

29 July 2016

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As I outlined at the meeting on 18 July FIA is dismayed at the content, tone and manner of the draft Discussion Paper. The deliberations of, and recommendations made to Reference Group these past two years have been ignored and we have been forced to produce an alternative version which is attached that removes the most offensive and inaccurate parts of the original draft.

The most benign explanation is that expressed by Cancer Council Queensland in its response. The task that has been set is too ambitious to be achieved in one consultation. It is our belief that there is a need for needs to be two processes; first dealing with the nature of what we are trying to achieve and second addressing the detail.

That does not explain, however, the deficiencies in that part of the draft relating to the Collections Act which FIA has addressed in this alternative version of pages 22 to 26.

The rationale for the proposed increase in regulation – a purported increase in concern about street collections - is unsubstantiated by any empirical data, rather a throwaway line quoted from a UK journalist is supposed to provide that evidence.

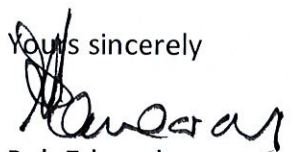
It would appear that no account was taken of the submissions made late last year at the request of the Reference Group particularly that of the Public Fundraising Regulatory Association on 15 October 2015 detailing their successful efforts in conjunction with the Brisbane City Council in reducing the level of complaints in relation to street collections.

A fact that was substantiated by the representative from BCC at the meeting on the 18th.

The focus of the draft lacks balance and proportionality. It highlights a perceived need for greater consumer protection but totally ignores the need to reform the overlap and duplication internally in Queensland between state and local government. This has been a regular feature of NFP Reference Group deliberations. These meetings have been well documented and the minutes efficiently circulated by the OFT but totally ignored in the preparation of the draft Discussion Paper.

I look forward to your response.

Yours sincerely


Rob Edwards
Chief Executive Officer

QUEENSLAND GOVERNMENT NFP SECTOR DISCUSSION PAPER

FUNDRAISING INSTITUTE OF AUSTRALIA RECOMMENDATIONS FOR RE-DRAFTING PAGES 22 TO 26

1. NATURE OF REGULATION

The intention of the Queensland Government is to replace the Collections Act with a new regulatory framework for fundraising. A key issue is what form that regulation should take.

At one end of the spectrum there is black letter law which would continue the current legislative approach down to a level of granularity which prescribes the precise nature of donor receipts. At the other end there is self-regulation which has been successfully adopted and is reducing the level of complaints in Brisbane for face-to-face fundraising.

Since the Collections Act was introduced in 1966, fundraising regulation has proliferated with federal intervention in charities law and telemarketing, involvement of local government in Queensland and growing sophistication and operation of codes of conduct.

On the issue of proportionality, there are 4330 entities registered for fundraising purposes in Queensland. Of these, 2785 or 64 per cent are registered with the ACNC and subject to the ultimate penalty for a charity of cancellation of registration and loss of tax deductible status.

The ACNC is actively providing guidance material around fundraising having published a set of Q&As earlier this year with a more comprehensive best practice guide in the process of completion. The ACNC views good fundraising practice as an essential part of building and maintaining confidence and trust in charities.

Fundraisers in Queensland are subject to the provisions of the Criminal Code Act which is already utilised to a greater extent than the Collections Act in cases of malfeasance such as theft and fraud. The issue for this discussion paper is what form and level of regulation is necessary to protect the people of Queensland from the activities of mainly the 1555 fundraising organisations not registered with the ACNC and what mischief this proposed regulation is seeking to address?

Questions:

- **Should the new fundraising regulatory framework adopt a comprehensive legislative approach replicating laws from other jurisdictions? If so which jurisdictions represent best practice in terms of fundraising regulation?**
- **Should the framework adopt a collaborative approach with other regulators such as the ACNC including entering into MOUs to avoid duplication and overlap?**
- **Should the new framework co-regulate with codes of conduct such as those of FIA and PFRA?**
- **Should the new framework include provisions to delegate authority to organisations such as local government where appropriate?**

2. GENERIC PROVISIONS

Modernising charitable fundraising regulation is one of the most difficult issues facing the NFP sector because laws in each State and Territory, including the Collections Act in Queensland, have evolved differently over the many decades they have been in existence.

