Chapter 5

Options for reform

5.1 This chapter outlines options for reform to the current framework of fundraising regulation for charities and not-for-profits that have been raised by submitters and witnesses.

5.2 Those who gave evidence to the inquiry were of the near-universal opinion that the status quo was not an acceptable outcome for the fundraising sector. The frustration at a lack of reform in this area was summarised by Mr David Crosbie, Chief Executive Officer of the Community Council for Australia:

> It's one of those areas where you just find yourself banging your head against the wall and thinking, 'What is happening here?' There is a long history of regulatory failure. Twenty-three years ago, this was identified as an issue that needed to be fixed. It's been identified time and time again…
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> [W]e are beyond frustrated with the inability of regulatory authorities in this country to provide charities with a capacity to operate their fundraising regimes in the 21st century. Time and again we raise concerns, we put out media releases, we get it on agendas, we get it on various kinds of reform agendas, red-tape reduction agendas, but it just doesn't happen. It's kind of a slap in the face for the charities sector, because you wonder, if we were a business sector that employed 1.3 million, would we still be asked to go through these really ridiculous regimes of regulation?[1]

5.3 Dr Matthew Turnour, a lawyer who was also a member of the Australian Charities and Not-for-profit Commission (ACNC) Legislative Review Panel, echoed these sentiments, reporting to the committee that all stakeholders believed national reform was necessary; however, there was disagreement only in relation to how to achieve this. Dr Turnour told the committee:

> …if there's one theme that comes through the ACNC review, and we heard this everywhere we went from state regulators as much as from anybody else in a sense, it's that everybody thinks that fundraising should be regulated at a national level. Everyone thinks that it's impossible to do it in any other fashion. The only difference is how it's done—whether it's done under the ACCC [Australian Competition and Consumer Commission] or whether it's done by its own national scheme.[2]

5.4 Dr Turnour was optimistic about change for the sector, observing that:

> It's true that it's been on the agenda for 23 years, but I don't think it's had this much heat in it, this much excitement and this much anticipation in all of these years, and the time does seem to be right. To be very, very frank,

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1 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 39.

2 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 18.

> the failure is political—nowhere else. Politicians have got to get this done. It's as simple as that. My view is they've got to do it at a national level, emanating from, with the greatest of respect, the federal parliament to start with, and do the deals that have to be done to create a national scheme just as we did for the Corporations Act nearly 40 years ago now.[3]

5.5 Throughout the inquiry no fundraising regulatory models from overseas were put forward as appropriate for the Australian context. Professor Myles McGregor-Lowndes, an expert on fundraising regulation, told the committee that despite his determined efforts he has been unable to find a suitable legislative fundraising model elsewhere, saying 'I've searched the world and I don't think that there's a model that I'd take bits out of to try to construct a national scheme here…'[4]

5.6 The committee heard that any reform should *lessen* the regulation that the charities and not-for-profit sector deals with. For example, Mr Paul Tavatgis, Director, Whipbird Consulting, told the committee:

> I think it would be better to keep the existing regime rather than have a lengthy process or a partial change to the system, which actually adds additional requirements before old ones are removed. I think that would be counterproductive and would add to the inefficiencies of the system.[5]

5.7 Any model for reform must be suitable for all types of charity fundraisers, not just large organisations. Ms Tracy Adams, Chief Executive Officer, yourtown, urged the committee to be mindful of the capacity constraints that small organisations operate within when considering models of reform:

> I think, whatever we end up going with, we cannot just build a model that suits one element of those who are working in the space of fundraising. We need to try and develop a way that creates genuine return and confidence for the charities and for the community, while being mindful that this is very diverse and can be complex. We've got organisations that might be totally volunteer based, right through to highly sophisticated charities.[6]

5.8 Proposals for reform raised with the committee throughout the inquiry included:

- amending the Australian Consumer Law (ACL) to ensure that all charitable fundraising activities are captured under the ACL;

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3 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard,* 31 January 2019, p. 18.

4 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 15. See also p. 11.

5 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

6 Ms Tracy Adams, Chief Executive Officer, yourtown, *Proof Committee Hansard*, 31 January 2019, p. 10.

- repealing existing state and territory fundraising legislation and relying primarily on the ACL;
- introducing a national, mandatory code of practice for charitable fundraising activities; or
- seeking harmonisation of state and territory fundraising laws, possibly through the development of template legislation.

Amendment to the ACL and repeal of state and territory legislation

5.9 A significant number of submitters and witnesses advocated for a solution to create a nationally consistent, contemporary and fit-for-purpose fundraising regulatory regime involving three elements:

- amendments to the ACL to ensure that all fundraising activities undertaken by charities and not-for-profits are included within the scope of the ACL;
- repeal of existing state and territory fundraising laws; and
- the introduction of a mandatory national code of conduct governing fundraising activities.

5.10 Justice Connect was the primary advocate of this proposed model, supported by a large number of other organisations as part of the #fixfundraising campaign.[7]

5.11 Each of the elements in this proposed model were discussed at length during the inquiry, and are considered here in turn.

Amending the ACL to ensure all fundraising activities are covered

5.12 As noted in Chapter 3, the ACL currently applies to fundraising activities that are undertaken 'in trade or commerce', which is likely to occur where these activities:

- involve the supply of goods or services;
- involve fundraising in an organised, continuous and repetitive way; or
- are undertaken by a for-profit professional fundraiser.

5.13 The obligations triggered by the ACL in such circumstances include that bodies fundraising in trade or commerce:

- must not engage in misleading or deceptive conduct or unconscionable conduct; and
- if the body's fundraising activities involve supplying goods or services, it must not make false or misleading representations or engage in unconscionable conduct in relation to the supply of those goods or services.

