the good governance of registered charities and has issued guidelines to assist charities with sound fundraising practice. The ACNC refers most routine complaints about fundraising practice to the relevant State or Territory regulators for enforcement action.

These arrangements are not the most efficient solution due to the issues canvassed in paragraph marked "a" above, but given that the ACNC regulates only a small proportion of the hundreds of thousands of not-for-profit organisations that conduct public fundraising in Australia, the ACNC does not offer an Australia-wide solution at present.

Those charities and not-for-profit organisations that are not registered with the ACNC but which solicit funds from the public are currently licensed by their respective State and Territory fundraising regulators.

The threat of revocation of registration at either ACNC or State/Territory licence level for failure to conduct their fundraising activities in accordance with their conditions of registration or licence would no doubt be seen by those concerned as having a serious impact on the capacity of the organisation concerned to continue operations.

It will be noted that there are a range of behaviours that are subject to other types of regulations.

- If the fundraising behaviour is an alleged fraud, then the police are best placed to conduct the investigation.
- If the fundraising behaviour is nuisance public solicitation, then the best regulator may well be the local council who would routinely be responsible for investigating similar nuisance behaviours among commercial operators;
- If the fundraising behaviour is alleged misuse of funds raised by a licensed fundraising organisation, then an appropriate government regulator may well be the appropriate regulator;
- If the fundraising behaviour to be investigated is alleged to be of an unconscionable kind, rather than a breach of any laws, then action might best

be taken under the provisions of a Code of Conduct policed by a professional body such as Fundraising Institute Australia or the Public Fundraising Regulatory Association.

It should be noted that the activities described as not-for-profit “fundraising” include a range of fundraising “products”, “solicitation channels” and “payment methods” that are likely to be regulated under legislation that is not specifically intended to regulate fundraising.

The following table illustrates the range of transactions involved in “fundraising”:

| Market for Charitable Intensions | | |
|---|-----------------------------|------------------------------------|
| Products | Solicitation Channels | Payment Methods |
| Donations | Person to person | Cash |
| Bequests | Telephone | Cheques & Money Orders |
| Special Event Sales | Letter | Creditcard at POS |
| Charitable Gambling products | Email | Creditcard online |
| Experiential fundraising event revenues | Texting | Creditcard - authority to debit |
| Purchase of goods & services | Workplace giving | Bank transfer online |
| Sponsorships | P2P Social Media | Bank transfer - authority to debit |
| Markets, Fetes, Fairs | Street collections | |
| Second hand goods | Direct response advertising | |
| Sausage sizzles | Print media | |
| Commercial Sales with charity benefit | Radio | |
| | TV advertising | |
| | On-line advertising | |
| | Social media advertising | |
| | Crowdfunding | |
| | Outdoor advertising | |
| | Letterbox distribution | |

Examples of general legislation that may be applicable to some kinds of fundraising transactions include Gaming legislation, Consumer law, Communications law, Local Government legislation, Privacy legislation etc. and these transactions are best regulated by the relevant specialist regulators.

It should be noted that the attribute that makes any of these transactions “fundraising” is the stated or implicit undertaking in the solicitation to the “buyer” that the transaction is for the benefit of a charitable or not-for-profit purpose.

f. how Federal, State and Territory Governments could work together to provide charities with a nationally-consistent, contemporary and fit-for-purpose fundraising regime;

The Productivity Commission’s review in 2010 recommended the establishment of a national one-stop-shop regulatory framework to oversee the not-for-profit sector, grant tax endorsements and to pursue greater harmonisation of regulation between the states and territories and the Commonwealth to reduce compliance costs.

The ACNC Bill was widely supported by the charity sector in the belief that a “one-stop shop” national regulator would reduce the regulatory burden caused by the fragmented and duplicative regulatory framework clearly identified in the numerous previous inquiries. The sector’s support for the ACNC was largely based on the understanding that there may be a relatively small increase in the regulatory burden initially, but that over time, the ACNC’s harmonisation work would lower the overall burden.

In the first five years the ACNC has made some progress in reducing the complex regulatory burden on charities – the major reason why the charity sector supported the establishment of the ACNC. However, the ACNC has not reduced the burden of State and Territory fundraising regulation.

The ACNC regulates only those charities registered with it. It does not regulate charities that choose not to be registered with it, nor does it regulate the rest of the estimated 600,000 not-for-profit entities in Australia¹.

Option A

That the ACNC be provided with the legislative powers and resources to allow it to regulate fundraising.

For the ACNC to take responsibility of regulating all not-for-profit fundraising there would need to be a referral to the Commonwealth of the State and Territory powers to regulate fundraising, the widening of the objects of the ACNC to include all not-for-profit entities and the commitment by the Commonwealth Government of very considerable additional resources.

Given the difficulties in negotiating such an arrangement with the States and Territories, the very considerable resources needed by the ACNC to take on such a task and the significant impact on the 560,000 not-for-profits that would need to be contacted and registered by the ACNC, this solution does not appear viable.

Option B.

The development and adoption of National Model Fundraising Regulation

Step 1. That the Commonwealth Government appoints an expert panel to develop a National Model Fundraising Regulation in close consultation with State and Territory regulators and not-for-profit peak bodies;

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¹ The Productivity Commission's 2010 research report Contribution of the Not-for-profit Sector estimated that there were roughly 600 000 not-for-profits in Australia. Of these, nearly 60 000 are registered with the ACNC.

