NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

Submission to the Inquiry into Tax Deductible Gift Recipient Reform Opportunities

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About the National Congress of Australia's First Peoples

Congress is a representative voice for Aboriginal and Torres Strait Islander Peoples. Established in 2010, Congress has grown steadily and now consists of over 180 organisations and almost 9,000 individual members, who elect a board of directors.

Congress opposes legislation or policy that is, or may be, discriminatory (directly or indirectly) and or may limit the rights of Australia's First Peoples. Many of the social problems faced by First Peoples today are the result of a history of coercive government policies, notably forced removal from land, relocation to reservations and missions, assimilation, stolen generations, stolen wages and income management regimes.

Congress advocates self-determination and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*. Congress believes Aboriginal and Torres Strait Islander peoples should be central in decisions about our lives and communities, and in all areas including our lands, health, education, law, governance and economic empowerment. It promotes respect for our cultures and recognition as the core of the national heritage.

Introduction

Congress welcomes the opportunity to submit to this Inquiry, and comment on what is quite a significant issue for Not-for-profit entities ('NFPs')[1] - entities that do 'not operate for the profit, personal gain or other benefit of particular people'.[2]

This Inquiry considers 'possible reforms to the Deductible Gift Recipient (DGR) tax arrangements'.[3] It focuses on the 'governance of DGRs and the complexity of DGR application processes, and considers ways to ensure an organisation's eligibility for DGR status is up to date'.[4] Congress notes that any reform to DGR arrangements is serious for the NFP sector, given that DGR status enables the holder of DGR status to receive tax-deductible gifts and contributions. Hence, DGR status increases the incentive for persons to

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[1] House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations*, Report (Canberra: Parliament of Australia, April, 2016), 51, 75.

[2] Ernst & Young, *Research into Commonwealth Regulatory and Reporting Burdens on the Charity Sector: A report prepared for the Australian Charities and Not-for-profits Commission* (Canberra, Ernst & Young, 30 September 2014), 3; Australian Charities and Not-for-profits Commission, "Not-for-profit," viewed 13 July, 2017, https://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_is_NFP/ACNC/Reg/NFP.aspx?hkey=0c89fa5a-.

[3] Treasury, *Tax Deductible Gift Recipient Reform Opportunities* (Canberra: 15 June 2017), 1.

[4] Ibid.

donate to NFPs. Any change to this incentive is especially a concern for charities, given that 8.3% of their 2015 funding came from donations and bequests.[5]

Congress - a recipient of DGR status, and the peak national representative body for Aboriginal and Torres Islander organisations - is particularly concerned by the proposed reforms.[6] Since tax-deductible donations partly fund NFPs with DGR status, DGR reform influences 'the delivery of goods and services [provided by NFPs] that are of public benefit'.[7] These goods and services are particularly beneficial for Aboriginal and Torres Strait Islander communities, as Congress will outline. A particular reason for this is that DGR entities that are based in these communities are particularly sensitive to the needs and wants of their stakeholders. They can effectively lobby the different levels of government for policies suited to those needs and wants, and provide, or assist in the provision of, services culturally appropriate to their stakeholders. Ultimately, benefit flows to the First Peoples communities whom they serve, helping to alleviate the latter's predicament as the most marginalised Australians.[8]

Congress will explore the reforms' consequences through two lenses: the impact on the NFP sector as a whole, and on Aboriginal and Torres Strait Islander NFPs ('First Peoples NFPs'). Within each lens, we will consider the impact of the reforms on NFP advocacy, and that through arguably higher compliance costs from the proposed auditing, and self-reporting, regimes. For the first lens, in relation to the NFP sector generally, we will stress the detriment associated with having an 'activities' test for DGR status, and the weakening of DGR entities' ability to perform advocacy. In relation to First Peoples NFPs, Congress will point to the importance of their culturally sensitive advocacy, the failings of a community standards-based test for the legitimacy of advocacy, and the loss of regulatory neutrality arguably resultant of the latter. For the second lens, regarding the NFP sector as a whole, Congress will demonstrate the severity of the impacts of larger compliance burdens on NFPs, as well as the arguable absence of concrete justification for the proposed regimes, When considering First Peoples NFPs, Congress will point to how the higher compliance burden will disproportionately affect those with DGR status.

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[5] Natasha Cortis et al, *Australian Charities Report 2015* (Melbourne, Australian Charities and Not-for-profits Commission, 2016), 52.

[6] National Congress of Australia's First Peoples, "About us," viewed 13 July, 2017, http://nationalcongress.com.au/about-us/.

[7] Treasury, *DGR Reform Opportunities*, 1.

[8] National Congress of Australia's First Peoples, *Redfern Statement* (Redfern: National Congress of Australia's First Peoples, 9 June, 2016), 5.