As a report commissioned by the ACNC from Deloitte Access Economics published in February 2016 concluded:

“Overwhelmingly, fundraising is the source of the greatest amount of regulatory burden for charitable organisations. Fundraising legislation differs significantly between jurisdictions which very quickly escalates the administrative costs a charity incurs...Fundraising regulation has not kept pace with new forms of fundraising particularly as online campaigns for funds have grown through the use of third party websites. The current arrangements treat fundraising as an activity isolated to one state or territory, when, in reality, even small organisations may attract interest nationally and internationally through online channels such as crowdsourcing websites.”

As many of the techniques applied today by the NFP sector are similar to those used in the commercial sector, certain generic consumer protection provisions in the Australian Consumer Law which are nationally uniform and apply to all media and platforms may be able to be applied to fundraising practices including:

- prohibitions on misleading or deceptive or unconscionable conduct
- prohibitions on the making of false or misleading representations
- protections relating to unsolicited agreements

While there is support throughout the sector for alignment or harmonisation of fundraising regulation there are significant reservations as to whether expansion of the ACL is the best way to achieve this objective.

In the ACL a ‘consumer’ is defined as a person who receives goods or services from a supplier in return for payment. A donor who makes a donation to a charity does not receive anything from a charity except goodwill. In most cases a donation made by a donor is a gift which enables the recipient to deliver on its charitable purpose.

A donation made by a donor is a gift to the charity which is the reason why gifts are tax deductible.

The ‘cooling off’ period provision of the ACL is also problematic for charities as they would be unable to use the funds donated during the cooling off period. This would particularly affect smaller charities with limited cash flows. This will also have significant administrative implications in the case of coin collections such as gold coin collections where it would be impractical to keep individual records or apply a cooling off period.

Further, the relationship between donor and charity is not a contract. It is an agreement which charities readily cancel when donors change their mind in the interests of protecting their reputation.

In relation to door-to-door collections there is a conflict between the Collections Act and the ACL as currently in Queensland collectors cannot call after 5pm on any day whereas under the ACL collectors may call up until 6pm on weekdays. Other jurisdictions also have different approaches.

In giving consideration to the application of the generic principles in the ACL to charities and NFPs, it is important to note the considerable difference in penalties. The maximum penalty under the Collections Act is 40 units or \$4,712 whereas the maximum penalty for false or misleading or unconscionable conduct under the ACL is \$1.1 million for corporations although judges would use discretion in such cases.

Any amendment to the Queensland legislation would have to take into consideration that the ACL is currently under review with a final report due in March 2017. One of the issues under review is the possible application to fundraising activities.

The ACNC has a different approach from the ACL which could be more suited to charities and NFPs. The ACNC requires entities to meet governance and reporting standards. In relation to fundraising, the ACNC applies the question "Is the fundraising conducted with the goal of furthering the charitable purpose of the charity?". (ACNC. **FAQs: Charities and Fundraising**)

As the ACNC already regulates charities, adoption of its principles and extension of its powers to facilitate national fundraising regulation, which would require referral of powers by the States and Territories, could provide for more efficient alignment and consistency than expanding the ACL. However, there are numerous NFPs and individuals raising funds for not for profit/community purposes in Queensland that do not fall within the ambit of the ACNC either because they do not fall within the statutory definition of 'charity' or because they have not applied for federal tax exemption. The Queensland Criminal Code Act covers general criminal offences including theft and fraud. The OFT rarely undertakes any enforcement or compliance actions. In the case of natural disaster appeals the police use their powers to deal with offenders rather than referring to the OFT.