5.14 Justice Connect stated that minor amendments could be made to the ACL 'to ensure its application to fundraising activities for and on behalf of charities (and

7 Justice Connect, *Submission 49*, p. 3. According to Justice Connect, the #fixfundraising campaign has been supported by 'more than 235 organisations and individuals representing more than 570 charities'.

other not-for-profit organisations) is clear and broad'. It argued that this measure, when combined with the repeal of state-based fundraising regulations, would create a nationally-consistent, contemporary and fit-for-purpose fundraising model that is:

- **Stronger:** It would use the ACL supported by a mandatory code of conduct to put better protection of all donors at the heart of fundraising regulation across the nation, regardless of the method used to fundraise (or the location of the fundraiser);
- **Simpler:** It would use the ACL, which is principles-based regulation (backed by a process for nationally consistent reform) which would help capture innovation and changes to methods of fundraising without territorial limitations; and
- **Smarter:** It would create a truly modern, national system of regulation by removing duplicative and burdensome requirements for registration and reporting, allowing for ethical conduct to be central to all fundraisers and fundraising activity.[8]

5.15 Justice Connect provided a number of reasons why it considers the ACL to be a suitable platform for reform of fundraising, including:

- the core policy objectives of the ACL are congruent with the policy objectives of fundraising regulation (including: preventing practices that are unfair or contrary to good faith, are unconscionable or deceptive; helping people make informed decisions and protect them when they have been treated unfairly; and penalising those who have acted unfairly);
- the ACL represents a modern, principles-based approach to regulation of people and organisations, which would ensure that individuals and fundraisers are aware of their obligations without overly onerous registration and reporting requirements;
- through jurisdictional cooperation, the ACL can apply to any person (natural or corporate or resident overseas) who operates in Australia;
- the ACL is a well-understood piece of law, which means it is easier to explain to fundraisers and donors, and is likely to more quickly improve fundraiser behaviour;
- the ACL does not impose any additional regulatory burden on fundraisers and has been shown to be an effective method for both private enforcement and redress (not available under state-based laws) as well as regulatory pursuit of misconduct where it does occur;
- the amendments proposed to the ACL would be cost effective to implement and serve to broaden the remedies available to all ACL regulators;

8 Justice Connect, *Submission 49*, pp. 21–22.

- the ACL contemplates the development and enforcement of voluntary and mandatory industry codes, which would be appropriate and helpful in the fundraising context;
- the regulators with oversight of consumer law are the same regulators concerned with fundraising laws; and
- the current regulatory approach of the ACCC and state-based regulators of the ACL is a risk-based, proportionate approach.[9]

Specific amendments to the ACL

5.16 In terms of what specific amendments to the ACL would be required under this scenario, Ms Alice Macdougall of the Law Council of Australia stated:

> [T]he provisions [of the ACL] that apply only to the supply of goods and services should be expanded to cover fundraising activities as well. That's the main area in relation to the ACL that would require tweaking.[10]

5.17 Justice Connect submitted that the ACL should be amended to achieve the following:

- without amending the definition of 'trade or commerce', ensure the following provisions apply to the fundraising activities of not-for-profits: section 18, (misleading or deceptive conduct), section 20 (unconscionable conduct) and section 29 (false or misleading representations); and
- in the context of fundraising activities, breaches of section 21 (unconscionable conduct), section 29 (false or misleading representations) and section 50 (harassment and coercion) should not be required to be in connection with the supply of goods and services in the context of fundraising activities of not-for-profits.[11]

5.18 Justice Connect stated that the proposed changes would 'provide regulators with increased remedies to address serious fundraising misconduct'.[12] It suggested that its proposed amendments could be achieved by: creating a separate 'fundraising activities' provision in the ACL; adding a carve out for 'fundraising activities' to the relevant provisions; and inserting a definition of 'fundraising activities'.[13]

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9 Justice Connect, *Submission 49*, pp. 24–26.

10 Ms Alice Macdougall, Deputy Chair, Charities and Not For Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 12. See also Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, pp. 22–23.

11 *Submission 49*, p. 24.

12 Justice Connect, answers to written questions on notice, 30 November 2018 (received 20 December 2018), p. 5.

13 *Submission 49*, p. 24.

ACCC view

5.19 The ACCC was not supportive of the proposal to deregulate state and territory fundraising regimes and rely on an amended ACL to regulate charitable fundraising. While acknowledging there is a strong case for reform to fundraising regulation, ACCC representatives cautioned that relying on the ACL as a cover for any poor conduct in the charitable fundraising sector 'would bring about regulatory gaps'.[14] According to the ACCC, the ACL solution would not deliver:

- specific regulation requiring accountability and record keeping on the part of fundraisers; or
- proactive monitoring and surveillance of the fundraising sector to ensure compliance.[15]

5.20 The ACCC explained further in its submission:

> The ACL and state and territory fund raising legislation cover fundamentally different areas of regulation. Broadly speaking, the ACL prohibits misleading or deceptive conduct and specific forms of unfair practices in dealings between businesses and consumers. It applies consistently to all sectors of the economy.
>
> Unlike state and territory fundraising legislation, the ACL does not mandate that [not-for-profit] sector participants take specific positive courses of action. It does not require [not-for-profit] sector participants adopt accountability or transparency measures.
>
> In response to concerns of governments and the public, some state and territory [not-for-profit] sector legislation contains specific probity and accountability measures designed to promote public trust and confidence in a sector that relies so heavily on voluntary contributions… The ACL is not designed to achieve such specific outcomes. It does not impose the licencing, financial reporting and other accountability requirements to which the [not-for-profit] sector is currently subject and which seek to ensure good governance and accountability.[16]

5.21 Mr Scott Gregson, Executive General Manager of the Mergers and Authorisation Review Division at the ACCC, noted that consumer law regulators, and in particular the ACCC, 'must scan and prioritise work across the economy':

> [The ACCC is] not in a position to provide the same level of focus or expertise that industry-specific regulators do, and we've seen that in the

14 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 24.

15 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 31.

