

Submission on the Review of Philanthropy (Phase 2) – November 2023 Draft Report “Future foundations for giving”

12 February 2024

Productivity Commission
Karen Godfrey
Email: philanthropy@pc.gov.au

Contact: **Taylah Spirovski**

President, NSW Young Lawyers

Sarah Ienna

Submissions Lead, NSW Young Lawyers

Timothy Allen

Chair, NSW Young Lawyers Animal Law Sub-Committee

Contributors: Rishika Pai, Timothy Allen

Coordinator: Rishika Pai

The NSW Young Lawyers Animal Law Sub-Committee (**Sub-Committee**) makes the following submission on the Review of Philanthropy (Phase 2) - November 2023 Draft Report “Future foundations for giving” (**Draft Report**)

NSW Young Lawyers

NSW Young Lawyers is a Committee of the Law Society of New South Wales that represents the Law Society and its members on issues and opportunities arising in relation to young lawyers i.e. those within their first five years of practice or up to 36 years of age. Through its 15 sub-committees, each dedicated to a substantive area of law, NSW Young Lawyers supports practitioners in their professional and career development by giving them the opportunity to expand their knowledge, advance their career and contribute to the profession and community.

The Sub-Committee comprises a group interested in laws regulating the treatment of animals. The Sub-Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst the Sub-Committee is a passion and desire to use their legal skills and the law to improve protections for animals.

Summary of Recommendations

The Sub-Committee notes that the Draft Report relates to a broad inquiry into philanthropic giving. The Sub-Committee wishes to raise for the Productivity Commission's consideration the following recommendations which impact organisations and charities concerned with the treatment of animals:

1. We affirm our support for the Draft Report's recommendation that Deductible Gift Recipient (**DGR**) status should expand to all animal welfare charities, including those that advocate for the interests of animals and thereby prevent animals from being harmed in the first instance.
2. We reiterate our suggestion for amending the relevant wording of item 4.1.6 of section 30.45 of the *Income Tax Assessment Act 1997* (Cth) (**Tax Act**) so it is clear that all animal charities are eligible, as follows (additions in **bold**):

"An institution whose principal activity is one or more of the following:

(a) providing short-term direct care to animals (but not only native wildlife) that have been lost or mistreated or are without owners;

(b) rehabilitating orphaned, sick or injured animals (but not only native wildlife) that have been lost or mistreated or are without owners;

(c) conducting advocacy, research, campaigning or other activities aimed at the prevention of cruelty to animals (but not only native wildlife), including educating the public on animal welfare and promoting responsible animal ownership."

3. We recommend that the Productivity Commission anticipate potential tensions regarding the interpretation of "disqualifying purposes" and "public benefit" in respect of DGR status eligibility and provide further clarity on these terms in the Final Report by way of discussion and/or examples. In particular, it ought to be confirmed in the Final Report that advocacy for adequate animal welfare standards and upholding anti-cruelty laws is of public benefit and should not be considered a disqualifying purpose.
4. We support the Draft Report's recommendation to extend DGR status to organisations that conduct public interest journalism, noting it is crucial to instigating positive change in often neglected or marginalised areas, including animal welfare. Noting limited discussion in the Draft Report of, and potential opposition to, this recommendation, we submit that the Final Report should include an in-depth discussion and endorsement of this recommendation. The Final Report should also include

confirmation that public interest journalism concerning animal welfare issues can provide a public benefit and should not be automatically considered a disqualifying purpose.

