

15 July 2016

Ms Regina Haertsch
The Department of Finance, Services and Innovation
State of New South Wales
Level 9, McKell Building, Rawson Place
Sydney, New South Wales, 2000

Submitted by email: policy@finance.nsw.gov.au

Dear Ms Haertsch

Charitable Fundraising Review, Discussion Paper, July 2016

Thank you for the opportunity to provide comment on the *Charitable Fundraising Review, Discussion Paper* of July 2016 (**the Discussion Paper**). We welcome the New South Wales Government's consideration of, and consultation on, the repeal or retention of the *Charitable Fundraising Act 1991 (NSW)* (**the Act**).

About us

Justice Connect's Not-for-profit Law service (**NFP Law**) provides free and low cost legal assistance to small and medium not-for-profit community organisations across Australia, with increased assistance for those working in Victoria and New South Wales. Our service 'helps the helpers' by providing legal information, advice and training to not-for-profit community organisations. We are committed to improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate. Our policy and law reform work is focused on effective and appropriate regulation of the Australian not-for-profit sector, helping organisations be more efficient and effectively run, and ensuring reform takes into account impacts on the sector.

Our response

NFP Law supports the repeal of the Act and congratulates the NSW Government on its leadership in reducing regulatory burden for NFPs.

NFP Law is working with leading sector bodies, including the Australian Institute of Company Directors, Chartered Accountants Australia and New Zealand, CPA Australia and the Governance Institute of Australia, on the urgent need for fundraising reform.

To this end, the NFP Law made a submission to Consumer Affairs Australia and New Zealand's review of the Australian Consumer Law (**ACL**), proposing the law be clarified to ensure its application to fundraising activities. It is our view that minor amendments to the ACL would enable the repeal of state and territory fundraising regimes, thereby effectively creating a nationally-consistent regulatory regime. NFP Law's submission is attached for reference.

In our ACL submission, NFP Law proposed that fundraising reform could be achieved through three simple steps:

1. minor amendments to the ACL to ensure application to fundraising activities is clear and broad;
2. repeal of state-based fundraising laws; and
3. working with other regulators (for example, the Australian Charities and Not-for-profits Commission, state-based regulators and self-regulatory bodies) to improve fundraiser conduct (including door-knocking, telemarketing and excessive spending of funds on third party services).

NFP Law, and the sector bodies referred to above, support the repeal of the Act, and encourages the NSW Government to take additional action (as above) in order to achieve substantive fundraising reform for the benefit of all Australians and the not-for-profit sector.

Mitigating risks associated with repeal of the Act

NFP Law considers that without having contemporaneously undertaken the additional actions as outlined above (amending the ACL and the proposed work with other regulators), there are some risks involved in the repeal of the Act.

The extent of non-compliance, at least to a degree that could cause detriment to the public, is unclear because (as the Discussion Paper states) the NSW Government does not undertake any specific compliance and enforcement under the Act. However, we note:

- that in the 11 months to July 2015, investigation of 29 complaints received about unauthorised fundraising in NSW were found not to involve detriment to the public. Prior to this period, of complaints made, the majority were found to be minor and unintentional mistakes, and cases of non-compliance had mostly been found to result from complex and differing statutory requirements, and
- the Northern Territory has no substantive fundraising legislation without any apparent issue or loss of public trust and confidence.

Without any proactive compliance work, it is not possible to be sure that there is no (or even very little) charitable fundraising misconduct occurring in NSW that is of public concern. **In reaching our view to support the repeal of the Act, NFP Law has balanced this risk – public detriment from unethical charitable fundraising activity – against the extent to which it can be mitigated.**

We note that even with the repeal of the Act, there are a range of other enforcement avenues open to the NSW Government, including:

