

Philanthropy in Australia

Submission to the Productivity
Commission's Inquiry

June 2023

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Introduction

About Justice Connect

Justice Connect designs and delivers high-impact interventions that increase access to legal support and progress social justice.

We believe in a fair and just world, where people and communities are supported to engage with and fully participate in our legal and social systems, and avoid the negative impacts on their wellbeing or organisational health that flow from unresolved legal problems.

About our submission

We thank the Productivity Commission for providing the opportunity to contribute to this important Inquiry into Philanthropy in Australia.

We have structured our submission in two parts:

- **PART 1: Perspectives from our not-for-profit clients**
- **PART 2: Perspectives from Justice Connect, as a not-for-profit ourselves**

Summary of recommendations

Recommendations informed by perspectives from our not-for-profit clients:

- 1.1** DGR endorsement should be extended to all charities registered with the ACNC, provided that charities do not use donated funds for purposes solely for the advancement of religion, childcare, or primary or secondary education.
- 1.2** The definition of charity and charitable purpose set out in the *Charities Act 2013* (Cth) should be adopted or recognised by all states, territories, and local government authorities to reduce the potential for inconsistent endorsements and entitlements across jurisdictions, and reduce complexity and red tape for organisations.
- 1.3** Justice Connect reiterates its call for a nationally consistent and fit-for-purpose charitable fundraising regime to #FixFundraising.
- 1.4** Wherever possible, state, territory and Commonwealth laws regulating the engagement, treatment and activities of volunteers should be harmonised to reduce the compliance burden on not-for-profit organisations.

Recommendations informed by perspectives from Justice Connect, as a not-for-profit ourselves:

- 2.1** The Productivity Commission should consider the inclusion of pro bono legal assistance in the scope of philanthropic activity.



1. Perspectives from our not-for-profit clients

Justice Connect's Not-for-profit Law program is a national, specialised legal service that not-for-profits and their peak bodies trust; it is the only service of its kind in Australia. Since its establishment in 2008, Not-for-profit Law has helped hundreds of thousands of community organisations across Australia with legal, regulatory, and governance issues through our effective, integrated, multi-channel service design.

Our acclaimed self-help website (www.nfplaw.org.au) has over 300 legal resources and is the foundation of our service model. Each year, our site receives close to half a million views. We offer legal advice and educational services to organisations across Australia, and advocate for improved standards and legal frameworks for the not-for-profit sector. We also run a certified legal training social enterprise and deliver a dedicated legal support service for Local Aboriginal Land Councils in New South Wales.

Effectiveness and fairness of the Deductible Gift Recipient framework

Recommendation 1.1: DGR endorsement should be extended to all charities registered with the Australian Charities and Not-for-profits Commission (ACNC), provided that charities do not use donated funds for purposes solely for the advancement of religion, childcare, or primary or secondary education.

Our recommendation and submission on this topic draws from our experience in this area:

- In 2022, we handled 164 requests related specifically to deductible gift recipient (DGR) endorsement and, in addition to our resources, we provided more than 1,400 hours of free legal assistance to organisations on this complex issue.
- Our [DGR resources](#) on our website received over 4,900 unique views during 2022, with our DGR Guide being downloaded more than 1,900 times. In 2021, we also launched our [DGR Tool](#), an online tool that helps users make sense of the complex laws regulating DGR status which has seen 5,634 users. We also regularly deliver training and webinars on understanding DGR status.

From our experience advising small to medium community organisations, we know that access to DGR endorsement continues to be one of the most misunderstood and resource intensive areas of the tax system for not-for-profit organisations. Problems with the current regulatory framework have been explored in successive federal government reviews¹ as well as internationally in the recent OECD report into taxation philanthropy.²

¹ E.g. Australian Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra; Not-For-Profit Sector Tax Concession Working Group, *Fairer, simpler and more effective tax concessions for the not-for-profit sector*, May 2013.

² See Myles McGregor Lowndes, 'Are any more recommendations worth implementing from nearly 30 years of Commonwealth nonprofit reform reports?' (2023) The Australian Centre for Philanthropy and Nonprofit Studies QUT, p11.



DGR categories are ad hoc and incoherent

Over the past one hundred years, successive governments have created new DGR categories in an ad hoc manner.³ There are currently 52 categories. Organisations also have the option of applying to be specifically listed by name in the *Income Tax Assessment Act 1997* (Cth) as a DGR but the process for granting such requests is opaque and once listed, there is no clear reporting mechanism or process for listings to be reviewed.⁴

As a result, the current framework is piecemeal and is not underpinned by a coherent or contemporary conception of the public good. This leads to inequities where a war memorial repair fund or a fund for the provision of religious instruction in government schools can access DGR endorsement, but a neighbourhood house cannot.

The rules for DGR endorsement are too complex

Each of the 52 DGR categories has its own eligibility criteria which is often described in technical, bureaucratic, or old-fashioned language. For example, the requirements of the Public Benevolent Institution DGR category can only be fully understood by reference to 90 years' worth of case law and a lengthy ACNC Commissioner's Interpretation Statement. For some categories, charities must demonstrate that their whole organisation fits into an established DGR category. For others, charities can apply to have only part of their organisation endorsed. Organisations often face challenges when they have a diversity of purposes and activities that do not fit neatly into one DGR category.