Support for expansion of DGR status for all animal welfare charities

1. On 18 May 2023, the Sub-Committee made a submission to the Inquiry prior to the release of the Draft Report (**Initial Submission**).¹
2. Our Initial Submission highlighted the important role that animal welfare charities play in protecting the welfare and rights of animals, and that all animal charities having DGR status is crucial to enabling animal charities to conduct their work effectively.
3. The Draft Report acknowledges concerns raised in our Initial Submission that certain animal welfare charities are not eligible for DGR status, particularly those focused on advocacy rather than direct short-term care of animals.²
4. The Draft Report also highlighted that animal welfare was the most common type of organisation for which people were interested in volunteering (29.4% of persons surveyed).³ We submit that this highlights the community's desire to support animal welfare charities, and accordingly the need for public policy reform to encourage giving to, and volunteering for, such charities by extending DGR status to them.
5. The Draft Report proposes that:
 - i. animal welfare charities be included in the DGR system, with no exclusions;⁴
 - ii. animal welfare charities should not be restricted to having a principal purpose of short-term direct care and rehabilitation of animals;⁵ and
 - iii. DGR status should be expanded to charities focused on advocacy and prevention, a wider range of animal welfare charities, and many charities run solely by volunteers.⁶
6. The Sub-Committee strongly supports these recommendations, for the reasons set out above and in our Initial Submission. We submit that DGR status being extended to all animal welfare charities will enable

¹ Submission 241 dated 18 May 2023.

² Page 169 of the Draft Report.

³ Page 116 of the Draft Report.

⁴ Page 187 of the Draft Report.

⁵ Page 204 of the Draft Report.

⁶ Figure 6.3 on page 204 of the Draft Report.

more efficient and effective use of donations, and in the long run, fewer animals will require care or rehabilitation, thereby reducing the burden on those charities conducting these caring activities and their volunteers.

7. We reiterate our suggestion for amending the relevant wording of item 4.1.6 of section 30.45 of the *Income Tax Assessment Act 1997* (Cth) (**Tax Act**) so all animal charities are eligible, as follows (additions in **bold**):

"An institution whose principal activity is one or more of the following:

(a) providing short-term direct care to animals (but not only native wildlife) that have been lost or mistreated or are without owners;

(b) rehabilitating orphaned, sick or injured animals (but not only native wildlife) that have been lost or mistreated or are without owners;

*(c) **conducting advocacy, research, campaigning or other activities aimed at the prevention of cruelty to animals (but not only native wildlife), including educating the public on animal welfare and promoting responsible animal ownership.***"

Potential challenges – “disqualifying purpose” or lacking “public benefit”

8. The Sub-Committee endorses the idea that animal welfare organisations actively involved in policy advocacy constitute a valid and constructive form of charitable work, serving as a proactive approach to safeguarding animal welfare. Nevertheless, we remain aware of potential challenges that may impede certain animal advocacy charities, including by limiting or compromising their eligibility for DGR status.
9. The Draft Report recognises the significance of engaging in advocacy activities,⁷ but also acknowledges the inherent tensions associated with such endeavours; for instance, page 7 of the Draft Report states (**bold** added for emphasis):

*"Philanthropy can also support advocacy that conveys the perspectives of communities, facilitating their input into democratic processes and policy outcomes. **This can include expressing views on policy issues which are different from the government or the wider public.**"⁸*

⁷ For example, page 17 of the Draft Report.

⁸ Page 7 of the Draft Report.

10. The Draft Report notes that at the Australian Government level, there is a specific legal definition of a charity that requires a Not-for-Profit organisation (**NFP**) to:
 - i. have only charitable purposes that are for, or to advance, the public benefit
 - ii. not be an individual, a political party or a government entity
 - iii. not have a disqualifying purpose.⁹
11. Disqualifying purposes include activities that are unlawful or contrary to public policy, or purposes that promote or oppose a political party or candidate for political office.¹⁰
12. The Draft Report also states at pages 180 to 181:

“The Commission has been asked to examine how the DGR system aligns with public policy objectives and the priorities of the broader community. The current DGR system lacks any coherent policy underpinning, and the Commission has sought to address this by developing a principles-based framework which should be used to determine which classes of charitable activities are within the scope of the DGR system. Charities undertaking these classes of activities would then be eligible for DGR status. The outcome of this approach would be that most, but not all, registered charities would be eligible for DGR status... determining which classes of charitable activities are within the scope of the DGR system should be subject to a higher threshold, so that those activities where there are likely to have the greatest net benefits to the community as a whole are prioritised.”

