

13 August 2021

Transparency Code Working Group
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

(submitted by email: charitiesconsultation@treasury.gov.au)

Developing a Transparency Code

Justice Connect appreciates the opportunity to comment on the merits of developing a voluntary code to improve the transparency about the use of charitable donations made during natural disasters (**the Transparency Code**).

For the reasons set out below, **Justice Connect does not support the introduction of a new Transparency Code, but instead recommends a policy approach that would address elements covered by the Code in a more holistic way.**

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive.

We have been serving the community for more than 25 years. We are a registered charity, operating nationally.

Justice Connect has experience in disaster response, from the crisis stage through to long term recovery and community rebuilding. For example, we set up a coordinated national pro bono program in response to the 2019-2020 bushfires.¹ We also launched a tailored legal service to support small businesses, primary producers and farmers grappling with legal problems because of floods, cyclones and bushfires.²

¹ Justice Connect, 'Australian bushfires: getting legal help to where it's needed', (16 January 2020), available at <https://justiceconnect.org.au/fairmatters/australian-bushfires-getting-legal-help-to-where-its-needed/>.

² Justice Connect, 'Natural disaster community support', available at <https://justiceconnect.org.au/campaigns/natural-disaster-community-support/>.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit community organisations and social enterprises, many of whom are registered charities.

Justice Connect advocates for an improved legal and regulatory framework for the sector to ensure law reform considers the impacts of regulation, especially on small to medium sized organisations. Effective and appropriate regulation supports efficient and well run not-for-profits and social enterprises; a thriving ‘for purpose’ sector benefits all Australians.

Fundraising in the wake of natural disasters and COVID-19

In the wake of the 2019–2020 Australian bushfires and the COVID-19 pandemic, we have seen an increase in enquiries from not-for-profits relating to fundraising via their websites and using online platforms.

Many of these groups previously relied on face-to-face events for their fundraising income. Last year we had thousands downloading our resources on this topic. We have spoken to many who have been confused about how to comply and distressed about how long it takes.

Overarching position

Leading the #FixFundraising campaign, Justice Connect has long advocated for nationally consistent and streamlined fundraising laws that preserve transparency and protect the wishes of donors.

Out of date and ineffective fundraising laws is a systemic issue identified repeatedly, including by the Royal Commission into National Natural Disaster Arrangements (2020), Productivity Commission Inquiries (1995, 2010), Senate Inquiries (2008, 2019), in academic research and sector surveys.³ These laws waste precious charity resources that could be better spent in Australian communities, including after disasters.

In this submission we propose a comprehensive and future proof policy response, devised in consultation with the sector and its advisers, drawing on more than a decade of our service provision to small-medium sized charities and supported by data-based evidence and recommendations from previous inquiries.

³ Justice Connect, ‘New report shows charities still face unnecessary red tape when raising funds for their vital services’, (27 May 2021), available at <https://justiceconnect.org.au/fairmatters/charities-face-unnecessary-red-tape-fundraising-vital-services/>.

What problem does the Transparency Code seek to address?

From the 2004 tsunami to the 2019–2020 Australian bushfires, we acknowledge that distribution of charitable donations immediately post natural (and other) disasters is highly scrutinised and can be perceived as being ‘too slow’ with ‘too much red tape’ required of applicants. The consultation paper refers to this as ‘a mismatch between the expectations of donors around how their funds would be used and the obligations of the charities to use funds in line with their charitable purpose’.⁴

In addition to the Transparency Code, and as another attempt to address concerns about the speed of distribution, we note Minister Anderson (New South Wales) has consulted on a ‘fundraising disbursement condition’ that would require an organisation conducting a disaster relief fundraising appeal to disburse the money raised within a specified period.⁵

However, the research tells us that charities are not hoarding disaster relief donations and best practice disaster relief requires charities to think beyond the immediate relief phase.