According to the latest ACNC Charities Report, over 65% of Australia's registered charities are classified as 'extra small', 'small', or 'medium'.⁵ Many of these charities are not equipped to understand and navigate DGR endorsement without legal assistance, and as a result, are locked out of the benefits of receiving tax deductible donations and philanthropic funding. From our experience, the system is particularly inaccessible for people and groups from culturally and linguistically diverse backgrounds.

This complexity does not just burden charities at the application stage: it also creates an ongoing compliance cost as charities with DGR endorsement must ensure they do not lose their endorsement by accidentally straying from their given category.

³ See Ann McConnell, *Taxation of Charities and Not-for-Profits* (LexisNexis Australia, 2020) 254; Not-For-Profit Sector Tax Concession Working Group (above no 1.) Additionally, Emeritus Professor Myles McGregor Lowndes notes that none of the significant tax concessions (including in relation to DGR reform) in the past 50 years originated in report recommendations (above no 2).

⁴ For a more detailed analysis, see Fiona Martin, 'Tax Deductibility of Philanthropic Donations: Reform of the Specific Listing Provisions in Australia', *Australian Tax Forum*, Vol. 33(3), 2018.

⁵ Australian Charities and Not-for-Profits Commission, [Australian Charities Report 8th Edition](#) (2022).



Client story: Ubuntu Project

Our lawyers often assist not-for-profit organisations that are struggling to understand and apply for DGR endorsement.

[Ubuntu Project](#) is a Victorian incorporated association established to improve integration outcomes and services for African Australian communities in Melbourne. Successfully securing DGR status was the one step holding the organisation back from driving community fundraising and growing its impact.

Ubuntu Project got in touch with Not-for-profit Law for advice on how to be endorsed as a DGR. Nor Shanino, Ubuntu Project's CEO, reflected that *"for a number of years, we were hesitant to proceed with a DGR application despite having a few donors and philanthropists that made commitments to support us if DGR status was secured. **The reluctance in pursuing DGR was due to not having a clue where to begin, the resources to hire consultants or time to figure it out with an overwhelming workload during the pandemic**".*

We referred the Ubuntu Project to one of our pro bono member law firms for assistance with re-drafting the organisation's purpose clause, and assistance with registering as a charity and being endorsed as a DGR. Describing the importance of pursuing DGR endorsement, Nor explained, *"attaining DGR status will allow us to access support and secure resources that are critical in providing sustainability and necessary expansion to meet the needs of the communities we support"*.

Our pro bono member law firm supported Ubuntu Project to update its rules and complete the application for charity registration and DGR endorsement. Ubuntu Project *"are patiently waiting to hear on our application which will allow us to do things that seemed impossible not too long ago"*.

Successive Australian Pro Bono Centre National Law Firm Pro Bono Surveys show that DGR and other tax matters are one of the top areas law firms assist not-for-profit organisations with on a pro bono basis, and are also one of the top areas of law where they reject requests for pro bono assistance.⁶ Yet, without access to free legal support, many small and medium sized organisations like Ubuntu Project struggle to navigate the DGR system and obtain endorsement. Indeed, many organisations approach us for support once they have already applied and been rejected for endorsement, having failed to understand the eligibility requirements and/or underestimated the complexity of the application process.

DGR categories do not support a contemporary not-for-profit sector

In our view, current DGR categories are out of step with community expectations and hold charities back from taking contemporary approaches to address complex social and environmental problems.

There are many not-for-profit organisations performing activities which are highly valued by the community, but which are not eligible for DGR endorsement. For example, organisations that focus on a variety of interrelated social or environmental issues are often unable to fit into a single DGR category. Additionally, organisations with a focus on preventing harm to individuals and communities (for example, preventing poverty) are often unable to secure DGR endorsement.

⁶ See detailed results from the Australian Pro Bono Centre's [National Law Firm Pro Bono Surveys](https://www.probonocentre.org.au/information-pro-bono/survey/) available at <https://www.probonocentre.org.au/information-pro-bono/survey/>.



Example: Neighbourhood houses

In our experience, neighbourhood houses often struggle to obtain DGR endorsement. For example, a neighbourhood house might provide services for people in need (such as food relief, a supported domestic violence referral service, and a free day care service for people on low incomes) and promote wellbeing, sustainability, and social cohesion in the general community (through free art and exercise classes, community events, community gardening and a circular economy program where people can swap goods).

Such a neighbourhood house would likely be ineligible for endorsement as a DGR, largely because it has a diversity of social welfare, environmental and community purposes. This is despite the fact that these purposes are reflected in separate DGR categories such as for a Public Benevolent Institution, necessitous circumstances fund, environmental organisation, and community shed.

In order to receive tax deductible donations, the neighbourhood house would need to cease pursuing a number of its purposes, set up a complex business structure to quarantine certain activities into a separate entity, or find another organisation or fund with DGR endorsement to auspice particular projects. Setting up and administering these arrangements, with paid legal assistance if necessary, would of course divert precious funds, time and resources away from the organisation's core work.

