Inquiry into Charity Fundraising in the 21st Century

Submission to the Select Committee on Charity Fundraising in the 21st Century (Commonwealth)

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Introduction

Federation of Parents and Citizens Associations of New South Wales (P&C Federation) is thankful to the Select Committee into Charity Fundraising in the 21st Century for this opportunity to contribute feedback into this inquiry into Charity Fundraising in the 21st Century. P&C Federation supports the position of individual educational and developmental needs met by a range of differential services expressed through appropriate and well-planned curricula, programs and environments conducted by sensitive and well-trained personnel in conjunction with parents[1] and families.

The core belief of P&C Federation is that the education of our children and youth is the most fundamental means of ensuring individual and collective success and, as a result, is our greatest national resource.

P&C Federation's response to this Inquiry is guided by our belief that the current regulations governing fundraising are unnecessarily labyrinthine and difficult to navigate, and that allowing each State/Territory its own fundraising laws creates excessive red tape. They are also frequently inadequate in addressing fundraising methods in the modern age. Fundraising regulations in Australia should be modernised in a way that is streamlined and nationally consistent, and easy for charities to navigate.

P&C Federation Response to Terms of Reference

A problem underlying fundraising regulations in Australia is that they are highly multi-layered and complex, and charities that have every intention of being compliant may struggle to identify each regulation they need to cover and unintentionally find themselves in breach of fundraising laws. In New South Wales, the State Government has found that the majority of breaches of the State's fundraising laws are "*minor and unintentional mistakes and where noncompliance has occurred it has been the result of complexity and different requirements of the Acts.*"[2]

This complexity is highlighted by situation faced by P&C Associations in New South Wales. Most fundraising in New South Wales is covered by the Charitable Fundraising Act and Regulations, and the Lotteries and Art Unions Act and Regulation, all of which are administered by NSW Fair Trading, which usually require organisations to have a fundraising authority to fundraise. Most P&C Associations in New South Wales public schools are exempt from the need for a fundraising authority, as they are established under the NSW *Education Act 1990,* and Section 9.3(b) of the *Charitable Fundraising Act 1991* states that organisations established by an Act and subject to the control and direction of a Minister can fundraise without an authority.

P&C Associations not incorporated under the *Parents and Citizens Associations Incorporation Act 1976* may still choose to be affiliated with P&C Federation, in which case they agree to operate under the Standard Constitution for P&C Associations, which is established by the New South Wales Minister of Education, and may therefore fundraise without an authority as per Section 9.3(b) of the *Charitable Fundraising Act 1991*. However, P&C Associations not incorporated under the 1976 Act which are not affiliated with P&C Federation and instead are registered with Fair Trading are in a less clear position

[1] "Parent" refers to anyone with legal care of a child, such as a parent, carer or legal guardian
[2] New South Wales Government, Charitable Fundraising Review, Discussion Paper, 2016

– they may adopt any constitution that is line with the Fair Trading Model Constitution. This means they are not necessarily governed by the Constitution set by the New South Wales Minister of Education and thus may not be exempt under Section 9.3(b) of the *Charitable Fundraising Act*. On the other hand, they are still constituted under section 115 of the NSW *Education Act 1990*, which is under the control of a Minister, and organisations registered with Fair Trading are administered under the *Associations Incorporations Act 2009*, also under the direction and control of a Minister. This sort of ambiguity is entirely needless and should be rectified.

Other complications of Australian fundraising laws include the fact that they do not adequately support modern fundraising, such as crowd funding and online fundraising. Indeed, of all State/Territory fundraising laws, only those of Tasmania and South Australia mention Internet fundraising. New South Wales fundraising laws have no mention of online fundraising, apart from stating that a person conducting fundraising appeals by email and is being remunerated for it must disclose that they are being remunerated (section 14(a-b) of the *Charitable Fundraising Regulations*). A more general underlying problem is the fact that fundraising laws are not consistent between States/Territories, and fundraising across State/Territory borders may require multiple fundraising permits.