16 Australian Competition and Consumer Commission, *Submission 50*, pp. 2–3.

> areas where there might be an expectation of the ACCC filling a gap, and it stretches our capacity to do that when we're looking across the economy.[17]

5.22 Ms Rose Webb, the New South Wales Fair Trading Commissioner, provided similar evidence to the committee that existing provisions of the ACL do not cover all the regulations that are required in relation to charitable fundraising.[18]

5.23 The ACCC also argued that removing the 'trade and commerce' filter that is currently applied to the ACL, or explicitly adding 'fundraising activities' to definitions in the ACL, may raise issues of constitutional validity, and more broadly may be expanding the ACL beyond its current scope. Mr Gregson commented:

> A fundamental frame of the [ACL] is its application to conduct in trade or commerce. It's not intended to apply, for example, to conduct that might be engaged in in public or political debate. This both has a constitutional point and is a sound policy constraint on the legislation.
>
> …We think the trade or commerce power—or the provisions, the framework—does appropriately delineate conduct that should be regulated by bodies such as the ACCC and conduct that shouldn't. We simply don't think our laws should be catching conduct in… things that have nothing to do with trade or commerce.[19]

Other submitter and witness views

5.24 Many submitters and witnesses were supportive of the proposal to extend the coverage of the ACL to fundraising activity and repeal state and territory regulation.[20]

5.25 Some witnesses argued that amending the ACL to clarify its coverage of charitable fundraising would provide certainty for the sector, without noticeably increasing the operational burden on the ACCC in practice. For example, Mr David Crosbie, Chief Executive Officer of the Community Council for Australia, commented:

> No-one is asking the ACCC to be a regulator for the charities sector… We just want to ensure that the small area of interaction around fundraising that

17 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 24.

18 Ms Rose Webb, New South Wales Fair Trading Commissioner, *Committee Hansard*, 7 November 2018, p. 37. See further information in Chapter 3.

19 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, pp. 23 and 25.

20 See, for example: Australian Council of Social Services, *Submission 10*, p. 2; CPA Australia, *Submission 44*, p. 1; Chartered Accountants Australia and New Zealand, *Submission 40*, p. 3; Community Council for Australia, *Submission 43*, p. 5; Law Council of Australia, *Submission 47*, p. 7; Philanthropy Australia, *Submission 77*, p. 5; Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, pp. 7 and 12.

> is not clearly, definitely covered by the Australian Consumer Law is covered, which would require some minor amendments.[21]

5.26 Mr Crosbie argued that all donations should be considered consumer interactions and come under the remit of the ACL:

> ACCC are about consumer issues. The point at which they knock on my door and ask, 'Will you donate to this charity?' and I donate to the charity and then it's not a charity, that's ACCC. We know it already is. That's what's being prosecuted. If they take the money and use it completely differently, that's an ACCC issue. It is already. It's misleading and deceptive conduct. I don't think we necessarily need any major beefing of any laws. We just need to make it very clear—and apparently, the lawyers tell me, you can do this with some minor legislative changes—that all donations should be treated as consumer interactions. I think that's fair enough.[22]

5.27 It was also pointed out that under the ACL's multi-regulator model, most regulatory action relating to fundraising activities would continue to be undertaken by state and territory regulators, with the ACCC only becoming involved in particularly significant or national cases. Further, it was highlighted that in a recent high-profile case of wrongdoing by a charitable fundraiser, the Victorian regulator had chosen to seek remedy in the courts using penalty provisions available under the ACL, rather than remedies available under state-based fundraising legislation.[23]

5.28 Mr Norman O'Bryan, SC, further explained the Justice Connect submission, and expressed doubt that clarification of ACCC jurisdiction in relation to the application of the ACL's coverage of fundraising was 'really necessary'. In relation to ACCC comments about the constitutionality of adding fundraising to the ACL, Mr O'Bryan stated:

> If the Commonwealth is going to pass a small amendment to the ACL—and the ACL is state and territory legislation for practical purposes—there is no constitutional impediment whatsoever. The ACL is passed by the Commonwealth, but it is a schedule to the act, it is picked up by the states and it applies in the states. That is absolutely constitutionally bombproof.[24]

5.29 Dr Matthew Turnour, Lawyer and member of the Review Panel of the ACNC Legislation, suggested that 'shoehorning' charities into the ACL and under the oversight of the ACCC was better than nothing; however, he and others proposed that a national scheme for not for profit and charities law was a better option:

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21 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 39.

22 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 46.

23 Ms Sue Woodward, Head, Not-for-profit Law, Justice Connect, *Committee Hansard*, 29 October 2018, pp. 3 and 5.

24 Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 23.

> A national scheme focused on the not-for-profit space is the ideal. If we can't do that, then we can force the ACCC to go as far as it can within its constitutional powers.[25]

5.30 This proposal is discussed in more detail below.

Role of the ACNC under a new regulatory model

5.31 The current role of the ACNC in regulating aspects of charitable fundraising was discussed in detail during the inquiry, as well as questions of how that role could evolve as part of a revised regulatory regime.

5.32 Some submitters and witnesses suggested that the ACNC's current functions, involving registration of charities and overseeing governance and reporting requirements, are sufficient to regulate charitable fundraising when combined with a strengthened ACL.[26]

5.33 Legal firm Mills Oakley suggested that the ACNC could oversee the assessment of fundraising licences across all states and territories, as well as the reporting and auditing of charitable fundraising, while leaving investigation of poor fundraising conduct to be regulated under the ACL framework. Ms Vera Visevic from Mills Oakley explained:

> …an organisation could obtain a licence from the ACNC, subject to them having ticked off meeting certain criteria, and on a yearly basis they would then report, put in audited accounts and so on.
>
> The ACCC would then have the powers to actually determine whether or not an organisation with a licence has breached any of the provisions of the ACL... Then, if the ACCC investigated that organisation and found there had been a breach of the ACL, that could be a ground upon which the ACNC could then revoke that licence.[27]

5.34 This was echoed by Mr John Mikelsons from the Australian Council of Social Service, as discussed in Chapter 4. Mr Mikelsons argued that the ACCC should regulate conduct via the ACL, while the ACNC should take the role of sector-specific regulator and oversee reporting.[28]

5.35 The ACCC was in favour of expanding the role of the ACNC to more comprehensively regulate the not-for-profit sector, rather than a solution involving expansion of, or reliance on, the ACL:

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25 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 14.