The solution to overcome these issues already exists: extend DGR status to more charities. Justice Connect has previously made recommendations that DGR endorsement should be simplified and extended to all charities registered with the ACNC, provided that charities do not use donated funds for purposes solely for the advancement of religion, childcare, or primary or secondary education. This recommendation aligns with the Productivity Commission's Contribution of the Not-for-profit Sector 2010 report and the Not-for-profit Sector Tax Concession Working Group's 2013 report.⁷

Inconsistent definitions of charity and charitable purpose

Recommendation 1.2: The definition of charity and charitable purpose set out in the *Charities Act 2013* (Cth) should be adopted or recognised by all states, territories, and local government authorities to reduce the potential for inconsistent endorsements and entitlements across jurisdictions, and reduce complexity and red tape for organisations.

For over a decade, we have called for the definition of charity and charitable purpose to be harmonised across all Australian governments.⁸

Since the passage of the *Charities Act 2013* (Cth), there has been a single definition of charity for the purposes of registering with the ACNC and obtaining federal tax concessions and exemptions (including income tax exemption, GST concessions, fringe benefits concessions and DGR status). However, state and territory governments continue to utilise different definitions for the purposes of state and territory tax concessions and exemptions (such as payroll tax, stamp duty, land tax and local government authority rate exemptions) as well as the regulation of charitable fundraising. This can lead to a situation where an organisation is recognised as a charity in some jurisdictions but not others.

⁷ Above, no 1. See also Not-for-Profit Sector Tax Concession Working Group, *Fairer, simpler and more effective tax concessions for the not-for-profit sector*, (Discussion Paper, November 2012) p22-25.

⁸ See, for example, our submission to the Senate Standing Committee on Economics Inquiry into the Disclosure Regimes for Charities and Not-for-Profit Organisations, 2008, or our submission to Treasury's 'A Definition of Charity – Consultation Paper', 2011.



In its 2016 paper 'A common charity definition'⁹ the ACNC observed:

"In addition to the common law definitions, the terms 'charity', 'charitable purpose' and 'charitable status' occur in 172 pieces of Commonwealth, State and Territory legislation, including in a number of Acts unrelated to state revenue purposes. Of these Acts, 45 of them define the above terms."

This inconsistency leads to inefficiency, uncertainty and increased administrative costs for organisations that must repeatedly prove their status as a charity to different regulators.

Example: Charities and New South Wales local government rates

We have seen the impacts of these inconsistencies firsthand.

For example, our lawyers have helped several not-for-profit organisations that have sought an exemption from paying local government rates in New South Wales.

The *Local Government Act 1993* (NSW) provides an exemption for rates payable on land that 'belongs to a public benevolent institution or public charity and is used or occupied by the institution or charity for the purposes of the institution or charity'.¹⁰ The terms 'public benevolent institution' and 'public charity' are not defined in the Act. The only guidance provided by the legislation is that the provisions of the *Charitable Fundraising Act 1991* (NSW) are irrelevant in determining whether a body is a public benevolent institution or public charity for the purposes of rates exemptions.¹¹

Therefore, the only way to understand eligibility for these exemptions is by reading lengthy court decisions. These decisions are, of course, the result of (no doubt costly) litigation involving a range of not-for-profit organisations.

This is why multiple reports and submissions over the years have recommended harmonisation,¹⁰ and why Justice Connect recommends **that all federal, state, territory and local governments adopt the definition of charity and charitable purpose set out in the *Charities Act 2013* (Cth) and accept that an organisation's registration with the ACNC demonstrates its charitable status and purpose.** If there is a policy reason for a variation (for example, the intention is for a concession to be given to 'charities except religious bodies' or to 'charities and sporting clubs'), this can still occur with the core definition of charity and charitable purpose applying consistently.

Some charity lawyers suggest that this change may be achievable through regulatory guidance without legislative reform in some jurisdictions.¹¹

⁹ Australian Charities and Not-for-Profits Commission, *A Common Charity Definition* (Conference paper, Tax Institute State Taxation Conference, 27 July 2016).

¹⁰ Section 556(1)(h) *Local Government Act 1993* (NSW).

¹¹ Section 559.

¹⁰ See parts 3.8 and 5.2 of the ACNC paper, above no 9, for a summary of relevant reports and enquiries.

¹¹ Bridgid Cowling, 'When is a charity not a charity?', *The Tax Institute*, 2021, <https://www.taxinstitute.com.au/insights/articles/when-is-a-charity-not-a-charity->



Complex and confusing fundraising laws

Recommendation 1.3: Justice Connect reiterates its call for a nationally consistent and fit-for-purpose charitable fundraising regime to #FixFundraising.

Fundraising laws are one of the biggest regulatory burdens facing charities

The problems with fundraising laws are well known: numerous reports over the decades have supported the experience of our clients that Australia's fundraising laws are complex, inconsistent and out-of-date, and harmonised national regulation is sorely needed.¹² They are a significant barrier to charities raising money to pursue their purpose.

Since 2016, Justice Connect and a coalition of eight other sector and peak professional bodies have advocated for reform under the #FixFundraising banner: www.nfplaw.org.au/fundraisingreform.

Currently, charities need to comply with seven different sets of fundraising laws – laws that were developed before the internet, the Australian Consumer Law, and the ACNC.