13. The Sub-Committee is concerned that the Productivity Commission’s acknowledgement of these concepts of “disqualifying purposes” and “public benefit” may impact the DGR status eligibility of some animal welfare organisations that work in policy advocacy.
14. For instance, some such organisations may challenge and/or advocate for a change in the practices of the animal agriculture industry – such as factory farming conditions, live exports, the use of battery cages for hens, the use of gas chambers for pigs, and the culling of male chicks. We anticipate an argument being made that animal agriculture contributes to the Australian economy and the public, and also receives support from Australian public policy in various ways through regulation and grants.
15. We are concerned by the prospect that policy advocacy animal welfare organisations, especially those whose charitable activities may involve opposition to certain animal agriculture practices, may encounter

⁹ Box 1.1, page 54 of the Draft Report.

¹⁰ *Charities Act 2013* (Cth), s 11.

allegations that such opposition runs contrary to public policy. This, in turn, could be construed as a "disqualifying purpose" and/or deemed not in the public benefit, potentially resulting in their ineligibility for DGR status.

16. We anticipate that the animal agriculture industry might present such arguments in submissions to this process, or during parliamentary discussions following the potential implementation of recommendations contained in the Draft Report.
17. Examples of organisations advocating for change in animal agriculture practices include:
 - i. Animals Australia have long advocated against the use of battery cages for hens in egg production. This has included lobbying efforts directed at policymakers, campaigning to educate consumers about the issues surrounding battery cages, and collaborating with other animal welfare organisations, farmers, and industry stakeholders to work towards more humane and sustainable practices in egg production. These efforts have been met with public support, which ultimately compelled governments to agree to put an end date on battery cages – a staggered phase out period will occur from 2032 to 2036.¹¹
 - ii. Animals Australia and the Australian Alliance for Animals have long advocated for a ban to live animal exports,¹² particularly long-distance sea transport. As a result, the live export industry has faced increased scrutiny and changes in policy over the years. Notably, following ABC's Four Corners broadcast footage from Animals Australia's live export investigation, the Australian government temporarily suspended live cattle exports to Indonesia in 2011.¹³
18. Currently, neither Animals Australia nor the Australian Alliance for Animals holds DGR status. In the instances mentioned earlier, their advocacy efforts, initially perceived as potentially contrary to public benefit, were ultimately validated by widespread public support garnered through extensive campaigns. We submit that the possibility of such outcomes should be considered when contemplating the potential impact of "disqualifying purposes" and "public benefit" concepts on the DGR status eligibility of animal welfare organisations engaged in policy advocacy.

¹¹ 'Aussie hens condemned for 10+ more years in cages', Animals Australia (Web Page 24 July 2023) <<https://animalsaustralia.org/our-work/factory-farming/battery-cages-phase-out/>>; 'Australia is banning battery cages by 2036 – but it needs to happen sooner' (Web Page 18 August 2023) <<https://www.allianceforanimals.org.au/ourwork/australian-is-banning-battery-cages-by-2036-but-it-needs-to-happen-sooner>>.

¹² 'Live Export', *Animal Australia* (22 January 2023) <<https://animalsaustralia.org/our-work/live-export/>>; 'Our Work', *Australian Alliance for Animals* <<https://www.allianceforanimals.org.au/ourwork>>.

¹³ 'Remembering Tommy', *Animals Australia* (4 June 2020) <<https://animalsaustralia.org/our-work/live-export/remembering-tommy-his-legacy-end-live-export/>>.

19. We recommend that the Productivity Commission anticipate this tension/possible argument and provide further discussion about what constitutes a “disqualifying purpose” and what falls outside the “public benefit” for the purpose eligibility for DGR status. We also recommend that such discussion considers our above submissions in respect of the public benefit offered by improving and maintaining strong animal welfare standards.