- The Australian Charities and Not-for-Profits Commission (**ACNC**) undertook a review into the disaster appeals following the 2019–2020 bushfires of several key charities. It found that the reviewed charities took a strategic and reasonable approach to the disbursement of funds.⁶
- The University of Melbourne also published research into appropriate recovery expenditure around natural disasters which suggests that, while crisis payments (those made within six months of a natural disaster) are a necessary aspect of disaster recovery appeals, it is critical to promote medium-long term support to ensure sustainable recovery for affected communities.⁷

The need to mitigate against applicant fraud is also heightened in the immediate aftermath of natural disasters which can make the distribution process feel slow. But the ACNC recommends certain due diligence steps to mitigate against the risk of applicant fraud,⁸ including physical site inspections and secondary assessments, all of which take time.

⁴ Commonwealth Treasury, ‘Developing a Transparency Code: a consultation paper’, available at: https://treasury.gov.au/sites/default/files/2021-07/190753_developing_transparency_code_consultation_paper.pdf.

⁵ Law Society of NSW Journal, ‘The latest developments in law reform & advocacy: August 2021’, (July 30 2021), available at <https://lsj.com.au/articles/the-latest-developments-in-law-reform-advocacy-august-2021/>.

⁶ ‘Bushfire Response 2019-20: Reviews of three Australian charities’, Australian Charities and Not-for-Profits Commission, October 2020, page 5 (**ACNC Report**).

⁷ The University of Melbourne, ‘Beyond Bushfires 10 Years Report 2020’, (March 2021), available at <https://mispgh.unimelb.edu.au/centres-institutes/centre-for-health-equity/research-group/beyond-bushfires>.

⁸ ‘Protect your charity from fraud: Guide’, ACNC, accessed 15 June 2021, <https://www.acnc.gov.au/tools/guides/protect-your-charity-fraud> (**ACNC Fraud Guide**)

Governments have themselves experienced this risk with the New South Wales government bushfire disaster relief facing concerns about illegitimate claims and fraudulent activity.⁹ This serves as a salient example of the danger of putting pressure on charities to disburse funds within a specific (and short) period as it can increase the risk of fraudulent activity by unnecessarily truncating a charity's due diligence processes.

In summary, we do not see transparency about disaster relief appeals as the key issue in charitable fundraising, nor a voluntary natural disaster fundraising code as the solution.

What is the broader, systemic issue?

The key issue is Australia's current charitable fundraising laws exist across seven different statutes (each state and the ACT). They were developed before the internet, the ACNC and the Australian Consumer Law and collectively require charities to comply with seven different regulatory frameworks if the fundraising appeal happens online (which is increasingly the case).

Our work (legal education, training and advice) supports ethical fundraising practises and good governance. A key plank of ethical fundraising practice is transparency, but mechanisms like an appeal intent or additional quarterly reporting requirements (even if self-imposed), would be piecemeal changes that may not be possible, appropriate or even meet donor needs in every disaster appeal situation (even with the suggested \$3 million limit).

We need uniform, enforceable regulation not limited to one type of fundraising appeal

To promote transparent, ethical fundraising we recommend all states and territories adopt a single set of clear principles for all fundraising that are backed by registration by, and reporting to the ACNC.

As outlined at the beginning of this submission, the complexity and ineffectiveness of Australia's fundraising laws has been well articulated including, most recently, with a recommendation by the Royal Commission into National Natural Disaster Arrangements.¹⁰

⁹ 'Millions of dollars paid in fraudulent bushfire and COVID grants', 7:30 ABC, 16 June 2021 <https://www.abc.net.au/7.30/7.30-investigates-fraudulent-bushfire-and-covid/13393110>. ABC's 7:30 program reported that Service NSW provided at least \$11m, and maybe as high as \$17m, of fraudulent claims due to inadequate fraud protections and due diligence processes. Service NSW was found to have a 'limited and potentially non-existent ability to track fraud across a range of grant programs', and provided money earmarked for 'small businesses to pretty much anyone who asked'.