Each of these laws is significantly different to each of the others. The Northern Territory has never had its own fundraising law. In each of the seven existing laws there are different definitions of 'charity', 'charitable purposes' and 'fundraising'. The existing fundraising-specific laws are out-of-date and no longer fit for purpose. They deal with archaic issues, for instance, wishing wells, the length of handles on collection boxes, and the requirement to keep carbon copy receipts. They fail to adequately deal with new forms of fundraising, including fundraising through online platforms.

All in all, we have many laws but no clear, practical answer to the common question charities ask: "What rules do we have to follow so we can add a donate button to our website?".

This complex regulatory environment has posed a huge barrier to how charities can fundraise, restricting their income and impact. To make matters worse, these laws disproportionately affect small to medium not-for-profit organisations. The 2022 Australian Charities Report demonstrates that overwhelmingly, it is smaller charities that are more heavily reliant on fundraising as a source of revenue: donations make up 38% of revenue for small and extra small charities, and 27% for medium charities.¹³ Smaller charities are also more likely to be volunteer run, with few or no paid staff, and less capacity to comply with complex laws.

¹² For example, see Productivity Commission, above no 1 from p. 137; Deloitte Access Economics, Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation, 23 February 2016, p. 17; Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review Report, 2018, p. 96; Report of the Inquiry under the Charitable Fundraising Act 1991 into The Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution and RSL LifeCare Limited, January 2018, Chapter 13.1 and recommendations 14.7 to 14.10.

¹³ ACNC, above no 5, Page 20



Client story (deidentified)

We recently helped a charity that was having trouble filling out its annual report to the ACNC. The ACNC form asked the charity whether it intended to fundraise in the following financial year. We were contacted by the small charity's volunteer board member, who was unsure whether some of the charity's methods of revenue raising counted as 'fundraising' (for example, charging membership fees to members, offering paid webinars, or charging attendance fees for conferences).

This simple question proved to have an unnecessarily complex answer. We told the board member that each state and territory has a different definition of fundraising and it was possible that the charity's activities (particularly its online methods of fundraising) might count as fundraising in one state or territory, but not another.

In order to accurately complete the charity's annual reporting, the volunteer board member undertook to review our seven separate state and territory fundraising factsheets, to work out whether the charity's revenue raising activities met any of those definitions of fundraising. Likely this was a task they completed in their spare time at night or over the weekend – time that they could have contributed to the charity's work in a more meaningful way.

There is evidence that these laws are holding the sector back, particularly for online campaigns. The Fundraising Survey Report 2021¹⁴ of over 600 charities and other not-for-profit organisations published by Justice Connect's #FixFundraising Coalition and the Charities Crisis Cabinet highlighted some of the broader issues with fundraising regulation, including:

- 57 – 88% of organisations reported that the fundraising registration process is either very complex with a lot of excessive information required, or 'somewhat complex'.
- 53% of organisations considered the impact of current fundraising rules and registration processes as 'significant' and 22% considered them so significant they have become a barrier to fundraising.
- The majority of organisations used online fundraising, however 39% of organisations were not aware of the need to comply with different state and territory licenses and regulations when raising funds online.

Over the years we have heard countless stories like these from our supporters¹⁵:

"It is simply too complicated, it is actually almost impossible to know that you comply in every way. It just simply is a minefield. It is a barrier to fundraising and a drain on resources, for no final benefit to the regulatory environment or in protecting consumers from poor behaviour by charities." (Medium charity, >250K but <1M. Less than 5 paid staff)

"Currently, our charity serves several states and with all non-paid volunteers it is extremely complex trying to keep up with legislation and regulations on requesting donations from members and the public. One system nationally would make it less time consuming and easier to manage this segment of our charity." (Volunteer-run. Nil paid staff. Small charity <250K)

"We are a new volunteer NFP mental health consumer support group, please make it uniform and simpler for "ordinary people" to carry out fundraising. We are doing our best to raise our

¹⁴ Piazza Research Pty Ltd, *Charities Crisis Cabinet Fundraising Survey 2021*, Research report, 2021. Available at <https://justiceconnect.org.au/wp-content/uploads/2021/05/Fundraising-Survey-Report-Final-0520210830.pdf>

¹⁵ <https://justiceconnect.org.au/campaigns/fix-fundraising-supporters/>



own funds without taxpayer support, hence it is only fair to streamline the laws and rules for fundraising across our wonderful country." (Name withheld)

Despite these issues being well known for decades, reform has been painstakingly slow, incremental, and hard won.¹⁶

A simple solution to reduce red tape for charities

The #FixFundraising campaign has achieved incremental progress towards achieving three key reforms for registered charities.

1. Single point for registration

Most states and territories have now changed their laws to introduce a simplified process for registered charities to obtain fundraising licence. This 'cross border recognition model' was announced in December 2020 and will be fully implemented once Western Australia and Tasmania change their laws.

2. Single place of reporting – 'report once, use often' via the ACNC

We are pleased that now, in all states and territories, a registered charity need only report once a year to one regulator: the ACNC. This has reduced duplication in reporting for thousands of registered charities who previously were required to report to the ACNC as well as state-based fundraising regulators.