New Zealand case: *Greenpeace of New Zealand Incorporated v Charities Registration Board*

20. Greenpeace is a well-known environmental charity that first applied for charitable registration in New Zealand on 19 June 2008.¹⁴
21. Greenpeace was embroiled in a decade-long legal battle with the Charities Commission to become a registered charity. The Board of the Commission had denied registration of Greenpeace because it had engaged in “political advocacy”. This culminated in a historic case in the Supreme Court (*Re Greenpeace of New Zealand* [2014] NZSC 105). The Court held that political advocacy could be a charitable purpose if the advocacy was to the public benefit, and remitted the decision back to the Commission.¹⁵
22. The Board of the Commission, once again, denied registration for reasons including that the political advocacy of Greenpeace was not the type allowed by the Supreme Court. Greenpeace once again applied to review the decision.¹⁶
23. On 10 August 2020, Mallon J delivered her decision that Greenpeace was entitled to, and should now, be registered as a charity.¹⁷ In concluding that the Board had erred in finding otherwise, her Honour noted at paragraphs 85 to 86 of her judgment (**bold added for emphasis**):

*“Protecting the environment will often come at the cost of competing interests, but advocating for its protection, in opposition to competing interests, is no less in the public benefit because of that. **The Supreme Court cannot have meant that the nature of the advocacy will be disqualifying if an***

¹⁴ *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2010] NZHC 2993.

¹⁵ ‘Case Brief: Greenpeace v Charities Registration Board [2020]’, *Franks Ogilvie* (20 August 2020) <<https://www.franksogilvie.co.nz/news/case-brief-greenpeace-v-charities-registration-board-2020>>.

¹⁶ ‘Case Brief: Greenpeace v Charities Registration Board [2020]’, *Franks Ogilvie* (20 August 2020) <<https://www.franksogilvie.co.nz/news/case-brief-greenpeace-v-charities-registration-board-2020>>.

¹⁷ Sue Barker, ‘Focus on purpose – What Does a World-Leading Framework of Charities Law Look Like?’ (Report, 10 April 2022); *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [13].

*organisation advocates for environmental protection of a kind for which there will be opposition ... the public benefit comes from raising awareness of the environmental issues at stake and thereby assisting to ensure that the public's interest in protecting the environment is part of the decision-making process. Without that advocacy, the environmental interests may be unknown or given insufficient attention as against the private interests of the applicant for the permit. The advocacy in this example is not undertaken to confer a private advantage and something of value to the public is achieved.*¹⁸

24. Her Honour also noted at paragraph 176:

*"Greenpeace NZ's main activity is to advocate for the protection of the environment. It does that mainly by advocating for measures to mitigate climate change, for sustainable fishing for the protection of the ocean environment and for improving the quality of New Zealand's freshwater. **There is a charitable public benefit in that advocacy, as it contributes to the broad-based support and effort necessary for the end goal of protecting the environment.**"*¹⁹

25. The Sub-Committee submits that her Honour's comments can readily be applied to a number of animal welfare charities of the kinds addressed in this submission. Accordingly, these charities should be given similar treatment in Australia in relation to their eligibility for DGR status, and the relevant provisions of the *Tax Act* amended to that effect.

Suggestions to deal with the potential challenges

26. The Draft Report states in Box 2.4 on page 78:

*"Advocacy by charities involves promoting or opposing a change to any matter of law, policy or practice in Australia or overseas, in furtherance of a charitable purpose (ACNC 2023h). In *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, the High Court of Australia recognised the public benefit associated with the generation of public debate, where this is linked to another charitable purpose."*

27. In our Initial Submission, the Sub-Committee highlighted the importance of, and commitment to, promoting animal welfare which has been demonstrated by the government and the community. It also highlighted statistics on community values regarding animal welfare – a 2018 report showed 95% of

¹⁸ *Greenpeace of New Zealand Incorporated v Charities Registration Board* [2020] NZHC 1999 at [85] – [86].

¹⁹ Case Brief: *Greenpeace v Charities Registration Board* [2020], *Franks Ogilvie* (20 August 2020)

<<https://www.franksogilvie.co.nz/news/case-brief-greenpeace-v-charities-registration-board-2020>>.