26 See, for example, Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, pp. 44–45.

27 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 34. See also Mills Oakley, *Submission 64*, p. 5.

28 Mr John Mikelsons, Senior Policy and Advocacy Officer, Australian Council of Social Service, *Committee Hansard*, 7 November 2018, p. 4.

> The ACNC has an existing role in regulating the NFP [not for profit] sector. The ACNC Act could be amended to expand this role. Expanding the role and functions of the ACNC would allow for a nationally consistent approach to probity, financial reporting and accountability measures.
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> If this approach were adopted, it would be critical to ensure that the ACNC has the appropriate enforcement, compliance and investigative tools and adequate resources to provide meaningful oversight.[29]

Registration and licensing requirements

5.36 The fact that some jurisdictions (namely South Australia and the ACT) have already streamlined their fundraising licensing requirements to allow for registration to occur through the ACNC was used as supporting evidence that the ACNC could take on this role for all jurisdictions.[30]

5.37 On the question of the best way to register or licence fundraising operators, the Fundraising Institute of Australia argued that creating a single national register of fundraising entities, ideally through the ACNC charity portal, was the most promising way forward:

> The states have a legitimate interest in knowing who is fundraising in their jurisdiction and this is why registers exist. Yet technology has enabled fundraising to cross state borders. This has created red tape for charities who have to register their fundraising activity in multiple jurisdictions. Logically, if the 'blockage' in the path towards harmonisation and alignment among the states is a technological one, then technology should be used to solve it.
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> Surely the solution is to create a platform in which all states can ensure that all organisations and individuals fundraising in their jurisdictions have registered in one place so that, if they receive donations from people in other states or other countries, the money can be properly accounted for, and the risk of any fraudulent activity reduced. Such a platform already exists: the ACNC charity portal.[31]

5.38 Ms Tania Burstin, Managing Director of Mycause, argued that licensing or registering requirements for fundraisers are ineffective at preventing bad behaviour in any case:

> What is the material difference if I am fundraising for the Cancer Council or I'm fundraising for my friend with cancer if, in fact, I do not pass the funds to the beneficiary as I said I would or, in fact, if I state I have cancer even if I do not? I've committed fraud no matter who the beneficiary is, I've committed fraud no matter which entity or nonentity I represent, and I've committed fraud even if the charity that I purport to represent is registered in seven states and territories.

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29 Australian Competition and Consumer Commission, *Submission 50*, pp. 4–5.

30 See, for example, Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 30.

31 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 5.

> The state regulations do not stop this fraud and are, in fact, unworkable in this context… We believe it is up to the donor to take personal responsibility for their donation. It seems nonsensical for a charity to be registered in each state when a fundraiser could, in fact, claim to fundraise for that charity without the charity's knowledge or approval and without any registration anyway.[32]

5.39 Dr Ted Flack argued that a basic level of registration or licensing for organisations undertaking not-for-profit fundraising is still required in order to maintain public trust in the sector. Dr Flack stated that licensing requirements for fundraising organisations could be kept to a bare minimum, sufficient only to demonstrate to consumers that the organisation is making a properly constituted request for funds in relation to a recognised philanthropic or not-for-profit purpose.[33] Dr Flack argued that such a licensing system could be enforced through a simple complaint mechanism, involving either the ACNC or state and territory regulators.[34]

Practicality of repealing state and territory fundraising legislation

5.40 Several witnesses expressed doubt that repealing state and territory fundraising legislation, as part of a solution involving reliance on the ACL, was practically achievable. Mr Derek Mortimer, Principal at DF Mortimer & Associates, while supportive of a repeal of state and territory regulation, did not consider that this was feasible:

> I don't oppose Justice Connect's submission. If states were to repeal their legislation, that's fantastic. But, by the same token, the regulators haven't listened to Justice Connect's submissions [in the past]. Nor have the regulators listened to the Productivity Commission about harmonising. So we're in a position where something has to give, and I'm not confident that states and territories are simply going to line up en masse and repeal their legislation in the way that Justice Connect would perhaps like them to.[35]

5.41 The Fundraising Institute of Australia (FIA) stated similarly:

> The states and territories are integral to fundraising reform but FIA does not detect any intention, particularly on the part of the largest states, to repeal their fundraising laws. Such repeal would be an absolutely essential precursor to the introduction [of] any single, national regime if any real reduction in red tape were to be achieved.[36]

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32 Ms Tania Burstin, Founder and Managing Director, Mycause, *Committee Hansard*, 29 October 2018, pp. 25–26.

33 Dr Ted Flack, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 29.

34 Dr Ted Flack, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 29.

35 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 21.

36 Fundraising Institute Australia, *Submission 28.1: Supplementary to Submission 28*, p. 5.

Mandatory Code of Conduct for fundraising activities

5.42 Some witnesses and submitters expressed support for a fundraising code of conduct, with various suggestions about the type of code and what it would contain.[37]

5.43 Ms Geraldine Magarey, Leader Research and Thought Leader at Chartered Accountants Australia and New Zealand, informed the committee a national fundraising code of conduct would provide guidance and consistency across the sector in how fundraising activities are to be conducted:

> We feel that the code of conduct would be a sort of 'how to' in terms of what needs to be done. Obviously, legislation deals with definitions et cetera and the letter of the law, but in terms of how to enact the law we feel that a code of conduct would be very beneficial. A mandatory one which would then be consistent—a simplified one—is probably the way to go, not to complicate things and turn it in its own right into a massive legal document.[38]

5.44 Dr Lisa O'Brien, Chief Executive Officer of The Smith Family, suggested that a code of conduct would increase confidence in the sector:

> [I]t's in everyone's interest that there is consistent and effective fundraising across the country. I think having a code of conduct that all fundraisers adhere to will better ensure that and that it will enhance the reputation of organisations that fundraise.[39]

5.45 Dr O'Brien stated that a code of conduct could also be useful insofar as it may give the states and territories the confidence necessary to remove other regulatory requirements in individual jurisdictions:

> South Australia has already removed its requirement for local registration as a fundraising organisation. We need more states to follow that lead. But I think it's also about having a framework in place that will address the concerns of the states and jurisdictions around registration. I suspect the code of conduct would assist with that as well, because in essence the states are concerned about conduct. If there's a mandatory code that all fundraisers adhere to, that would give some confidence as well and address some of their concerns about local activity.[40]

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37 For example, Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 43; Justice Connect, *Submission 49*, p. 21; Whipbird Consulting, *Submission 60*, p. 60; Australian Red Cross Society, *Submission 63*, p. 5; DF Mortimer & Associates, *Submission 6*, p. 3.