3. Single set of rules to help ensure ethical fundraising practice

In February 2023, Justice Connect welcomed the announcement that the Commonwealth, state, and territory Treasurers had agreed to a set of nationally consistent fundraising principles.

These fourteen principles of ethical behaviour are simple, clear, and consistent and will replace seven sets of outdated laws about how charities and their representatives should conduct themselves when fundraising. When implemented, they will:

- replace overly complex rules like the font size to go on a name badge (Victoria), or the requirement to keep carbon copies of receipts (Queensland)
- drastically reduce the amount of costly and time-intensive paperwork charities must deal with to fundraise effectively, and
- improve public understanding, trust and confidence in the standards that apply to charitable fundraising.

It's now up to state and territory governments to roll out these changes in each jurisdiction and they have agreed to each release an implementation plan by July 2023.

There is the potential for these reforms to save charities hundreds of hours of unnecessary administrative time but to realise this benefit, the reforms must be implemented quickly and in a consistent way across jurisdictions to ensure the key aims – simplification and harmonisation – are achieved.

¹⁶ For more information about the history of the campaign to #FixFundraising, see: <https://justiceconnect.org.au/campaigns/fix-fundraising-timeline/>



Client story: Zahra Foundation

Grounded by the principles of hope, opportunity, partnership, and empowerment, [Zahra Foundation](#) works to address one of the biggest barriers to women leaving and remaining free of abusive relationships: financial disadvantage.

The foundation assists South Australian women and children experiencing domestic and family violence by supporting their immediate needs and building their capacity to attain economic independence. By creating pathways to further education, training, and employment, the organisation ensures that women leaving domestic and family violence are economically independent.

The Zahra Foundation was founded in 2015 and operates with nine paid staff and ten volunteers. Only 25% of their service delivery and program work is financed through government grants. **The remaining expenses and operational costs are covered thanks to the generosity of donors from their local community and individual partners and sponsors.**

In 2022, the Zahra Foundation seized an opportunity to run a large-scale, professional fundraising appeal called Not a Lottery. The campaign attracted a lot of attention in South Australia and delivered excellent fundraising outcomes, which would have been even greater had the campaign gone national. The Foundation's CEO, Kelly-Ann Tansley admits that the complex nature of fundraising laws and the organisation's limited capacity to ensure compliance with those regulations stopped the fundraising campaign from being rolled out nationally.

The web of complicated and overlapping legislation across states and territories has also disincited the organisation from expanding some of its programs to other locations. One of their most successful small grants schemes, Opportunity Knox, is a service Zahra Foundation are longing to offer clients in NSW. Ms Tansley said, *"getting our heads around fundraising laws was challenging and complicated, so we haven't been able to offer the grants typically available for educational resources such as laptops, school uniforms and school/TAFE fees to women in NSW."*

Kelly-Ann was delighted to learn about the planned simplification of fundraising laws nationally. "I will be able to sleep better at night!" she said.

"Running a not-for-profit is a high risk for boards and CEOs. We need to be across everything all the time with limited resources, and that can be very stressful. Some of the current laws are so outdated and archaic that we could be at risk of non-compliance if, for example, a financial supporter has moved interstate and continues to donate to the foundation, but we have not been notified about their change of address. Under the laws, we could be non-compliant without even realising it!"

Kelly-Ann is looking forward to being able to expand Zahra Foundation's programs to other jurisdictions without the burden of an excessive administration effort.

"Zahra is quite unique in what we provide. Because we have that strong focus on economic empowerment, and not many services across Australia provide these types of supports for women escaping family violence. It's great to know we will have an opportunity to deliver those specialist services to other states when the limitations around how we can fundraise no longer stand in our way."

Stories like this show just how crucial it is that these long awaited reforms are implemented as a matter of priority.



Reforming fundraising laws for all not-for-profit organisations

Justice Connect is focused on ensuring that the abovementioned reforms are implemented appropriately for the benefit of charities, in line with the sector's expectations. However, we would also welcome broader reforms to harmonise fundraising laws for not-for-profit organisations that are not registered charities.

Inconsistent laws impacting volunteers and volunteer involving organisations

Recommendation 1.4: Wherever possible, state, territory and Commonwealth laws regulating the engagement, treatment and activities of volunteers should be harmonised to reduce the compliance burden on not-for-profit organisations.

Australia's federal system of government means that charities and other not-for-profit organisations often operate in multiple state, territory, and Commonwealth jurisdictions, including when engaging volunteers. For example, organisations operating nationally may engage volunteers in various locations across Australia, and those located near or on state borders may engage volunteers from locations on either side of the border. Increasingly, organisations also engage with volunteers in an online environment.

Inconsistent state, territory and Commonwealth laws regulating the engagement, treatment and activities of volunteers add to the compliance burden for volunteer involving organisations, and indirectly increase the costs associated with volunteering.

Our overall position is that, wherever possible, state, territory and Commonwealth laws regulating the engagement, treatment and activities of volunteers should be harmonised to reduce the compliance burden on volunteer involving organisations and ensure equal treatment for volunteers regardless of the where they volunteer.

Safety and discrimination

For many years we have advocated for volunteers to receive the same protections as employees in the workplace when it comes to safety, sexual harassment and discrimination. This not only makes volunteering more attractive for volunteers, but also results in a simplified regulatory approach that is easier for not-for-profit organisations to understand and comply with.

