

9 February 2024

Our ref: WD:NFP

Philanthropy Inquiry
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By online portal: <https://www.pc.gov.au/inquiries/current/philanthropy/make-submission#lodge>

Dear Review Team

Philanthropy Review – Future foundations for giving - draft report

The Queensland Law Society (QLS) appreciates the opportunity to provide feedback on the draft report "Future foundations for giving" (**Draft Report**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals and increase community understanding of the law. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Not for Profit Law Committee, whose members have substantial expertise in this area.

QLS acknowledges the breadth and detail of the issues addressed in the Draft Report and has commented on specific issues below.

The next iteration of the report could be enhanced by emphasising and exploring transformative giving initiatives to increase philanthropy, in addition to the current focus on existing tax and regulatory issues. We recognise that tax and regulatory reforms are important to enable the sector to build capacity and overcome unnecessary burdens. However, these reforms alone, may not achieve the federal government's goal of doubling giving by 2030.

QLS welcomes a number of positive initiatives proposed in the Draft Report, including:

- The information request in 7.1, seeking information from participants on whether a regulatory response to issues created by dormant charities is needed and possible approaches.¹ We have provided commentary below.

¹ Draft Report, page 230.

- Draft recommendation 7.2 - in relation to working with state and territory governments to ensure the Commissioner of the Australian Charities and Not-for-profits Commission (**ACNC**) has the necessary enforcement powers to fulfil their role within the regulatory framework for charities. We suggest that it is properly the function of State Attorneys-General to have standing to make applications in a state or territory Supreme Court for orders regarding the administration of charities, including the protection of assets held in trust for charitable purposes. However, improved cooperation between the States and the ACNC would be beneficial, to increase information-sharing to identify cases of concern and then to facilitate joint appearances with the Attorney and the ACNC in appropriate cases.
- Draft recommendation 7.3, calling for test case funding for the ACNC to distribute to charities for the purpose of developing the law in matters of public interest and introducing a binding rulings scheme for the ACNC.
- Recommendations in Chapter 9 supporting the improvement of public information about charities and giving, particularly in relation to the public reporting of philanthropy and donations by listed public companies and the collection of such data by the Australian Taxation Office (**ATO**);²

Information request 4.2 “Government policies to support giving”

QLS also welcomes the information request 4.2 “Government policies to support giving”.³

Given the intent of this review is to investigate ways to increase philanthropy in Australia, our members consider further investigation of options such as tax credits and ‘matched giving’ are worthwhile.

The United Kingdom experience with GiftAid⁴ is a model particularly worth considering. However, QLS would be concerned if the introduction of such a model, or a ‘rebate system’, was at the expense or dilution of the existing deduction regime. We consider the ‘full deduction’ regime is likely to be more attractive to donors.

In Australia, gifts made to charities or other entities classified as ‘deductible gift recipients’ can be claimed in full (up to the amount of your taxable income) on the donor’s tax return, reducing their taxable income. This approach is known as full deductibility at the marginal tax rate. A taxpayer on the top marginal rate has a rate of 47% (includes 2% Medicare levy).

The UK Gift Aid system is a gift matching by the government arrangement, which is not a tax rebate or deduction. Ireland, Norway, and Singapore also have a matching scheme, where government tops up donations at a given rate so that the entity receiving the donation is able to claim the tax relief. In the United Kingdom and Ireland the matched amount is linked to the personal income tax rate of the donor.

² Draft Report, page 31 and Chapter 9 Public information about charities and giving

³ Draft Report, page 38

⁴ Draft Report, page 148, Box 4.9

If a UK resident taxpayer makes a donation and chooses to apply Gift Aid, the charity can claim an extra 25% from the government. If the donor is a higher-rate taxpayer, they can claim an additional 20% relief on the donation – effectively a deduction.

QLS recommends consideration be given to introducing a gift-matching scheme in some form, without removing the current deduction regime.

Our members have also suggested that the concept of 'matching' could be extended to include a portion of a donation. For example, if an individual donated \$100 to a cause, a government agency could offer to 'match' by giving 20% of the donation so that the total amount given was \$120.

Although the individual does not gain a direct personal benefit from the 'match', the individual might still be incentivised to give something, rather than nothing, in the knowledge that a third party will be amplifying the benefit of their donation further.

Information request 7.1 Building a stronger regulatory framework

Dormant Charities/Charitable Trusts

The Commission is also seeking further information about options for ensuring that the assets of dormant charities are directed toward benefiting the public, including what test may be appropriate for determining whether a charity is 'dormant' and what steps could be taken in response.

QLS is pleased that the Draft Report has referred to our submission, which referenced the Scottish "Revitalising Trusts Project" which was a joint working agreement between the Scottish Charity Regulator and Foundation Scotland.

Recommended option - dormant charities/charitable trusts

QLS supports further investigation of options surrounding dormant organisations, with the first stage to involve gaining a better understanding of the prevalence of dormancy and the reasons for the dormancy.