38 Ms Geraldine Magarey, Leader Research and Thought Leader at Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 11.

39 Dr Lisa O'Brien, Chief Executive Officer for The Smith Family, *Committee Hansard*, 30 October 2018, p. 29.

40 Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 30.

5.46 Ms Alice Macdougall, Deputy Chair for the Charities and Not for Profits Committee at the Law Council of Australia, observed that a code may not in fact be necessary:

> On a review of everything that all the governments want covered, the conclusion may be that the current principle-based laws in the ACNC Act and in the ACL are sufficient to cover all areas relating to fundraising activities. The code of conduct may only be necessary if there are particular aspects which the state and territory governments may insist on in order for them to be comfortable in repealing the laws. In my view, it will depend on what is in that code of conduct, if in fact there is one, as to what the issues will be. It's almost too difficult to talk about how you would do it, who would be the regulator and if it can or can't be done until we can actually identify if in fact there is anything that needs to be in the code of conduct.[41]

5.47 Ms Macdougall further added:

> [I]f a code of conduct is needed in order to make sure that this fundraising legislation is repealed then, yes, we support it, but at this stage it's not clear that it is actually needed. I think that the states and territories will perhaps provide guidance on what they would need to see in order for them to be comfortable repealing the legislation. If the only way to satisfy that requires a code of conduct then we support the code of conduct.[42]

5.48 Ms Sue Woodward, the Head of Not-for-profit Law at Justice Connect, suggested that a mandatory fundraising code of practice could be introduced under the *Competition and Consumer Act 2010* (CCA) and enforced by the ACCC, as is the case for other industry codes:

> We've had specialist legal pro bono advice to say that there's no reason why another code of conduct couldn't be enforced using the multiregulator approach. It's just a matter of the drafting—just because it hasn't been done exactly that way before. There's no legal impediment that we're aware of, and nothing has been pointed out to us to say that that's not possible. The ACNC review panel reached that same conclusion.[43]

5.49 Similarly, the Public Fundraising Regulatory Association recommended the creation of a unified 'Australian Fundraising Standard' which would 'cover many of the specific requirements found in the state fundraising laws'. They emphasised that this should be contingent on the repeal of state and territory laws.[44]

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41 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, Senate Select Committee on Charity Fundraising in the 21st Century, *Committee Hansard*, 29 October 2018, p. 10.

42 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, Senate Select Committee on Charity Fundraising in the 21st Century, *Committee Hansard*, 29 October 2018, p. 13.

43 Ms Sue Woodward, Head, Not-for-profit Law, Justice Connect, *Committee Hansard*, 29 October 2018, p. 8.

44 Public Fundraising Regulatory Association, *Submission 25*, pp. 5–6.

5.50 The FIA argued against the imposition of a mandatory code administered by the ACCC:

> The prospect of amending the Consumer and Competition Act to create a 'code' to regulate charitable fundraising is fraught with regulatory risk and imposes yet another layer of (federal) government regulation, the constitutional implications of which are uncertain given that fundraising has traditionally been the jurisdiction of the states. While such an outcome would be a fillip to certain elements of the legal community, the cost burden would fall overwhelmingly upon charities and professional fundraisers.
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> The impact of a mandatory code administered by the ACCC would be largely felt, in terms of compliance risk and red tape, by FIA members who are responsible for over 80 percent of public fundraising in Australia.[45]

5.51 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs for the FIA, gave evidence that, in contrast to voluntary industry codes of practice:

> …A mandated, mandatory code is quite a different beast. We are talking about black-letter law here. It is regulation by another name. I would caution that we should be careful what we ask for when we're seeking a mandated code. [I]f we go down the path of a regulated, mandatory code without the agreement of the states to resile from the space, we could have the perverse outcome of yet another layer of red tape imposed on the sector. That would be, as you say, the worst outcome for us.[46]

5.52 The ACCC did not support the introduction of a mandatory code of conduct located in the CCA, stating:

> …the policy objectives of state-based NFP sector regulation are fundamentally different to the policy objectives of the CCA and of industry codes specifically… [T]he policy objectives of industry codes align with the broader policy objectives of the CCA and ACL to enhance the welfare of Australians through the promotion of competition and fair trading… Industry codes do this by addressing market failures which need specific regulation... These objectives are fundamentally different to the accountability and probity objectives of state-based NFP sector legislation.
>
> Further, a CCA industry code for the NFP sector would not cover the entire sector. This is because industry codes are subject to the same trade or commerce limitation as the ACL... It would not lead to the industry-wide coverage and harmonisation that the NFP sector desires. [47]

Voluntary codes of practice and industry standards

5.53 As noted in Chapter 3, several voluntary, self-regulatory codes of practice already exist in different parts of the charitable fundraising sector in Australia.

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45 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, pp. 2, 4.

46 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs for Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 4.