We were [pleased](#) when the *Sex Discrimination Act 1984* (Cth) was amended in 2021 to confirm that volunteers are protected from sexual harassment. The Act was further amended in 2022 to impose a positive duty on employers and 'persons conducting a business or undertaking' to prevent discrimination and harassment in their workplaces, including against volunteers.

Prior to these reforms, volunteers were excluded from legal protections under the Act, and were forced to rely on other sources of law for claims and remedies depending on where they volunteered. This gap effectively left volunteers who were survivors of sexual harassment in some states and territories without a clear avenue for complaint or resolution – and is symptomatic of a legal system where volunteers are often forgotten.



This inclusion of volunteers in sexual harassment protections was part of a key recommendation made by Justice Connect and Volunteering Australia in our joint 2019 [submission to the National Inquiry into Sexual Harassment in Australian Work](#).

However, the protections still don't cover people volunteering for 'volunteer associations' (organisations with a community purpose and no paid employees).

The Australian Charities Report 2022 shows that more charities operate without paid staff (51%) than with paid staff (49%).¹⁷ This means that there are many volunteers without protection under federal sexual harassment law. The results of our 2018 survey, conducted jointly with Volunteering Australia, highlight some of the unique risk factors that are present in a voluntary workforce and which underpin the need for all volunteers to be protected by the law.¹⁸ For these reasons, **Justice Connect recommends that protection against sexual harassment be extended to all volunteers, including those volunteering for 'volunteer associations'.**

While the application of sexual harassment laws to volunteers is now clearer, it is still complex and confusing to understand whether volunteers are covered by state and territory based anti-discrimination laws. It is often unclear whether volunteering is an 'area of public life' in which discrimination is prohibited (as it is in areas of public life such as employment, and access to goods and services).

Generally, state or territory based anti-discrimination laws will apply to volunteers in the Australian Capital Territory, Queensland, South Australia, and Tasmania. While not covered under current laws, new laws to come into force no later than 1 October 2024 in the Northern Territory will include these protections for volunteers. Anti-discrimination laws may protect volunteers in Victoria and New South Wales but only where volunteering falls into another area covered by the anti-discrimination legislation (such as the provision of goods and services). Anti-discrimination laws are unlikely to apply to volunteers in Western Australia.¹⁹

Also, different 'attributes' are protected in each state and territory. For example, in some jurisdictions but not others it is unlawful to discriminate on the basis of an irrelevant criminal record.

While the harmonisation of state, territory and Commonwealth anti-discrimination laws is likely to be outside of the scope of the Productivity Commission's inquiry, the above noted inconsistencies highlight our position that **laws aimed at protecting people in the workplace should, to the greatest extent possible, ensure the protections afforded to employees also apply to volunteers.**

Working with Children Checks

Justice Connect supports a nationally consistent approach to Working with Children Checks (WWCC), in line with recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.²⁰

In our experience, not-for-profit organisations that engage employees or volunteers in child-related work are very concerned to ensure their compliance with WWCC legislation. However, they find the current, individual state and territory based regimes confusing and resource intensive – it takes considerable time and effort to understand each regime and then implement systems to ensure compliance.

¹⁷ ACNC above no 5, page 13

¹⁸ Volunteering Australia and Justice Connect, Everyone's Business – whether they're paid or unpaid, submission to the National Inquiry into Sexual Harassment in Australian Workplaces, 28 February 2019, part 6. Available at <https://justiceconnect.org.au/wp-content/uploads/2020/12/Joint-Submission-to-National-Inquiry-into-Workplace-Sexual-Harassment-Feb-2019.pdf>

¹⁹ Justice Connect Not-for-Profit Law, *National Volunteering Guide*, Part 5, page 24. Available at <https://www.nfplaw.org.au/free-resources/managing-people/managing-volunteers#owe>

²⁰ See recommendations in the Royal Commission into Institutional Responses to Child Sexual Abuse [Working with Children Checks Report](#) (2015).



As it stands, each state and territory has different screening requirements for organisations that work with children. They have different definitions of core concepts such as child related work, 'contact' with children, and what constitutes 'work'. Additionally, WWCCs aren't portable between jurisdictions.

Through our work with the not-for-profit sector, we see organisations commonly struggle with this where they provide national, interstate, or online services that involve the recruitment of volunteers in different states and territories (for example, organisations delivering transport services across state borders, online tutoring services for at risk youth, or national helpline services). With the increase in online or remote volunteering, these challenges may become more prevalent over time.

A nationally consistent approach to WWCCs will reduce the compliance burden for not-for-profit organisations and improve safety outcomes for children by enabling organisations to develop simpler and more reliable systems to ensure appropriate checking is completed.

We note that the Commonwealth government is currently working with state and territory governments to develop options for national reform to enhance child safety and reduce regulatory barriers around WWCCs.²¹ **We urge the Commonwealth, state, and territory governments to continue to prioritise WWCC reform and consult with relevant stakeholders in the volunteer involving sector about the design and implementation of this reform.**

Civil liability

Each state and territory has legislation that sets out special protection for volunteers from personal civil liability for anything done or not done in good faith when performing community work for a community organisation. Under these laws, if a volunteer (who is protected by the relevant legislation) has caused personal injury, property damage or financial loss to a person as a result of the volunteer's own action or failure to act, the volunteer will not be personally liable to pay any compensation to that person.