Questions:

- **Should generic principles such as those applying to consumers in the ACL relating to misleading, deceptive or unconscionable conduct, making false and misleading representations and unsolicited agreements be included in the proposed Queensland fundraising framework?**
- **Subject to the ACL review and addressing the concerns of charities, should the ACL generic principles be incorporated into Queensland legislation ahead of national adoption?**
- **Are there unintended consequences for charities relating to tax deductibility, non-fundraising activities and cooling off periods should the ACL be expanded?**
- **Are there other overarching principles such as the ACNC's building trust and confidence principles which should apply to the conduct of fundraising?**
- **Are the current penalties in the Collections Act and the Criminal Code Act adequate for breaches of the legislation?**

3. CO-REGULATION/SELF-REGULATION

Rapid technological change and the changing demographic of an ageing population are presenting challenges for donors, fundraisers and regulators alike. The sector is responding pro-actively to these challenges.

The main representative body with 1500 members, Fundraising Institute of Australia (FIA), is currently conducting a Sustainable Fundraising and Code Review to be completed by the end of

2016. Particular attention is being given to the issue of vulnerable donors. FIA's current Standards of Practice relating to Face-to-Face (street collections and door-to-door), Telemarketing and social media, are attached.

The PFRA is a specialist organisation with about 70 members established in 2015 to improve and police standards in face to face fundraising (where fundraisers ask the public for direct debit donations in the street, at shopping centres and door to door). Its Standard which is currently operating nationally is attached.

ACFID is the organisation representing overseas aid organisations. It has recently reviewed and updated its extensive code and complaint handling procedures.

Codes are more flexible than legislation and can be more easily amended to suit changing conditions. There are a range of options for utilising codes in a regulatory framework. These can extend the application of a code to all entities providing universal coverage beyond the membership of the association involved.

In addition, as in the case of the NSW Charitable Fundraising Regulation 2015, standards of behaviour can be applied to exempt organisations such as small charities as well as others not covered by association membership. This can be achieved by Gazetting guidelines or codes as a condition of the authority to fund raise or as a condition of exemption.

Telecommunications Act provides for formal registration of codes which have the force of law.

Questions:

- **Should the fundraising framework include provision for the recognition and inclusion of codes?**
- **Should recognition and inclusion be a condition of the authority to fundraise?**

4. NATURE OF QUEENSLAND FACE-TO-FACE FUNDRAISING REGULATION

The Queensland fundraising regulation regime for street collection and door-to-door fundraising is the only one in Australia in which the State Government is responsible for the allocation of permits to charities to fundraise in specific locations. In all other jurisdictions this function is the responsibility of local authorities.

There is an advantage to this system in that it reduces the administrative workload for charities and fundraising agencies. Rather than requiring more than 100 permits through individual local authorities, a charity can obtain one permit from OFT. There are however significant disadvantages:

- Many local authorities in Queensland are already involved in fundraising regulation. Many have their own specific administrative requirements for fundraising collections alongside the OFT permit framework. A charity may therefore often require two permits for the same fundraising appeal.
- This duplication creates significant administrative burdens for charities, local authorities and fundraising organisations. It is estimated that the 20 major face-to-face fundraising organisations in Queensland are required to manage regulatory requirements fro OFT PLUS

at least 20 local authorities. This creates a requirement for at least 400 one to one relationships between fundraising organisations and local authorities as well as with OFT.

Individual fundraisers are often required to carry copies of two permits with them. The large number of fundraisers and duplication of permits creates an environment where compliance mistakes are more likely to occur, creating an additional enforcement and compliance burden for all involved.

In this regulatory environment there is a need for a fundraising framework which reduces the overlap and duplication between state and local government regulation as well as protecting donors.

Another feature of Queensland regulation with anti-competitive aspects is the State-wide Appeal System by which a single charity is able to exclude all other charities from fundraising through booking a State-wide Appeal (SWA). This causes significant impacts on many charities in Queensland.