¹⁰ Commonwealth, 'Royal Commission into National Natural Disaster Arrangements, Final Report', (28 October 2020), recommendation 21.1.

To forge Australia's path towards a simplified, nationally consistent fundraising law framework, the #FixFundraising coalition has worked with sector and professional law bodies to design a set of rules that provide a policy solution to Australia's failing fundraising laws: the Australian Fundraising Principle (AFP).¹¹

The AFPs (**Attachment A**) are principles of ethical behaviour that cover all areas of public harm that can flow from a fundraising appeal. Unlike the Transparency Code, the AFPs would not add yet another layer – they would replace outdated and inconsistent regulations.

Developed in consultation with many charities and experts, the AFPs have been drafted so that they are consistent with the Australian Consumer Law and existing self-regulatory codes of conduct. As the table below shows, compliance with the AFPs would cover off all the proposed Transparency Code principles.

The AFPs need to be adopted by all jurisdictions so that the same rules would apply regardless of where the donation is made, whether it's paid in cash or as an EFT via social media, or whether it's directed towards a disaster relief appeal or any other charitable cause.

If adopted as part of an overall policy solution,¹² the AFPs would enable donors to rely on a single source of information about how a charity intends to use donated funds (the ACNC public register) and charities would only be required to report on its compliance with *one* set of fundraising regulations, *once* a year, to *one* regulator – the ACNC. Additional reporting as a particular appeal unfolded (for example, via their website or direct communications with their donors), could be part of how a charity demonstrated compliance with the AFPs.

Educative role

We recommend that, instead of a voluntary Transparency Code, the Commonwealth, facilitates education for the public about what charities need to do before they disburse funds (particularly in the aftermath of a major natural disaster), and provides support for charities about how to provide transparency when raising funds and reporting back to donors. This can be done within the ACNC's existing powers.

The work done on the Transparency Code and examples in the Consultation Paper could be used by the ACNC in this way, a point raised by us (and others) in the consultation session on 11 August 2021.

¹¹ Charities Crisis Cabinet (CCC), 'Making Australia the world's most generous national when it's needed most', (November 2020), available at https://www.nfplaw.org.au/sites/default/files/media/Making_Australia_the_Most_Generous_Nation_in_the_World_-_November_2020.pdf.

¹² Justice Connect, '#FixFundraising Explainer', (August 2021), available at <https://www.nfplaw.org.au/fundraisingreform>.

How the proposed AFPs would cover off the Transparency Code principles

The AFPs are intended to be applicable in all fundraising contexts – including natural disaster fundraising appeals.

Below we outline how, if adopted, the AFPs would satisfy all the features of the proposed Transparency Code.

Transparency Code principle	Discussion paper reference	Australian Fundraising Principles (AFPs)	Analysis
Transparency Code will require that signatories publish an appeal intent outlining how donated funds will be used in response to the natural disaster.	Question 1: Would an appeal intent similar to the example provide sufficient information for donors? What additional information should be included?	AFP 9: To justify the trust shown by donors in the efficient and effective use of the resources given to our organisation, when fundraising (and in our reporting) we will clearly explain the purpose to which funds raised will be, or have been, applied.	The AFPs covers this Transparency principle. One way to help satisfy AFP 9 would be an appeal intent statement, but it is not the only way. Having the broader AFPs gives charities greater flexibility (to consider their size, the type of appeal, donor base etc.) <i>Note: requiring a charity to produce an appeal intent would not overcome the issues that arose in the Celeste Barber – NSW RFS situation.</i>
Transparency Code will prescribe specific information for signatories to report.	Question 3: Is there additional information that should be reported under the Transparency Code?	AFP 7: When we incur costs for our fundraising, such as using paid fundraisers or other contractors or agents, we will explain this as clearly and simply	The AFPs cover this Transparency principle. AFP 7 provides transparency about fundraising costs. It also covers contractors (third party fundraisers) which is important as many large charities use contractors (it is often more efficient to do so).