47 Australian Competition and Consumer Commission, *Submission 50*, pp. 3–4.

5.54 The FIA administers a voluntary, self-regulatory code of conduct for its members that governs their fundraising activities. FIA representatives noted that nearly 80 per cent of Australian charities that fundraise more than half a million dollars annually are FIA members and subject to this code of conduct.[48] It argued that any revised regulatory regime for charitable fundraising in Australia must recognise the importance of voluntary industry codes:

> Under any future regulatory regime for the charitable and not for profit fundraising sector, FIA believes there will continue to be an important role for its Code to establish and promote an ethical framework that balances broader community interests, including those of charity beneficiaries who often lack a voice in policy debates.
>
> FIA suggests that the Committee recommend a greater role for self-regulation to maintain trust and confidence in charities by promoting best practice and ethical conduct in fundraising activity.[49]

5.55 Mr Peter Hills-Jones, Chief Executive Officer of the Public Fundraising Regulatory Association, the self-regulatory body for face to face fundraising in Australia, argued similarly that self-regulatory codes are an important component of a well-functioning regulatory framework:

> Our members submit to a self-regulatory, voluntary code. We have the power to issue breaches, which lead to penalty fines, and in 2019 we're moving to a new penalty system that we hope will be much more effective in terms of deterring poor behaviour. We also have the power to suspend and terminate our members, and we terminated four members last year for a variety of reasons. I suppose, really, it's dispelling the myth that self-regulation is somehow lesser than state regulation, or less effective. In many ways, it is more flexible, more responsive and closer to the ground than state regulation.[50]

Harmonisation of states and territory legislation

5.56 Some submitters and witnesses suggested that pursing harmonisation of state and territory fundraising legislation may be preferable to attempting to pursue national regulation through the ACL.

5.57 The ACCC proposed that 'a uniform state code could be adopted in each jurisdiction', in which states and territories would remain responsible for regulation and enforcement. It noted the importance of state and territories responsible for administering such a code having 'the appropriate enforcement, compliance and investigative tools and adequate resources to provide meaningful oversight'.[51]

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48 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 6.

49 Fundraising Institute of Australia, *Submission 28*, p. 8.

50 Mr Peter Hills-Jones, Chief Executive Officer, Public Fundraising Regulatory Association *Proof Committee Hansard*, 31 January 2019, p. 31.

51 Australian Competition and Consumer Commission, *Submission 50*, p. 5.

5.58 Mr David Crosbie from the Community Council for Australia expressed scepticism that harmonisation of state and territory fundraising regulation would ever occur, after numerous failed attempts in the past:

> I hear that we need to 'harmonise'. I'm not a young man, but I think I've heard that phrase for well over a decade. I've watched enthusiastically from the sideline as various COAG [Council of Australian Governments] committees, led by this jurisdiction or that jurisdiction, have sought to do this—even the federal Treasury at one point, frustrated with the inability to harmonise fundraising regulations, put out their own discussion paper about possible federal legislation. Of course, what that did was stimulate the states to say, 'We should harmonise,' and we entered the process of failure again where we didn't harmonise. I well remember we had it on the agenda for consumer affairs ministers—I think it was in 2012 or 2013… and it was taken off the agenda because it wasn't seen as a significant issue by the consumer affairs ministers. And I have to say that my board asked me to criticise that very strongly.[52]

5.59 Mr Scott Gregson, Executive General Executive General Manager, Mergers and Authorisation Review Division at the ACCC, took a different view, and cautioned against adopting an approach other than harmonisation simply because harmonisation in this area of law has been difficult to achieve thus far:

> [H]armonisation of state and territory laws is a fairly common feature of Federation, particularly in the last number of decades. There are a number of success stories, including the way in which states, territories and the Commonwealth worked on the Australian Consumer Law, health regulation and food standards… The fact that that hasn't been able to be achieved [in the area of fundraising legislation] by governments isn't, in our view, a reason to look for a second, third or fourth best model. It should be up to those governments to get together and agree on what harmonisation and deregulation might look like.[53]

5.60 The FIA stated similarly:

> FIA believes past failures of COAG to effectively address duplicative fundraising regulation are not a reason to abandon this avenue of reform. While imperfect, the COAG process remains the most likely to achieve cooperation among state and federal players… What is needed (and what FIA now sees evidence of) is the political will to find solutions.
>
> Past experience tells us that introducing a new regulator to this sector, without the cooperation of the states, is a recipe for failure. When the ACNC was established in 2012 there was no agreement with the states about financial reporting. As a result, six years later there are still states that

52 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 39.

53 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 28.

> have not aligned their annual financial reporting requirements with the ACNC annual information statement.[54]

5.61 The FIA argued that in order to further the harmonisation agenda, various actions are required, including the following:

- all Australian governments commit to harmonise fundraising regulation within an agreed time limit of two years;
- re-establish the COAG Not-for-profit Working Group to elevate fundraising regulation reform;
- restore fundraising reform and charity/NFP issues to the COAG agenda;
- create a greater role for the ACNC Charity Portal to facilitate alignment and harmonisation of fundraising regulation; and
- centralise overall responsibility for fundraising issues at Commonwealth level under one senior minister.[55]

5.62 Professor Myles McGregor-Lowndes from the Australian Centre for Philanthropy and Nonprofit Studies at Queensland University of Technology also argued that harmonisation was urgently required, noting that the increasing use of the internet for 'frauds and scams' poses 'a great risk to charities and their reputations'.[56]

Harmonisation through the use of template legislation

5.63 Mr Derek Mortimer from DF Mortimer & Associates suggested that ministerial agreement on the Co-operatives National Law proved that ministers responsible for fundraising were able to develop 'template legislation' to achieve harmonisation across jurisdictions. Template legislation, he explained:

> …is where a host jurisdiction creates a law and that particular law is then adopted by the other jurisdictions... These laws can be used to create congruence. They can also be used to modernise laws and they can also be used to address the problem of multiple registrations and reporting that besets the charitable fundraising industry.[57]

5.64 Mr Mortimer used the intergovernmental agreement on the Co-operatives National Law as an example of template legislation.[58] In this agreement, state and

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54 Fundraising Institute Australia, *Submission 28.1: Supplementary to Submission 28,* p. 6.