Effect of Proposed Reforms on NFPs in General

The effect of the proposed reforms on the overall NFP sector will be examined by considering the effect on DGR entities' ability to perform advocacy functions, and the outcome of an increase in the regularity of audits of DGR entities.

Advocacy

In relation to advocacy, Congress is especially concerned about two issues. Firstly, the Treasury's suggested shift to a test for whether an entity receives DGR status, which would focus on an NFP's *activities*, rather than its purpose.[9] Secondly, the arguable 'erosion of the right of charities to undertake advocacy',[10] which is highly likely to result from this shift.

Congress believes that NFPs, particularly those seeking DGR status, would be adversely affected if the suggested test were introduced.[11] These entities would have to significantly change the way they operate to satisfy it, which would be quite disruptive for these entities. This change would stem from the test's losing its traditional focus on an organisation's broader purpose, for example.[12] NFPs would waste significant resources in compliance an overly complex, rules-based exercise as opposed to the current, principles-based scheme.[13] Under the proposed test, NFP governors would need to minutely examine each of their decisions, rather than merely consider the principal yardstick of their NFP's purpose. No longer can they flexibly and efficiently allocate resources to advocacy functions.[14]

Furthermore, the Australian Charities and Not-for-profits Commission (ACNC) already considers 'all the relevant circumstances of the [NFP]…, *including* its… activities' [emphasis added] in determining the existence of a disqualifying political purpose when granting DGR status.[15] This undermines the apparent necessity, and proportionality, of the proposed reforms versus the 'risk' they target via an 'activities' test. The current regime is effective in mitigating said risk. It categorically defines the purposes for which charities may be registered, and, by extension, it requires them to demonstrate their lacking a 'disqualifying purpose'.[16] This provides the certainty necessary for efficient decision-making by sector participants,

[9] ACT Council of Social Service, *Resource Paper to Support Coordinated Response to Treasury's Discussion Paper on Tax Deductible Gift Recipient Reform Opportunities* (Weston: ACT Council of Social Service, 2017), 1.

[10] Ibid 2.

[11] Ibid 1.

[12] See eg *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

[13] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 1.

[14] Ibid 1.

[15] Ibid.

[16] Ibid.

especially for NFPs specialising in contentious advocacy. Congress questions whether Treasury is making the right call in considering these reforms.

In addition, Congress believes that the proposed reforms would undermine the NFP sector's sustainability by fostering a mentality of excessive caution among sector participants. They would be quite likely discouraged from conducting any activity - like advocacy - that may fail the activity-based test, however slight the chances. Charities would especially be likely to reduce the scope of their activities, which, in turn, would adversely affect their stakeholders and clients. This is because, in 2015, over a quarter of charities rely on donations and bequests for at least half of their income,[17] and 62.3% of charities specialising in law, advocacy and politics had DGR status.[18] They would hardly want to engage in any conduct that would jeopardise a significant part of their ability to raise funds.

Secondly, Congress warns against the likely erosion of NFPs' abilities to perform advocacy by the proposed reforms.[19] This warning is reinforced by the High Court's recognition of the importance of advocacy by charities to Australia's constitutional system of parliamentary democracy,[20] which was codified in the *Charities Act 2013* (Cth).[21] Congress is sceptical of the merit of the proposed reforms that seemingly seek to create special reporting obligations concerning advocacy functions,[22] despite the *ACNC Act* outlining limits for charities' charitable purposes.[23] These reporting obligations are very likely to represent a disincentive for these entities to engage in advocacy. Charities in particular have limited resources. So why would they, and other NFPs, seek to expend them on advocacy that would create additional compliance obligations? This links with Congress's previous argument that the reforms are quite likely to paralyse the sector by excessive caution.

Congress also notes that the ACNC has provided guidance on what legitimate advocacy constitutes, which Treasury acknowledges.[24] To retain ACNC registration, charities already have to comply with set governance standards that catch any unlawful advocacy.[25] The absence of concerted, comprehensive enforcement action by the ACNC concerning political advocacy in particular detracts from the apparent

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[17] Natasha Cortis et al, *Australian Charities Report*, 57.

[18] Ibid 51.

[19] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 2.

[20] *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

[21] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 2-3.

[22] Ibid 3.

[23] *Charities Act 2013* (Cth) s 11.

[24] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 3; Treasury, *DGR Reform Opportunities*, 4.