QLS recommends that the Federal government provides additional funding to the ACNC to establish a project that identifies potential dormant charities and charitable funds (whether or not they are directly regulated by the ACNC) and undertakes an assessment of the reasons for dormancy. We understand that the experience from Scotland indicates that dormancy could be for a number of reasons including difficulty in identifying beneficiaries, being unable to spend the income of the charity, finding it hard to attract trustees, finding it difficult to manage the charity, or needing assistance in winding up the charity. The Scottish Revitalising Trusts project defines a dormant charitable trust as one that has either not spent or received any money in the last five years; spent less than 30% of its income in the last five years; or failed to send OSCAR annual accounts during the last five years.

The justification for a dedicated project would be the public benefit flowing from these entities being able to re-activate and re-commence disbursing charitable funds as grants, scholarships, awards, loans, or other payments to charities, community organisations or individuals.

The ACNC should then be further funded to engage with any identified charities/trusts to assist with potential options for reinvigorating operations or establishing a partnership with an appropriate partner to provide technical and governance assistance to reactivate or wind up (if required) the charity/charitable trust.

QLS would be pleased to participate in any further consultation on how such a project might be developed and any potential regulatory issues which might arise in the second stage of engaging with dormant organisations.

Information Request 7.2 – regulation of online giving platforms

QLS supports the need for greater consideration of regulating online platforms. The rise of online giving has many benefits but there are also challenges for charities and not for profits.

As noted in the Draft Report, the Uniform Law Conference of Canada has adopted model legislation designed to reform benevolent and community crowdfunding laws. QLS considers this model would provide a sound starting point for wider consultation in Australia about a proposed regulatory response.

The following resources could also provide the basis for more detailed consultation:

- The *Saskatchewan Informal Public Appeals Act* attempts to deal with legal gaps arising from online crowdfunding on sites such as GoFundMe, Kickstarter and Facebook. Its purpose is to provide some structure for the disbursement of funds raised by informal (such as on social media) and specific-site online methods. The Informal Public Appeals Act came into force in Saskatchewan on 1 January 2015 in response to a consultation paper published by the Uniform Law Conference, a national body that proposes changes to Canadian provincial, territorial and (where necessary) federal laws to increase harmonisation and develop uniform statutes across the country.⁵
- Williamson, Alexandra, Leat, Diana, & Phillips, Susan D (Eds.) (2023) *Philanthropic Response to Disasters: Gifts, Givers and Consequences*. Global Perspectives on Philanthropy and Public Good. Policy Press, Bristol, UK.

We particularly recommend Chapter 6 of the publication, by Myles McGregor-Lowndes “Fundraising, Granttaking and Regulatory Issues: Regulating Good in Bad Times”.⁶

QLS endorses the consultation questions in this Information Request and also makes the following comments about these questions:

1. *a regulator to be notified of fundraising appeals once a certain threshold of donations is met* – QLS recommends permission should be sought from the charity before an online appeal is started. Notification to the regulator is also beneficial but permission of the charity is paramount, for the reasons discussed below.

⁵ Refer *Humboldt Broncos Memorial Fund Inc (Re)* 2018 SKQB 341 (CanLII) <https://eprints.qut.edu.au/200260>

⁶ In Williamson, Alexandra, Leat, Diana, & Phillips, Susan (Eds.) *Philanthropic Response to Disasters: Gifts, Givers and Consequences*. Policy Press, Bristol, UK – Chapter 6 at pp. 109-
<https://eprints.qut.edu.au/238964/>

2. *online giving platforms to make reasonable efforts to notify a charity of appeals being conducted in their name* – As above, QLS recommends a requirement that the permission of the charity is sought before the appeal is begun. There are multiple benefits from a charity knowing what appeals are being conducted in their name. Having knowledge of an anticipated donation is helpful from a budgeted perspective, but the conduct of an appeal may also have reputational implications for a charity which they may wish to manage. It may also be that a charity could work with the ‘fundraiser’ to ensure the appeal is being conducted in the most beneficial way and in the name of the most appropriate entity. Such an approach might have avoided the issues experienced in *New South Wales Rural Fire Service & Brigades Donations Fund; Application of Macdonald* [2020] NSWSC 604.
3. *online giving platforms or a regulator to halt a fundraising appeal being conducted in the name of a registered charity upon that charity’s request* – this seems a particularly apt reform to be made, particularly given the experience referenced in the Draft Report of the Celeste Barber fundraising case of *New South Wales Rural Fire Service & Brigades Donations Fund; Application of Macdonald* [2020] NSWSC 604.

Repurposing unclaimed moneys for societal benefit

QLS acknowledges philanthropy typically involves the donation of time, money, or assets for the betterment of others or society as a whole. However, there is another area that the draft report has not touched on but which aligns with the overarching goal of philanthropy and that is the repurposing of unclaimed money, namely, leveraging unused resources to support social, cultural and environmental causes.

Repurposing unclaimed funds for social good can systemically fulfil philanthropic objectives by redistributing resources through established channels or government policy. QLS recognises that this proposal departs from traditional philanthropy but it is considered that repurposing unclaimed moneys would maximise the societal benefit by putting dormant assets to productive use.