However, the relevant tests for protection differ between jurisdictions, as do the levels of protection offered. For example, in most states and territories, civil liability incurred by a protected volunteer is automatically transferred to the community organisation (so that the organisation itself would have to pay any compensation). However, in New South Wales a volunteer will not be liable for their acts or omissions while volunteering unless they fall into an exception in the legislation, and where a volunteer is not liable, the organisation will ordinarily not be liable for the volunteer's acts or omissions.

In Queensland, the relevant legislation is silent on whether the organisation itself takes on the volunteer's liability and there is no clear case law on this, so the legal position is not yet settled. It is possible that liability could transfer from the volunteer to the organisation under the legal principle of 'vicarious liability', where one party becomes liable for the actions of another (the usual example is that an employer is vicariously liable for actions of its employees), but it's not clear whether this principle applies in the volunteering context.

This is another example of legal complexity and inconsistency which adds to the indirect costs of engaging volunteers across jurisdictions. In order to understand the level of exposure an organisation and its volunteers have under the law, multiple sets of laws may need to be consulted.

Part 4 of our National Volunteer Guide²², from pages 11-20 (and in the Guide's annexed checklists for each jurisdiction from pages 66-121) illustrate the complexity of this issue for volunteer involving organisations that operate interstate.

²¹ For further details, see <https://www.regulatoryreform.gov.au/priorities/productivity-enhancing-regulatory-reforms>

²² Above no 22



We urge governments to consider harmonisation measures across civil liability legislation to reduce confusion, gaps in protection and the compliance burden for volunteer involving organisations that need to grapple with differing legal obligations across jurisdictions.

Client story: Thurgoona Community Centre

Thurgoona Community Centre is a not-for-profit organisation that supports the local Thurgoona community through a number of vital services, including child and family health services, financial counselling, and a youth program. The Centre relies on volunteers to deliver many of its services.

Sherylyne, the Centre's coordinator, attended a Not-for-profit Law training webinar on the topic of emerging issues in working with volunteers. Following the webinar, Sherylyne was able to identify a number of legal issues in relation to the Centre's volunteer engagement, on which she sought advice.

The Centre's legal issues related to defining the role of a volunteer, risk management for volunteer-run programs and how civil liability law interacts with volunteers and the organisation. **As the Centre is located on the border of New South Wales and Victoria, Sherylyne sought advice about whether the Centre's legal obligations were affected by inconsistencies in the laws of those two states.**

We provide almost an hour of telephone advice to Sherylyne to discuss each of the issues in full, and help the Centre understand its legal obligations in relation to volunteers as well as manage risks arising out of their volunteer activities and programs delivered in both New South Wales and Victoria.



2. Perspectives from Justice Connect, as a not-for-profit ourselves

We commend the Government's ambitions to "double philanthropic giving by 2030". As a charity ourselves, we are pleased to share our reflections, experience, and recommendations on how the Government can support not-for-profit organisations to leverage philanthropy.

Digital innovation and philanthropy

In 2016, Justice Connect committed to exploring how digital transformation and digital innovation could be used to meet ever increasing levels of unmet legal need in the Australian community. Our digital innovation work has been, and continues to be, focused on co-designing solutions to improve the experience, efficiency, and impact of access to justice legal services.

Justice Connect's three digital innovation priority areas

Our digital innovation work sits across three priority areas that reflect Justice Connect's purpose, strategy, and theory of change:

1. Delivering scaled-up legal assistance directly to people and organisations needing legal help in online settings and empowering people to progress resolution of legal issues without requiring one-to-one assistance
2. Supporting legal service efficiency and effectiveness resulting in increased service capacity and improving the consumer experience of engaging with legal services, and
3. Supporting the justice ecosystem to provide a better experience of navigating the system and improving linkages between legal services, supporting efficient matching of unmet legal need with pro bono capacity.



Challenges with attracting philanthropic funding for digital innovation

Justice Connect's digital innovation work's scope, impact and innovation is unmatched around the world. However, our unique work brings unique funding challenges, particularly in the context of philanthropic funding.

Philanthropy has shown consistent interest in funding consumer-facing work (Priority 1) and the seed stages of infrastructure work. Gaining ongoing philanthropic support for work in Priority 2 and 3 has been more challenging - explaining this work can be more complex, and system-level infrastructure often falls outside funder priorities. We also face challenges securing funding for user support and ongoing maintenance for our digital products.

Pro bono legal assistance and philanthropy

Recommendation 2.1: The Productivity Commission should consider the inclusion of pro bono legal assistance in the scope of philanthropic activity.

Justice Connect currently has 53 member law firms and a network of over 10,000 pro bono lawyers and barristers. We also work with a broader group of 160 law firms in our disaster response coordination. Our members include large global and national law firms, boutique practices, barristers, and sole practitioner solicitors.