Transparency Code principle	Discussion paper reference	Australian Fundraising Principles (AFPs)	Analysis
	<p>Question 5: Should administration costs be included in the Transparency Code? Do you have suggestions for what should be included in the definition of administration costs?</p>	<p>as possible to the public, before they choose to donate.</p> <p>AFP 8: We will be open and honest in our annual reporting about our fundraising strategy, results and costs and why they are appropriate for our cause at this time.</p>	<p>The Australian accounting standards need to provide a standard way of accounting for these costs leveraging off the existing (ACNC maintained) National Standard Chart of Accounts.</p> <p>Each charity that elects to have a 'deemed fundraising authority' as part of its ACNC registration should then report its compliance with the AFPs through its Annual Information Statement (AIS) to the ACNC. The states and territories would be able to enforce the AFPs as deemed licence conditions.</p> <p>No additional reporting obligation should be mandated. There are existing self-regulatory codes that expand on these issues.</p>
<p>Transparency Code will set out minimum reporting frequencies for signatories to meet.</p>	<p>Question 2: Do you think the reporting elements proposed are appropriate?</p> <p>Question 6: Do you consider the quarterly minimum reporting will meet donors' expectations of transparency?</p>	<p>AF 8: We will be open and honest in our annual reporting about our fundraising strategy, results and costs, and why they are appropriate for our cause at this time.</p>	<p>The AFPs cover this Transparency principle.</p> <p>See above. As a minimum, charities using the deemed fundraising authority via the ACNC would be required to report on their compliance with the AFPs annually. Charities can also use such additional means (eg, updates on their website) that are suited to their donors.</p> <p>The Australian National Disaster Recovery Principles support steady, medium to long term</p>



Transparency Code principle	Discussion paper reference	Australian Fundraising Principles (AFPs)	Analysis
	Would you suggest a different approach?		expenditure in response to natural disasters – which would be appropriately captured through the AIS.
Transparency Code will be voluntary and target charities involved in the response to a natural disaster and in receipt of substantial public donations.	Question 4: Would your charity have the capability to publish the proposed reporting content during a natural disaster?	AFP 5: We will take responsibility for the standards, practices and conduct of all our fundraising activities, regardless of who conducts them (us, or a contractor or agent on our behalf), or how they are delivered.	The AFPs go further than this Transparency principle Australia needs straightforward regulation that <u>applies to all charities</u> (and those fundraising on its behalf), that applies to all types of fundraising appeals. A voluntary code that applies only when a natural disaster has been declared and sits on top of existing fundraising laws adds an unnecessary layer. But the AFPs would be <u>instead of</u> the existing seven different sets laws.
Commonwealth will facilitate but not administer or enforce the Transparency Code, with compliance driven by signatories.	Question 7: Should there be an expectation that charities who receive donations in excess of \$3 million from a disaster specific appeal should be a signatory to the Transparency Code? Question 8: Are there sufficient	Preamble: AFPs are designed to complement existing self-regulatory fundraising codes, and do not require any additional compliance to meet them.	The AFPs are consistent with the Commonwealth approach of not administering or enforcing the Transparency Code. The Commonwealth can support and facilitate by the ACNC: (1) serving as the central point for registration and reporting, and (2) providing education for the public and charities on these issues. The AFPs are ultimately enforced by the states as they serve as conditions of the deemed fundraising authority. By adopting



Transparency Code principle	Discussion paper reference	Australian Fundraising Principles (AFPs)	Analysis
	<p>incentives for charities involved in disaster responses to adopt the Transparency Code voluntarily?</p> <p>Question 9: Do you see any risk with allowing signatories to self-regulate compliance with the Transparency Code?</p>		<p>the AFPs, the states can remove out of date regulation in favour of the AFPs but retain their enforcement powers.</p> <p>The Commonwealth can facilitate, and drive the urgency of this work, by continuing to work with the states and territories via the Council of Federal Financial Reforms.</p> <p>If the ACNC website serves as a platform to highlight that a charity has agreed to comply with the Transparency Code, it should also allow charities to indicate compliance with other voluntary codes such as ACFID, PFRA, FIA and the numerous sector accreditation standards.</p>