55 Fundraising Institute Australia, *Submission 28,* p. 2.

56 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard,* 31 January 2019, p. 14.

57 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard,* 29 October 2018, p. 19.

58 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard,* 29 October 2018, p. 19.

territory ministers agreed in 2007, via the forum of the Ministerial Council for Consumer Affairs, to implement uniform legislation on co-operatives.[59]

5.65 New South Wales is the host jurisdiction for the Co-operatives National Law. The New South Wales Parliament passed the *Co-operatives (Adoption of National Law) Act 2012* in May 2012, which includes the template Co-operatives National Law. As of December 2018, all jurisdictions except Queensland had introduced enabling or consistent co-operatives laws with the New South Wales template legislation.[60]

5.66 The Ministerial Council for Consumer Affairs noted that the Co-operatives National Law remade pre-existing:

> …co-operatives legislation as laws of each State and Territory in a uniform manner. The terms of the supporting inter government agreement permits a jurisdiction to make consistent legislation as well as applying the Co-operatives National Law as a template.[61]

5.67 Co-operatives that have registered in a jurisdiction that has adopted the Co-operatives National Law or passed consistent co-operatives legislation have authority to carry on business in other jurisdictions. The Law includes a civil penalty regime for breaches of duties that are not criminal in nature.[62] The Ministerial Council for Consumer Affairs stated that the Co-operatives National Law scheme sits within the legislative powers of states and territories, and 'makes no provision which directly impacts upon federal laws, other than the Corporations legislation'.[63]

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59 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf (accessed 17 December 2018), p. 3.

60 New South Wales Fair Trading, *Co-operatives national law*, https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/co-operatives/about-co-operatives/co-operatives-national-law (accessed 17 December 2018).

61 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf (accessed 17 December 2018), p. 3.

62 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf (accessed 17 December 2018), p. 8.

63 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf (accessed 17 December 2018), p. 9.

5.68 Mr Mortimer asserted that a template approach to harmonisation of state and territory laws would need to begin with 'an agreement at the Legislative and Governance Forum on Consumer Affairs' between the various jurisdictions.[64]

5.69 Dr Ted Flack put forward a similar proposal for the development of National Model Fundraising Regulation as 'the most practical means of reforming fundraising regulation in Australia', with the following steps:

> Step 1. 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.
>
> 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.[65]

5.70 Justice Connect did not support the use of template legislation as an appropriate way forward in relation to fundraising reforms, stating that 'this model of legislative change is not the best model to regulate fundraising conduct across the nation' for the following reasons:

- the commencement of legislation in each jurisdiction would be delayed because of state election cycles and corresponding changes of government;
- the legislation would be unnecessary, given existing reporting requirements to the ACNC and existing regulations governing conduct in the ACL;
- the legislation regulating charities at the state and territory levels is marked by much greater inconsistency than was the case for co-operatives; and
- the pace at which fundraising practices are changing could mean that by the time template legislation was developed and enacted, it would be out-of-date.[66]

Development of a national scheme for charities and not-for-profits

5.71 The committee heard that there were alternatives to relying on the ACL and the ACCC for fundraising regulation. For example, while acknowledging that this

64 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 24.

65 Dr Ted Flack, *Submission 91*, pp. 7–8.

66 Justice Connect, answers to written questions on notice, 30 November 2018 (received 20 December 2018), pp. 2–4.

option had some merit, Dr Matthew Turnour, Lawyer and member of the Review Panel of the ACNC Legislation, argued that the 'proper' and 'best' option would be a more comprehensive 'national scheme focused on charities' and not for profits.[67] At the Brisbane hearing, Dr Turnour explained his position:

> To put [this issue] in a broader legal context, there's a body of law for government and administration and it's centred on the constitution and administrative law. That regulates the power of government and its limits. There's a body of law that deals with families and justice within families around family law in states and so on and so forth. There's a body of law which centres on the regulation and support of the market. It's centred on the concept of contract law and qualifications to that. What's emerging at the end of the 20th and the beginning of the 21st century is a body of law around the not-for-profit space. It focuses on two things: the enabling and the encouraging of voluntary participation and giving.
>
> What we are endeavouring to do if we force this solution under the ACCC is to try to shoehorn the not-for-profit law under the commercial law rubric because we can't get it anywhere else, but the logical development is to develop a national scheme of non-profit law in the same way that we developed a national scheme of corporations law, consumer law and so on. So my strong personal preference is for us to develop a national non-profit law scheme—and I say non-profit, not just charity, because, whilst it will be centred on charity law, charities actually make up a relatively small percentage of the total civil society space.[68]

5.72 This proposal is broader in scope than addressing just the issue of fundraising regulation, and would presumably face similar criticisms from Justice Connect and others who value expediency. However, the committee notes that the legislative and administrative reforms called for by Justice Connect and others would also take time.

Harmonising local regulations in relation to face-to-face fundraising activities

5.73 As noted in Chapter 3, charities conducting face-to-face fundraising are also subject to regulation by local councils, governing issues such as the use of public spaces for fundraising activities. Mr Peter Hills-Jones, Chief Executive Officer of the Public Fundraising Regulatory Authority, commented that this creates an additional layer of regulatory burden for charities:

> I think it's also worth emphasising, for street and door-to-door fundraising… the role of local councils. Around 80 per cent of local councils, for instance, also issue permits for face-to-face fundraisers, so effectively charities are submitting to three tiers of registration, a federal, state and local level, to collect money to help people in need. I think if you were to compare that regulatory structure to some other areas of the

67 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard,* 31 January 2019, p. 12.

68 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard,* 31 January 2019, pp. 12–14.