Justice Connect's pro bono network accepts direct referrals to assist individual or not-for-profit help seekers, who could not otherwise access appropriate legal assistance, as well as providing lawyers to participate in our clinics and assisting other strategic projects such as creation, update, and review of self-help resources, engagement in advocacy campaigns, pilot projects, and our digital innovation work.

The 8th National Law Firm Survey conducted by the Australian Pro Bono Centre revealed that 72.3% of law firm respondents engaged in pro bono work through Justice Connect, the highest percentage of any source of pro bono nationally.²³ Collectively in FY22, pro bono lawyers delivered 53,219 hours of direct pro bono legal assistance to Justice Connect help-seekers and not-for-profit clients, equalling \$20,584,322 of contributions. In addition, pro bono lawyers contributed to Justice Connect's ongoing non-legal project work, taking the total pro bono time contributed to Justice Connect to 54,260 hours, an estimated valued of almost \$21,000,000.²⁴ Our pro bono partners also provide Justice Connect with various in-kind support.

A key driver of our ability to deliver services at scale is our harnessing of the extraordinary pro bono contributions of our member firms and the barristers we work with across the country. We direct pro bono effort through our innovative service models to ensure that pro bono hours deliver the best outcomes for the community.

Pro bono contributions made by lawyers and law firms represent a significant proportion of Justice Connect's philanthropic engagement annually. While there is no universally accepted definition of pro bono, in the legal sector it generally means the provision of legal services for free or on a significantly reduced fee basis, with no expectation of a commercial return.

It is our view that pro bono legal assistance is a philanthropic activity that should fall within the scope of this Inquiry, given its significant impact in allowing Justice Connect, and similar not-for-profit community legal organisations, to design and deliver core services and products, and its alignment with definitions of philanthropy as "the giving of money, time, information, goods and services, influence and voice to improve the wellbeing of humanity and the community".²⁵

Motivations for pro bono contributions

There are a range of factors that motivate law firms and individual lawyers to participate in pro bono work, including a sense of professional responsibility and the ability to enjoy broad-ranging personal and professional benefits that may not typically arise in the lawyer's day-to-day work. There are tangible commercial benefits for law firms participating in pro bono legal work, including making the firm more attractive to high quality recruits, enhancing staff morale and loyalty, professional skills development, and marketing and corporate image enhancement.²⁶

²³ Australian Pro Bono Centre, Report on the 8th National Law Firm Survey (February 2023) p 12, <https://www.probonocentre.org.au/wp-content/uploads/2023/02/FINAL-8th-National-Law-Firm-Pro-Bono-Survey-Report-2022-2.pdf>

²⁴ Justice Connect 2022 Impact Report, p21.

²⁵ Philanthropy Australia (2022, p.1)

²⁶ Australian Pro Bono Centre, *The Australian Pro Bono Manual* at 1.4.1 <https://www.probonocentre.org.au/aus-pro-bono-manual/part-1/chap-1-4/>



In 2022, Justice Connect conducted a survey of our member pro bono lawyers. Respondents identified that their primary motivations for doing pro bono work included:

- Providing access to justice to vulnerable clients
- Using their skills to address disadvantage
- Providing diversity to their work
- Learning new areas of law
- Experience in running their own files and deciding strategy

We also know that engaging in pro bono work gives lawyers the opportunity to develop and hone their legal and client skills. Our survey of pro bono lawyers who participate in our legal Clinics revealed examples of the kinds of skills that pro bono lawyers feel are gained from their engagement with pro bono work, including:

- Identification of legal issues
- Client interviewing skills
- Skills in delivering legal advice
- Understanding issues affecting people experiencing socio-economic disadvantage

Our 2022 survey also asked Pro Bono Co-ordinators/Heads of law firm pro bono practices what influences their decision on whether or not to express interest in a pro bono opportunity with Justice Connect. They revealed an alignment with strategic direction and focus of their practices, and the expertise of the firm as primary considerations and motivating factors. The top 3 responses were:

- Special Interest Areas
- Area of Law
- Advice Type

Apart from these direct motivations, we note that many of our member law firms are also signatories to the National Pro Bono Target, which provides a minimum aspirational target for pro bono work of 35 hours per lawyer, per year. This target often forms the baseline of firms' pro bono practices and provides internal accountability and measurement frameworks for pro bono teams to work within.

Governments also play a role in influencing the amount of pro bono work undertaken by law firms through requirements associated with Government tendering processes. Most states, as well as the Commonwealth, impose strict pro bono requirements on law firms seeking to qualify for legal 'panels' to undertake Government work. While each jurisdiction's requirements are different, the Australian Pro Bono Centre note that these requirements have been successful in increasing the amount of pro bono undertaken by law firms. For example, in Victoria, the value of pro bono legal services performed by panel firms has increased from \$5.2 million in 2005-2006, to \$25 million in 2016-2017.²⁷

Contact

We thank the Productivity Commission for providing the opportunity to contribute to this important Inquiry into Philanthropy in Australia, and welcome any opportunity to participate further.

Sophie Gordon-Clark
CEO (Acting)
Justice Connect

²⁷ Australian Pro Bono Centre, 'Pro Bono Requirements in Government Tender Arrangements for Legal Services' <https://www.probonocentre.org.au/provide-pro-bono/government-tender-arrangements/>

