

NSWCCL SUBMISSION

AUSTRALIAN GOVERNMENT

**PRODUCTIVITY
COMMISSION**

**FUTURE FOUNDATIONS FOR
GIVING DRAFT REPORT**

9 February 2024

NSWCCL

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Productivity Commission (Commission) concerning the Future foundations for giving Draft Report (Report). NSWCCL is a non-profit, Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations. It does not have Deductible gift recipient (DGR) status and is not a registered charity.

The Report sets out the Commission's draft findings and recommendations relating to motivations for philanthropic giving in Australia and opportunities to grow it further.

NSWCCL endorses the draft recommendations of the Commission which will bring reforms to the DGR system, making it more transparent, simpler, fairer and more consistent. However, we comment specifically, in this submission, on areas that require further action to ensure a more democratic process and that align more consistently with civil rights. This submission will also concentrate on the system that determines which entities in Australia can receive tax deductible donations rather than tax incentives encouraging donation.

Draft Findings and Recommendations

4. How governments can incentivise giving

- (a) As noted by the Commission, volunteering in Australia has declined in the past decade. Organisations without DGR status are constrained in their activities and unable to reach their full potential, a situation which has been exacerbated by that decline. NSWCCL has experienced this, despite an increase in workload over the years of the COVID pandemic.
- (b) Organisations without DGR endorsement are also restricted in their ability to seek funding from the general public and philanthropic groups such as private ancillary funds and public ancillary funds. Raising funds requires DGR status to access the numerous charitable foundations that operate to advance and protect human rights, including social and political rights. For example, despite having been established since 1963 as a human and civil rights advocate, without DGR status, NSWCCL is currently excluded from consideration by any charitable foundation. These foundations and also private individuals who are not entitled to a deduction for their donation are less incentivised to donate to NSWCCL compared to other organisations.
- (c) In response to Information request 4.1- NSWCCL receives donations from people and organisations who do not claim a tax deduction because NSWCCL does not have DGR status and therefore the donations are not eligible for a tax deduction. Donations to our organisation tend to be attached to some direct benefit to the donor such as a fund-raising dinner.

5. An assessment of the deductible gift recipient system

- (a) NSWCCL agrees that "The DGR system deliberately seeks to steer donations and, with them, other resources toward certain charitable purposes and activities, and away from others ... [It] is not fit for purpose as a mechanism for determining which entities undertaking activities that benefit the community should receive tax deductible donations from individuals. The scope of activities eligible for tax deductible donations from individuals has evolved in an ad hoc way."¹

For example, the unique nature of the activities and function of the NSWCCL means that it does not easily fit into any one of the general DGR categories set out in subdivision 30-B of the ITAA 9. To the extent that the Commission seeks to expand those categories to advocacy groups, the NSWCCL endorses this recommendation which will apply a principle-based assessment to the

¹ Draft Report Overview pp14-15

DGR categories. This will lead to a more robust and democratic system affecting human rights organisations that advocate for policy change, many of which currently fall outside the system.

- (b) Specific listing in legislation can be used to gain DGR status for entities that do not fit into a single endorsement category. “However, the existing process lacks transparency, is time consuming for charities seeking endorsement and can lead to inconsistent outcomes. Access to decision makers can be an important factor in an entity being specifically listed.”² No reasons are required to be given for denial of an application for specific listing and there is no formal review process (as would be the case with administrative decisions).

NSWCCL endorses the draft recommendation to increase transparency about these applications and the decision-making process but also recommends an appeal process, particularly if the specific listing mechanism is only to be used in exceptional circumstances.

6. Reforming the deductible gift recipient system

As noted in the Report, the regulatory framework for charities is complex and reforms to the Australian Charities and Not-for-profits Commission (ACNC) are “needed to support the high level of public trust and confidence in charities...”³ NSWCCL strongly supports the Draft recommendations 6.1 and 6.2 of the Report but has concerns with some of the current role, functions and powers of the ACNC:

- (a) The ACNC provides the following guidance on its website about what is for the public benefit:

“A charity’s purpose is for the public benefit if achieving it would be of benefit to the public generally, or a sufficient section of the public.

A sufficient section of the community could be a local community, followers of a particular religion, people with a particular disability, refugees or young people.

There are many ways a charity’s purpose can benefit the public, for example, it can provide goods, services, education, counselling or spiritual guidance, or improve the environment.”

Draft recommendation 6.2 includes a recommendation to develop a legislated definition of public benevolent institution (PBI). NSWCCL strongly endorses this reform. PBIs are variously interpreted, including through many years of judicial interpretation, and is confused and complex.

- (b) Governance Standard 3 of the ACNC Regulations 2022 states that a registered entity “must not” engage in conduct that may be dealt with as an indictable offence (even a summary offence); or by way of a civil penalty of 60 penalty units or more. A breach of the Standard allows the ACNC to deregister an organisation if it “reasonably believes” an entity is likely to commit a summary offence e.g for protesting.

NSWCCL has not applied to be registered with the ACNC. NSWCCL is an organisation concerned with the protection of civil liberties from the encroachment of bureaucracies exceeding their roles. It has not registered with the ACNC because it is ideologically opposed to the regulation of charitable organisations affecting the ability to freely engage in advocacy without adequately protecting the freedom of political communication.

NSWCCL considers that the regulation, including regulations introduced in 2022 (summary offence relating to real property or personal property and an entities resources) should be repealed or substantially redrafted. “Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an

² Draft Report Overview

³ Draft Report Overview p.2

offence (unrelated to the ACNC's regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.”⁴

This submission was prepared by Michelle Falstein on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Productivity Commission .

Yours sincerely,

Tim Roberts
Secretary
NSW Council for Civil Liberties

⁴ Recommendation 9 of the Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018 <https://treasury.gov.au/publication/p2018-t318031>