Charities wishing to use face-to-face collections are mostly excluded for up to 20 weeks a year creating a significant barrier to fundraising particularly for charities operating solely within Queensland.

a) Street Collections

The street collection method of fundraising involving soliciting donations directly or commitment to future donations by regular payment is highly effective. However, as the focus of this activity is confined to high population density areas of mostly metropolitan cities, the extent of this activity and the method of collection have generated a noticeable level of complaint.

In response to these complaints the Brisbane City Council and the PFRA have consulted with each other to regulate this activity in the Queensland capital. The PFRA coordinates a voluntary site management plan. The mode of regulation is based on the OFT's permit assignment process and PFRA's self-regulatory standard.

The PFRA undertakes active compliance checking through the use of spot checks on fundraisers which are reported back to the charities and where necessary applies penalties for breaches of the standard. Between 15 and 20 spot checks are carried out on PFRA members' fundraisers each week in locations across Australia.

The Brisbane model is a relatively recent innovation and has reduced the number of complaints significantly. PFRA is applying this model nationally. Feedback from Brisbane City Council indicates that it is successful. This model is based on that used by similar organisations in the UK and New Zealand.

b) Door-to-door

Door-to-door fundraising is a face-to-face technique like street collection.

In recent years there have been few complaints about door-to-door collection. This is mostly due to the fact that this technique is mainly conducted on an annual basis by

charities which are respected household names such as the Salvation Army and the Heart Foundation. They have gained acceptance and a sense of normality.

The FIA Standard of Practice on Face-to-Face Fund Raising relates to both street collections and door-to-door. They are much more detailed than the Queensland Code of Conduct requirement (Appendix 3) covering:

- Training
- Fund raiser identification
- Organisation identification
- Information disclosure
- Professional Conduct

The PFRA Standard and Compliance program for direct debit fundraising also applies to door-to-door fundraising. As part of this program, PFRA inspects members' training sessions and conducts 'shadowing' of door-to-door fundraisers to ensure that they are complying with the PFRA Standard.

5. TELEMARKETING

Unlike most other forms of fundraising, telemarketing is subject to national regulation under the Telemarketing and Research Calls Industry Standard 2007 which restricts calling times to 9am to 8pm on weekdays, 9am to 5pm Saturdays and bans calling on Sundays and public holidays. All charities are bound by these provisions but are provided with a limited exemption which allows them to call numbers on the Do Not Call Register.

Complaints about frequent calls to vulnerable Australians have resulted in a Commonwealth Government consultation on improving procedures to ensure vulnerable donors do not receive telephone solicitations if they do not wish to.

Although the Industry Standard does not appear in Queensland law, it applies to all telemarketers making calls to and in Queensland. The Standard could be included in the fundraising framework by publishing it on the OFT website together with the FIA Telemarketing Standards of Practice. To include additional provisions in Queensland legislation would impose extra costs on Queensland charities because many of the calls are made from outside the State and any special conditions would impose extra costs.

Minimum standards in relation to all the above could be supported by best practice material on the OFT website and through relevant industry association to help guide the activities of charities and not-for-profit organisations.

From the public's point of view, information could also be provided on the OFT website to ensure the public are aware of the standards of behaviour to expect from charitable collectors, their rights in relation to refusing requests for donations and their ability to make complaints.

Fact sheets could be provided that include information on:

- Ways to identify a charity including via the ACNC
- What information should be in fund raising material
- Dos and Don'ts in relation to soliciting donations
- What personal details can be safely provided to a charity collector

– How to make a complaint and to whom

Questions:

- **Should street collection fundraising be regulated by local government?**
- **Should the fundraising framework contain provisions for delegation to local government?**
- **Should the Conditions in Section 41 of the Collections Regulation (Appendix 3) be retained?**
- **How should the conduct of face-to-face fund raising be regulated?**
- **Should the State-wide Appeal System (SWA) be reviewed?**
- **Should the Telemarketing and Research Calls Industry Standard and relevant industry association material be made available on the OFT website?**
- **Should material relating to vulnerable donors be provided on the OFT website when available?**