[25] Australian Charities and Not-for-profits Commission, *Charity Compliance Report: 2015 and 2016* (Melbourne, Australian Charities and Not-for-profits Commission, 2016), 10.

necessity of the proposed reforms. [26] If contentious advocacy is not an enforcement priority for a key NFP regulator, then why does the sector need the proposed reforms? This seems to contradict Treasury's argument that the reforms are partly based on the existence of issues with the governance of DGR entities, and thus whether the reforms are actually necessary. [27]

Audits & New Self-Reporting

Congress is against the proposed regular auditing by the ACNC and/or ATO to monitor the currency of an entity's DGR status, and the proposed regime requiring DGR entities *themselves* to annually validate their being eligible for DGR status. [28] This is mainly due to the high compliance costs this would impose on DGR entities, as well as the arguable lack of concrete justification for so rigorous a regime.

Firstly, Congress particularly is concerned that the likely high compliance costs would disproportionately affect a sizeable number of smaller charities and organisations. This would mainly stem from the fact that in 2015, 'half of charities had only 0.6% of the sector's total income', [29] and '37% [of charities had]… incomes below $50,000'. [30] They would arguably be inefficiently diverting resources to compliance functions to maintain DGR status. Their ability to effect their respective missions for the benefit of their stakeholders would be undermined. These very missions were pivotal to the entities getting DGR status in the first place, yet they would be busy in performing arguably ancillary compliance functions. This makes the proposed reforms rather ironic in effect.

Furthermore, Congress recognises that a sizeable proportion of workers in the NFP sector are volunteers: more than 80% of charities engaged at least one in 2015. [31] Around half of charities lacked paid employees. [32] This suggests that a number of NFPs lack the finances to afford even part-time staff. The proposed reforms are likely to further stress entities' finances, even create the chance of them losing human capital in qualified personnel that may have exceptional relationships with stakeholders. In turn, they may threaten the very viability of a large part of the sector, and the goods and services they provide to stakeholders. Hence, the reforms would have undesirable downstream effects. In light of the sector's limited resources, [33] the consequences of the time and expense added for entities in preparing for audits,

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[26] Ibid 7.

[27] Treasury, *DGR Reform Opportunities*, 1.

[28] Ibid 4.

[29] Natasha Cortis et al, *Australian Charities Report*, 53.

[30] Ibid 10.

[31] Ibid 11.

[32] Ibid.

[33] Susan Woodward, "'Not-for-profit' motivation in a 'for-profit' company law regime – national baseline data," *Company and Securities Law Journal* 21 (2003), 126.

and self-disclosures, would be rather grave, especially when the adverse effect on stakeholders is taken into account. In general, Congress considers that the reforms undermine part of the ACNC's mission: 'to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'. [34]

Secondly, Congress is alarmed by the absence of arguably irrefutable justification offered by Treasury. Congress notes that already, 'all registered charities must submit Annual Information Statements'. [35] The ACNC itself acknowledged that 'the vast majority of registered charities are well run, operate capably and professionally and improve the lives of countless people'. [36] This undermines the necessity of the proposed self-reporting regime. Existing public trust in the NFP sector [37] similarly detracts from the regimes' rationale, which partly focuses on the governance of holders of DGR status. [38]

In fact, Congress considers that a new auditing regime lacks necessity, or proportionality to the risk, which it would target. That risk - mainly, the abuse of DGR status - is tackled by the existing powers of the ACNC and ATO to, for example, 'undertake reviews and audits where they believe they are warranted'. [39] So Congress questions the reforms as appearing duplicative of incumbent wide regulatory discretion. The ACNC is prepared to take aggressive enforcement action in response to a serious breach of the regulatory framework when it jeopardises 'vulnerable people or significant charity assets'. [40] The ATO and ACNC's broad palette of enforcement powers enables them to properly target misconduct among charities that are DGR entities. [41] Hence, Congress, in arguing against the reforms, calls for Treasury to engage the existing expertise of the ACNC and ATO, in tackling the mentioned risk, to respect these agencies' autonomy in enforcement, and to properly fund the two agencies. [42] Treasury should also note that the ACNC's taking enforcement action is arguably the exception, not the rule. It has adopted a 'light touch' approach, educating NFPs generally as to their obligations. It mostly supports, rather than coerces, them to comply. [43] Therefore, Congress considers that the proposed reforms are arguably not examples of sound regulation

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[34] *ACNC Act* s 15-5(1)(c).

[35] Australian Charities and Not-for-profits Commission, *Charity Compliance Report*, 8.

[36] Ibid 2.

[37] Ibid 3; *ACNC Act* s 15-5(1)(a).

[38] Treasury, *DGR Reform Opportunities*, 1.

[39] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 4.

[40] Australian Charities and Not-for-profits Commission, *Charity Compliance Report*, 3, 9.

[41] Ibid 11; House of Representatives Standing Committee on the Environment, *Register of Environmental Organisations Inquiry*, 80.

[42] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 4; House of Representatives Standing Committee on the Environment, *Register of Environmental Organisations Inquiry*, 81.