Australians are concerned about animal welfare, with 91% supporting reform.²⁰ A 2022 study found that 50% of respondents wanted harsher sentences for animal cruelty, and 80% believed more individuals found guilty should face prosecution.²¹

28. The Sub-Committee submits that animal advocacy organisations are crucial to ensuring that animal welfare standards are being met and industries are held accountable for maintaining those standards, in accordance with community expectations and policy objectives. Such organisations may oppose certain animal agriculture practices as part of their advocacy, yet clearly do contribute to the public benefit by raising awareness of poor animal welfare outcomes, which may result in suitably increased penalties and more prosecutions. Without advocacy, there is a concern that poor animal welfare standards may go unnoticed or receive insufficient attention.
29. Securing these organisations' DGR status would further aid the public's interest in upholding animal welfare standards being considered in decision-making processes. When charities advocate for policies that private interests may oppose (for example because they take the view that adequate animal welfare standards and upholding anti-cruelty laws should be given primacy over fiscal, private benefit within the industry), they can be of overall public benefit by way of fostering informed debate and raising awareness.
30. It would be disappointing if animal welfare charities obtained DGR status, only to be rendered ineligible due to the issues raised above. Accordingly, we propose that these issues be dealt with in the Final Report with clarity provided that advocacy for adequate animal welfare standards and upholding anti-cruelty laws is held to be of public benefit and should unambiguously not be considered a disqualifying purpose. The Sub-Committee would welcome further consultation in relation to this issue if required.

Public Interest Journalism

31. The Sub-Committee welcomes the Draft Report's recommendation to extend DGR status to organisations that conduct public interest journalism, yet observes a limited discussion on the significance of this recommendation.

²⁰ Futureye, Commodity or Sentient Being? Australia's Shifting Mindset on Farm Animal Welfare (2018, Futureye Pty Ltd) <<https://www.sheepcentral.com/wp-content/uploads/2019/05/190129-Commodity-or-Sentient-Being-Australias-Shifting-Mindset-on-Farm-Animal-Welfare-v.-7.0.pdf>> 1.

²¹ Morton, Hebart, Ankeny, and Whittaker, 'An investigation into "community expectations" surrounding animal welfare law enforcement in Australia' (2022) *Frontiers in Animal Science*, 1.

32. We assert that public interest journalism plays a pivotal role by delivering accurate, reliable, and independent information, with the potential to instigate positive change in often neglected or marginalised areas, including animal welfare. Public interest journalism holds the power to shed light on animal welfare issues, advocate for policy changes, and ensure institutions are accountable for their treatment of animals.
33. We submit that the Final Report should include an in-depth discussion and endorsement of the recommendation that DGR status be extended to public interest journalism. Acknowledging this change may potentially face opposition, we submit that addressing any such concerns in the Final Report will contribute to a more comprehensive understanding of the importance of extending DGR status to public interest journalism.
34. The Sub-Committee also submits that the Final Report should also consider how the issues of “disqualifying purpose” and “public benefit” may relate to the DGR status of public interest journalism organisations. Similar to our submissions above, we assert that clarity should be provided that public interest journalism concerning animal welfare issues can provide a public benefit, and should not be automatically considered to be contrary to public policy and thereby having a disqualifying purpose. The Sub-Committee notes, however, that if other aspects of the disqualifying purposes test are met (for example the organisation’s public interest journalism promotes or opposes a political party or candidate for political office), then that aspect of the disqualifying purpose test may still apply in the circumstances of the particular organisation.

Concluding Comments

NSW Young Lawyers and the Sub-Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:

Taylah Spirovski

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Timothy Allen

Chair

NSW Young Lawyers Animal Law Sub-Committee

Email: alsc.exec@gmail.com

Alternate Contact:

Sarah Ienna

Submissions Lead

NSW Young Lawyers

Email: submissions.YL@lawsociety.com.au