At a Commonwealth level:

- the Australian Securities and Investments Commission (**ASIC**) currently reports that there is approximately \$1.5 billion in unclaimed money from lost bank accounts, shares, investments, and life insurance policies. ([Find unclaimed money - Moneysmart.gov.au](#))
- The ATO data reports that in 2022 the ATO is holding \$16 billion in lost or ATO held super. ([Total lost \(fund-held\) and ATO-held super | Australian Taxation Office](#)). This has increased from \$13.9 billion in 2021.
- Additionally, the Fair Work Ombudsman administers unclaimed recovered wages. ([Search for unpaid wages - Helping the community - Fair Work Ombudsman](#)).

Unclaimed money received by ASIC is transferred to Commonwealth Consolidated revenue but is available to be claimed by the rightful owner in perpetuity.

Since 2008, the United Kingdom (**UK**) has operated a Dormant Assets Scheme to provide a system to distribute dormant assets to good causes. This scheme is industry-led but

underpinned by legislation, the *Dormant Assets Act 2022 (UK)*. It applies to cash in UK bank and building society accounts that have been dormant for 15 years,

It is reported that it has distributed around £880 million since the Scheme began. The Scheme was expanded and the legislation was updated in 2022.

The primary principles of the Scheme are:-

- (1) attempts should first be made to reunite assets with their rightful owners before transferring them;
- (2) owners should always be able to reclaim their funds; and
- (3) participation is voluntary.

Funds should also not be used as a substitute for Government spending. The funds are paid into the Reclaim Fund Ltd which can then transfer surplus funds to the National Lottery Community Fund, which in turn distributes to the causes as set by the government. At present, in England, funding is restricted to youth, financial inclusion, and social investment. Social investment is the use of repayable interest-free loans to help an organisation achieve a social or environmental purpose.

Unlike the UK, Australia has well-established laws and measures regarding unclaimed moneys. These measures enable the transfer of unclaimed funds into consolidated revenue. At a Commonwealth level, bank accounts become unclaimed after 7 years if the account is inactive (no deposits or withdrawals). Under section 69(3) of the *Banking Act 1959 (Cth)* relevant entities have to lodge a statement with the Treasurer and amounts of not less than \$100 are transferred to the Commonwealth.

Similarly, life insurance policies become unclaimed 7 years after the policy matures and it is not claimed. Under section 216 of the *Life Insurance Act 1995 (Cth)* companies are required to give a statement to ASIC and transfer the unclaimed funds to the Commonwealth.

Under section 559 of the *Fair Work Act 2009 (Cth)* an employer may pay to the Commonwealth any moneys owing to a former employee if that employee cannot be found. However, moneys owing can be claimed through the Fair Work Ombudsman.

The QLS Not for Profit Law Committee is of the view that this Inquiry provides a good opportunity to investigate whether unclaimed moneys (dormant assets) can be directly and transparently utilised to enable and strengthen the charity and NFP sector in Australia.

Taking note of the UK Dormant Assets Scheme the government could establish a dedicated scheme adapting elements of that Scheme. This could be achieved through a legislative approach establishing a dormant asset scheme that enables the government to set up a body to operate the scheme, transfer a percentage of the total amount of unclaimed money held by it, and set criteria for the distribution of the funds setting out areas of priority for the government. Alternatively, an industry-led scheme could be established which is funded by unclaimed money amounts that are less than \$100.

The primary purpose of the dormant assets scheme should be to maximise the societal benefits derived from unclaimed moneys while ensuring transparency, accountability, and equitable distribution of funds. By repurposing dormant assets for social good, the government can make a meaningful impact on the well-being of the community and address pressing societal needs.

Philanthropy Review – Future foundations for giving - draft report

A particular focus of such a Scheme could be the funding of the Aboriginal and Torres Strait Islander philanthropic foundation proposed in draft recommendation 10.1 of the Report.

QLS would be pleased to discuss this recommendation further with the Productivity Commission, as one of the Not for Profit Law Committee's members, Linda Lavarch, is undertaking research on this area with the Queensland University of Technology.

Recommendation

That the federal government consider implementing legislation to establish a dormant assets scheme. This scheme could take one of two forms:

1. **Government-Led Scheme:** The government could establish a centralised dormant assets scheme that accounts for all unclaimed money held by it. This would ensure comprehensive coverage of dormant assets and streamline the process of repurposing them for social, cultural, and environmental causes, as well as strengthening the charity sector.
2. **Industry-Led Scheme:** Alternatively, the government could explore the establishment of an industry-led dormant assets scheme. Under this model, companies holding unclaimed moneys of less than \$100 would voluntarily contribute funds to the scheme. These contributions would then be pooled and utilised for social, cultural, and environmental initiatives, as well as to support the charity sector or as directed by the government.

QLS looks forward to the final report being delivered and to the opportunity to comment on the final recommendations.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team legal@qls.org.au.

Yours faithfully

Rebecca Fogerty
President