Step 2. Negotiate the progressive amendment of State and Territory existing fundraising legislation to comply with the agreed National Model.

Step 3. Amend the ACNC legislation to include powers to allow the ACNC to regulate the fundraising activities of charities in accordance with the National Model. (State and Territory regulators would continue to regulate non-charity, not-for-profit fundraising entities.)

Step 4. Negotiate with State and Territory fundraising regulators for a “report once” arrangement for ACNC registered charities to reduce the compliance costs of reporting both to the ACNC and State and Territory fundraising regulators.

Recommendation

That the Committee adopt Option B as the most practical means of reforming fundraising regulation in Australia.

g. the appropriate donor-focused expectations and requirements that should govern fundraising regulation in the 21st century;

As previously stated, it is my opinion, based on 38 years of engagement in the not-for-profit sector that the great majority of donors and other “buyers” of “charitable intentions” expect to be assured that those that solicit their purchases are genuine representatives of charitable and not-for-profit causes. This assurance is best provided by some type of licensing arrangement.

Where the buyer can reasonably assess the quality and quantity of their purchase, such as in the case of tickets to a charity function or event, purchase at sausage sizzle or purchase of a commercial sponsorship arrangement, then there is little need for the “badge of quality” provided by a fundraising licence.

Where the buyer has little information about the quality and quantity of their purchase, such as in the case of an on-line donation, a collection box, purchase of a raffle ticket, sponsorship of a child in a third world country, etc. then the decision to purchase is likely to be informed by the “badge of quality” provided by a fundraising licence. This is the fundamental policy intent of State and Territory fundraising regulation.

Where “buyers” of “charitable intentions” are solicited by persons or organisations that they do not know, and they are unable to assess the quality/quantity of their purchase, such as is often the case in a donation, the buyer may also want reassurance that the solicitor is a bona fide representative of a licensed not-for-profit. Responding to this need, provision for the authorisation and identification of fundraisers is included in most State and Territory fundraising regulation.

It is asserted in the media that donors to charities also want to know “how much of my donation actually get to the people who need it?” There is little evidence in the literature on charitable giving to support this being a widespread concern among donors, however some State and Territory fundraising regulation requires reports and returns that provide some of this type of information (Flack, 2004).

It should also be noted that presently there is no common agreement, either in the fundraising or accounting literature, on how cost of fundraising calculations can be reported accurately or consistently (Flack, et al, 2014). The available evidence suggests that regulation of cost-of-fundraising does not achieve the regulators’ purpose and encourages counter-productive behaviours (Flack, 2004).

h. how the Australian consumer law should apply to not-for-profit fundraising activities;

Despite the support from the charity sector for the Australian Competition & Consumer Commission (ACCC) to provide a solution as a national regulator of charitable fundraising, there are some conceptual as well as policy problems with such a solution.

Perhaps the most serious conceptual problem is that ACCC legislation is essentially about market-based transactions where there are exchanges of value at market rates. This framework does not easily fit a transaction involving charitable intentions such as a donation. There is no reciprocal exchange in a donation transaction and there are no market rates for donations.

It is true that where the fundraising transaction amounts to “engaging in trade or commerce”, such as in opportunity shops, stalls, fetes and fares, entertainments, etc., the Australian Consumer Law does already apply.

It will be noted that the Australian Competition & Consumer Commission (ACCC) does not support using Australian Consumer Law as a replacement for State and territory fundraising legislation (Australian Competition & Consumer Commission. 2018.)

i. what are the best mechanisms to regulate third party fundraisers and to ensure the culture of third party fundraisers matches community perceptions of the clients they work with;

Given the implementation of the reforms recommended in Option B in paragraph marked “f” above, fundraising licenses under the Model Fundraising Regulation should include license conditions that require adherence to a Codes of Practice that could include guidance for the behaviours of third party fundraisers. The responsibility for adherence to the license conditions should lie with those responsible for the governance of the licensed fundraising entity.

Further self-regulation mechanisms such as Fundraising Institute Australia's Standards and training can be expected to further reduce inappropriate fundraising behaviours.

j. whether a harmonised, contemporary fundraising regime could help in addressing concerns about the potential influence of foreign money on civil society and political debate in Australia;

It will be noted that only those not-for-profit entities that wish to raise funds from the public in the States and Territories except Northern Territory are currently required to register or obtain a license from their State/Territory regulator or, if they are a registered charity with the ACNC, from that body. Not-for-profit organisations that raise funds only from among their members are not required to be registered or licensed in some way. Under the recommended reforms outlined in paragraph marked "f" above this would not change. The misuse of charitable funds for party-political advocacy purposes is already covered under Australian charity law.

It is therefore suggested that fundraising legislation is not the appropriate regulatory mechanism for addressing concerns about the use of funds raised in Australia or overseas to influence civil society and political debate in Australia. Consideration might be given to including appropriate conditions in fundraising licenses issued by regulators.

k. the cost to the charity and not-for-profit sector, and the communities they serve, of postponing fundraising reform;

The available evidence suggests that the costs of compliance in the current inefficient system of fundraising regulation, runs into millions of dollars annually. The current system therefore diverts scarce resources from the charitable purposes for which funds are being raised.

l. any other related matters.

Nil.

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