> economy that are potentially creating harm to local communities—it's a frustration of charities that they are subject to that degree of regulation.[69]

5.74 Mr Paul Tavatgis told the committee that inconsistencies in the rules applied by different local authorities in relation to fundraising permits can create significant costs for the sector:

> When it comes to the local authority situation… [t]here are many different forms of rules. There is no consistency across local authorities, which means that charities or third-party fundraising businesses need to maintain significant teams of people to, essentially, liaise with local authorities on a week-to-week basis to ensure that their fundraisers have the correct permits in order to fundraise in each local authority area. That absorbs a huge amount of overhead. Charities are immensely conscious of overhead as being something that gets public scrutiny. They may want to minimise it. They want to direct as many funds as possible to the services they deliver. A significant face-to-face fundraising system may have as many as two, three or even four full-time staff solely working on that bureaucratic exercise.[70]

5.75 Mr Tavatgis argued greater uniformity is required in this area:

> There could be some form of consistency in that process if there were a uniform code of conduct that many local authorities could sign up to, or a uniform system for managing the practicalities of where people are going to stand and what days they're going to stand there. That would save tens of thousands of dollars—probably more—every year, I'd imagine. If the staff were involved, it would probably be in the hundreds of thousands of dollars.[71]

5.76 Professor McGregor-Lowndes proposed that the creation of a model code or set of by-laws for local councils to adopt would be a useful way forward in the regulation of 'public nuisance' issues associated with face-to-face fundraising:

> We think local authorities are the best to deal with that [face to face conduct on] the streets. They can decide where fundraisers should stand on the street; in communities with vulnerable people, like Indigenous communities, they can decide whether fundraisers should be allowed in to canvass at all. I would suggest that that could be largely harmonised if the professional bodies got together and formed a code or drafted a model set

69 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

70 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

71 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

> of by-laws for local councils—one for cities, one for regional towns and one for rural areas. Local government is best for that public nuisance.[72]

Committee view

5.77 The committee appreciates the position of Justice Connect and others: the time for action to reform fundraising regulation in Australia was more than 20 years ago. The committee commends Justice Connect for its significant work in mobilising the charity sector and highlighting the need for urgent action on fundraising reform. The committee is grateful to the witnesses and submitters to this inquiry who have each taken the time to carefully prepare submissions and appear at public hearings, despite the number of previous inquiries examining this issue that have not borne results of any significance. The committee expects that this trend will end with this report.

5.78 The committee has received a large number of thoughtful and intelligent proposals to address the current regulatory situation. Each of these has strengths and weaknesses, supporters and detractors. All participants agree that action must be taken immediately and that any reform is better than nothing, as long as it lessens the regulatory burden.

5.79 It is rightly the concern of many stakeholders to the inquiry that a regulatory fix be implemented as quickly as possible. However, the committee has sought to balance calls for expediency against the need to ensure that the proposed solution results in a concrete reduction of red tape for fundraising organisations and has the necessary support of all relevant stakeholders.

5.80 In this context, it is worth noting that any solution will necessarily involve the input and cooperation of state and territory governments. Even minor amendments to the Australian Consumer Law, as advocated for as part of the Justice Connect proposal, require ratification by the states and territories. Options involving the harmonisation of state and territory fundraising legislation would involve more significant work to reach consensus outcomes.

Government response to ACNC legislation review panel recommendations

5.81 As discussed in Chapter 2, in December 2017 the Australian Government announced an independent review of the ACNC's enabling legislation. The report and recommendations were provided to the government in May 2018 and on 22 August 2018 the Australian Government tabled the report. The government is yet to provide a formal response to the panel's recommendations. Recommendations relevant to this inquiry include:

72 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 12.

Recommendation 25

The Australian Consumer Law be amended to clarify its application to charitable and not-for-profit fundraising and a mandatory Code of Conduct be developed.

Recommendation 26

The use of the Charity Passport by Commonwealth departments and agencies be mandated.

Recommendation 27

Responsibility for the incorporation and all aspects of the regulation of companies which are registered entities be transferred from the Australian Securities and Investments Commission (ASIC) to the ACNC, except for criminal offences.

Recommendation 28

A single national scheme for charities and not-for-profits be developed.

5.82 The committee considers that an urgent response to the review panel's report is required, to inform possible future reforms to fundraising regulations; indeed the Consumer Affairs Ministers' forum has delayed its consideration of harmonising charitable statutory regimes until a response is provided.[73]

Recommendation 1

5.83 The committee recommends that the Australian government urgently provide a public response to the recommendations made in the review panel's report, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*.

A way forward for reform of national fundraising regulation

5.84 The Australian Government does not currently have a policy position on fundraising regulation for the charity and not-for-profit sector (other than the default policy of maintaining the status quo). The committee considers that a policy response is long overdue. Submitters and witnesses generally support that any reforms to charity fundraising laws must contain the following elements:

(a) A truly national scheme

(b) Simple and modern

(c) Address the regulation at all three levels of government

(d) Reduction of red tape for the sector

(e) If there is a code of conduct, any rules must be expressed as principles (this means the document is dynamic and can respond quickly to the emergence of new technologies and methods of fundraising)

73 Legislative and Governance Forum on Consumer Affairs, *Joint Communique: Meeting of Ministers for Consumer Affairs*, 26 October 2018, p. 6. See also Chapter 2 of this report.

(f) Apply to all charities and not-for-profits, and be tailored to the needs of both large and small fundraisers

5.85 Given the lack of consensus from expert witnesses before the committee about which specific model of regulation should be adopted, and the necessity of working closely with the states and territories to achieve either harmonisation or complete repeal of state and territory fundraising regulations, it is difficult for the committee to recommend a detailed regulatory model for immediate implementation. However, the Australian Government must demonstrate a commitment to achieve urgent reform.

5.86 The committee considers that the Commonwealth, State and Territory governments should commit to developing a nationally consistent model for the regulation of charitable and not-for-profit fundraising within a time limit of two years.

Recommendation 2

5.87 The committee recommends that the Australian Government commit to working with state and territory governments and the not-for-profit sector to develop a consistent national model for regulating not-for-profit and charitable fundraising activities within a time limit of two years.

Senator Catryna Bilyk
Chair
Senator for Tasmania

Senator Rachel Siewert
Deputy Chair
Senator for Western Australia