Such flaws could be overcome by the establishment of a single, nationally consistent fundraising regulatory regime that would supersede current State/Territory fundraising regulations. As has been frequently noted by organisations such as Justice Connect, the Commonwealth regulatory framework that could most easily govern fundraising nationally is the Australian Consumer Law (ACL). Much of the ACL currently applies to business, trade or commerce that is not carried on for profit, and it therefore seems likely that it already applies to fundraising activities of not-for-profit organisations. We note that legal advice provided to Justice Connect in 2016 reiterated that the ACL "*currently applies to regulate most ordinary not-for-profit fundraising activities*" and that it "*has the potential to regulate every commercial and non-commercial activity in every Australian State and Territory*", while acknowledging there is a "*need for a clearer and explicit application*."[3] In line with this, the 2017 final report of the ACL Review by Consumer Affairs Australia and New Zealand (CAANZ) noted there are "*considerable challenges and uncertainty that the charitable, not-for-profit and fundraising sector faces in identifying when and how its conduct will be captured by the ACL*". In particular, in determining whether the ACL applies to fundraising, it is unclear whether it depends on the scale or complexity of the fundraising, or on the nature of the relationship between the fundraiser and donor. The Review recommended clarifying "*the current application of the ACL to the activities of charities, not-for-profit entities and fundraisers*", including possible amendments to the ACL to support charity fundraisers.[4]

With that said, we acknowledge that the Australian Competition and Consumer Commission (ACCC) recommended against replacing State/Territory fundraising laws with the ACL, arguing that the ACL and State/Territory fundraising laws are fundamentally different: the ACL focusses on standards of conduct, while State/Territory fundraising laws focus on obligations such as registration/licensing and

[3] Legal advice from Dawson Chambers, in *Joint Statement on Fundraising Reform*. 2016, 12 September. https://www.nfplaw.org.au/sites/default/files/media/Joint_statement_on_fundraising_reformFinal_12_Sept.pdf

[4] Consumer Affairs Australia and New Zealand (CAANZ). 2017. *Australian Consumer Law Review: Final Report*. March

financial reporting.[5] However, we disagree with the ACCC in its statement that the ACL "*is not designed to address the public's ongoing demand for greater accountability in the charities, not-for-profits and fundraising sector*". The conclusions from CAANZ and legal experts mentioned above indicate that the ACL already applies to charity fundraisers to some extent, and we see no reason why the ACL's current focus on standards of conduct could not be extended to cover matters currently covered by State/Territory fundraising laws.

To this end, we believe the ACL should be amended to explicitly mention charity fundraising, thereby removing any ambiguity around the ACL's application to fundraising and facilitating the repeal of State/Territory fundraising laws. Specifically, we believe the following sections of the ACL could be amended to more explicitly cover charitable fundraising activities:

- Amend the definitions of "business", "services" and "trade or commerce" to explicitly reference fundraising.
- Establish a definition of "fundraising activity." We have no objections to the definition suggested by Justice Connect – "*Fundraising activity" includes any activity the purpose or effect of which is the donation of money, goods or services by persons, but does not include the payment or receipt of money only as consideration for goods and services supplied through a business or professional activity (whether or not carried on for profit). An activity can be a fundraising activity even if nothing is received by the fundraiser*
- Amend sections 18, 20 and 50 of the ACL to include reference of fundraising.
- Amend sections 29 and 32 of the ACL to apply some of its paragraphs to fundraising.

We also broadly support the establishment of a code of conduct for charity fundraisers that sits under the ACL which could house many of the requirements currently addressed by State/Territory laws. We reiterate the suggestion of Justice Connect that the South Australian Code of Practice for charities is commendably succinct and understandable, and is thus a viable template for a national fundraising code of conduct.[6] Some factors that such a code of conduct should include are:

- The nature of activities that are considered acceptable fundraising activities. This should clearly allow for crowd-funders and other online fundraising methods, as well as face-to-face and telephone fundraising.
- The expected conduct in a charity's marketing activities, such as the need to respect privacy when an organisation has access to someone's personal contact details.
- The need to maintain acceptable financial records and accounts of fundraising activities, such as income statements and balance sheets, and records of transactions.

Such a national code would establish a uniform set of expected conduct and financial reporting requirements for all charities, and would be readily accessible and understandable to all charities. We do not believe this code should include licensing requirements, and the Committee should instead consider amending the ACNC reporting requirements to cover more fundraising questions in the AIS, in lieu of a licensing regime.

[5] Australian Competition and Consumer Commission (ACCC). 2018. *Submission to Review of Australian Charities and Not-for-profits Commission (ACNC Legislation.*
[6] Justice Connect. 2018. *Supplementary Submission to the Review of Australian Charities and Not-for profits Commission*.

We also recommend allowing P&C Associations to gain Deductible Gift Recipient (DGR) status. Currently, the only donations to P&C Associations that may be tax deductible are those donated to a school building fund that the P&C Association operates. However, there are a host of activities in other than the maintenance of school buildings that P&C Associations would be able to support, such as the provision of teacher support for students with a disability. Granting DGR status to P&C Associations would allow P&C Associations to more easily gain the funds necessary to provide these services.