- *Associations Incorporations Act 2009 (NSW)* – if the actions of the entity (or its officers) also breach the Associations Incorporations Act, NSW Fair Trading could deregister the entity in certain circumstances and may also be able to bring other civil actions,
- *Charitable Trusts Act 1993 No 10 (NSW)* – where there is a breach or supposed breach of a charitable trust (the legal form used by some charities and also some bodies that fundraise for the purpose of then distributing funds to charities), the NSW Attorney General has powers to authorise the bringing of the proceedings in relation to that charitable trust,
- *Crimes Act 1900 (NSW)* – if actions of the entity (or its officers) involve stealing or similar offences, fraud (deception) or forgery (false and misleading information), the Crimes Act can be used to prosecute for pecuniary penalties, and suspended and custodial sentences,
- *ACL* – based on the legal opinion we have from Mr. Norman O’Bryan SC, NFP Law understands the ACL applies to most charitable and not-for-profit fundraising because the definition of “business”

in s. 2 of the ACL includes “a business not carried on for profit” and the definition of “trade or commerce” includes “any business or professional activity (whether or not carried on for profit).

The ACL has the advantage of a broader enforcement tool kit, enabling a focus on changing behavior (for example, by enforceable undertakings or directions to participate in education) in addition to pecuniary penalties. This can be of particular use where there is doubt the higher burden of proof under the Crimes Act will be met, or the matter is not of sufficient public detriment to warrant allocating criminal justice resources, yet action needs to be taken (for example, to support the maintenance of public trust and confidence charities). In this regard, it is noteworthy that in the very recent proceedings issued in *Director of Consumer Affairs Victoria v Annabelle Natalie Gibson & Anor*¹ where there are allegations of serious misconduct related to fundraising activities and considerable public detriment, the Victorian Government has taken action under the ACL rather than their equivalent fundraising law the *Fundraising Act 1998 (Vic.)*²

In addition, the risk may also be mitigated by NSW providing intelligence to other regulatory bodies:

- Australian Charities and Not-for-Profits Commission (**ACNC**): if the entity is a registered charity it could be deregistered by the ACNC also resulting in a loss of charity tax concessions, affecting its ability to fundraise. This could occur if the entity breaches the ACNC governance standards (for example, standard one concerning purpose and nature, or standard five concerning duties of entities) or other provisions of the *Australian Charities and Not-for-profits Act 2012 (Cth)*, or the *Charities Act 2013 (Cth)*. The ACNC has a broader range of enforcement options (such as enforceable undertakings and removal of responsible persons) if the entity is a “federally regulated entity”,
- Australian Securities and Investments Commission (**ASIC**): if the actions of the entity (or its officers) also breach certain provisions of the *Corporations Act 2001 (Cth)*, ASIC could take action to deregister the entity, and may also be able to bring civil and or criminal proceedings,
- Office of the Registrar of Indigenous Corporations (**ORIC**): if the actions of the entity (or its officers) also breach certain provisions of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, ORIC could take action to deregister the entity, and may also be able to bring civil and or criminal proceedings.

To mitigate the risk of harm to the public, including any flow on detriment to public trust and confidence in the broader not-for-profit sector (which can affect donations and volunteerism), NFP Law urges the NSW Government to:

- 1. Work with other Australian governments to introduce amendments to the ACL to ensure application to fundraising activities is clear and broad**
- 2. Work with other regulators (the ACNC, state-based regulators and self-regulatory bodies) to improve fundraiser conduct (including door-knocking, telemarketing and excessive spending of funds on third party services)**
- 3. Support education and training for NSW charities about the repeal of the Act, and ethical and legally compliant fundraising activities.**

¹ <https://www.comcourts.gov.au/file/Federal/P/VID535/2016/actions> accessed on 15 July 2016

² <https://www.consumer.vic.gov.au/news-and-events/media-releases/belle-gibson-to-face-legal-action-penguin-agrees-to-enforceable-undertaking--media-release> and <http://www.theage.com.au/victoria/conwoman-belle-gibson-fails-to-show-up-at-court--again-20160712-gg3ox7.html> both accessed on 15 July 2016

Thank you for the opportunity to respond to the Discussion Paper. Should you wish to discuss this response, please contact Sue Woodward, Director, on 03 8636 4468 or sue.woodward@justiceconnect.org.au.

Yours sincerely



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