Conclusion

Justice Connect’s lawyers long to have a clear and simple answer the common question of – ‘we want to put a donate button on our website, what do we need to do?’ A nationally consistent fundraising model that replaces out of date state regulations with the AFPs, backed by registration and reporting via the ACNC, would provide this answer. It would afford all 59,000 ACNC registered charities the opportunity to tap into the generosity of the Australian public without wasting so much time trying to navigate the current disparate and out of date regimes. This would enable them to provide more support when their communities most needs it, like when a natural disaster strikes.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signatures redacted).

Yours sincerely,



Chris Povey
CEO
Chris.Povey@justiceconnect.org.au
Tel +61 3 8636 4405



Sue Woodward AM
Chief Adviser, Not-for-profit Law
Sue.Woodward@justiceconnect.org.au
Tel +61 3 8636 4468

For more information please contact:

Daniel Komesaroff, Lawyer, Not-for-profit Law
daniel.komesaroff@justiceconnect.org.au
Tel: +61 3 9900 0060

ATTACHMENT A

Australian Fundraising Principles (proposed)

Context

The following principles are designed to provide a nationally harmonised standard for fundraising in place of the current confusing, expensive and ineffective state-based system.

Underpinned by the Australian Consumer Law, Privacy Act, Telecommunications Industry Standard, local council regulations and the ACNC, but with states retaining their oversight and enforcement powers, these principles would lead to stronger fundraising and better regulation. These principles are designed to complement existing self-regulatory fundraising codes, and do not require any additional compliance to meet them.

Principles

As a charity registered with the Australian Charities and Not-for-profits Commission (ACNC), we pledge to take all reasonable steps to ensure our fundraising is lawful, truthful and transparent. To do this, we will adhere to the following principles of ethical fundraising practice.

1. We will not mislead or deceive or use false or inaccurate information when fundraising.
2. We will not place undue or unreasonable pressure on a person when fundraising, or act unconscionably in any way to obtain a donation.
3. When fundraising, we will take all reasonable measures to never exploit the trust, lack of knowledge, lack of capacity, apparent need for care and support, or [vulnerable circumstances](#) of any [donor](#).
4. We will ensure that our fundraisers are always clearly, and individually, identifiable by the public.
5. We will take responsibility for the standards, practices and conduct of all our fundraising activities, regardless of who conducts them (us, or a contractor or agent on our behalf), or how they are delivered.
6. We will conduct all reasonable due diligence when engaging contractors or agents to assist, support or deliver fundraising activities on our behalf.
7. When we incur costs for our fundraising, such as using paid fundraisers or other contractors or agents, we will explain this as clearly and simply as possible to the public, before they choose to donate.

8. We will be open and honest in our annual reporting about our fundraising strategy, results and costs, and why they are appropriate for our cause at this time.
9. To justify the trust shown by donors in the efficient and effective use of the resources given to our organisation, when fundraising (and in our reporting) we will clearly explain the purpose to which funds raised will be, or have been, applied.
10. We will ensure that fundraisers employed, or directly engaged by us, only work within the designated hours of operation as permitted by relevant national, state/territory or local laws, or by a properly constituted self-regulatory body if no such laws exist.
11. We will only contact the public to seek support where we have the proper and lawful authority to do so, where this is required.
12. We will ensure personal information we collect, use and manage is done so in accordance with the Australian Privacy Principles.
13. We will take all reasonable measures to protect the health and well-being of fundraisers employed or directly engaged by us, and members of the public, during our fundraising activities.
14. We will operate a complaints process that allows for the proper investigation and redress of fundraising complaints by the public, and encourage anyone with any concerns about fundraising activity conducted in our name to contact us.