[43] Australian Charities and Not-for-profits Commission, *Charity Compliance Report*, 9.

when considering their impacts on the broader NFP sector. Following on from Congress's earlier point, if a key NFP regulator does not regularly take enforcement action, but prefers a conciliatory approach, then are the reforms necessary to mitigate the aforementioned risk?

Effect of Proposed Reforms on Aboriginal and Torres Strait Islander NFPs

Congress is highly concerned by the negative impact of the proposed reforms on the 8,577 NFPs providing services to Aboriginal and Torres Strait Islander people,[44] and their ability to achieve their respective missions concerning the interests of Aboriginal and Torres Strait Islander peoples. Congress will particularly explore the impact on those NFPs with DGR status ('First Peoples DGRs'). The gravity of Congress' concern is highlighted by the ACNC Commissioner's recognition of the 'unique situation of Australia's Indigenous Peoples and their disadvantage'. Indeed, the need for regulatory caution arises due to the prediction of the lengthy continuation of Aboriginal and Torres Strait Islander peoples' disadvantage.[45] Hence, poorly designed policy can exacerbate the predicament of our peoples by blunting the efforts of First Peoples DGRs serving their interests. Again, Congress finds it ironic that the reforms would impede the achievement of the missions of First Peoples DGRs that secured DGR status for them in the first place. This has 'consequences in most spheres of Indigenous lives, namely access to education, health services, [and] housing'.[46]

Advocacy

The above discussion on advocacy concerning NFPs generally applies to First Peoples NFPs. Congress reiterates the delicacy of the situation sought to be regulated, but would also like to make the following points.

Congress considers the benefit from providing human services to our peoples to be directly proportional to the effectiveness of First Peoples DGRs' advocacy on behalf of their stakeholders.[47] This link arises from the importance of advocacy in fostering a favourable policy environment, which establishes appropriate infrastructure. This creates the conditions necessary for effective service delivery, particularly

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[44] Sara Hudson, *Program and funding maze*, 21; Australian Charities and Not-for-profits Commission, "Explore Sector Detail," viewed 11 July 2017, http://australiancharities.acnc.gov.au/visualisations/explore-sector-detail/.

[45] Australian Charities and Not-for-profits Commission, *Commissioner's Interpretation Statement: Indigenous charities* (Melbourne, Australian Charities and Not-for-profits Commission, February, 2013), 1.

[46] Ibid.

[47] Ibid 6.

if the latter is critically dependent on that infrastructure. Hence, Congress cautions Treasury of the negative downstream effects of the proposed reporting obligations, argued above to act as a constraint on advocacy. If NFPs cannot lobby for efficient, culturally sensitive policies that target First Peoples communities' key issues, then service delivery is likely to lack benefit for our peoples. There must be an inclusive policy process that incorporates the perspectives of these organisations, and their stakeholders.

Furthermore, the importance of the link between advocacy, and the benefit from human service delivery, is greatly enhanced by the strong community ties between specific First Peoples DGRs, and their respective stakeholders. The need to respect these ties is evident in the view that 'many services in Aboriginal and Torres Strait Islander communities should be guided by the principles of self-determination and partnership rather than competition'.[48] Policy makers must also fashion the regulatory framework around the significant trust placed by First Peoples communities in relevant First Peoples NFPs on account of the latter's knowledge of cultural nuance, and deeply rooted working relationships with the communities.[49] Examples of such NFPs include the members of the Combined Aboriginal Organisations of Central Australia that have worked with our peoples in that region for up to four decades.[50] Congress further submits that the primary consideration should indeed be the DGR entity's respect for each First Peoples community's specific cultural requirements. Congress thus considers it more appropriate for community-based First Peoples DGRs to be responsible for advocacy, and even human service delivery, with regards to their respective First Peoples communities. Hence, the regulatory framework must not impede First Peoples DGRs' ability to execute these functions. Particularly critical to their operations, and the desired outcomes for their stakeholders, is the positive influence of their respect for cultural sensitivities on the quality of their output,[51] and the flexibility and responsiveness of its delivery.[52] Otherwise, detriment would flow from service delivery not contributing to social capital. In that scenario, the services will not 'empower... communities through advocacy and education, creating inclusive

[48] Australian Council of Social Service, *ACOSS Response to Productivity Commission Issues Paper: Human Services: Identifying sectors for reform* (Sydney, NSW: Australian Council of Social Service, August, 2016), 6; Productivity Commission, *Better Indigenous Policies: The Role of Evaluation: Roundtable Proceedings* (Canberra: Productivity Commission, 2013), 1.

[49] Family and Relationship Services Australia, *Submission to Commonwealth Indigenous Advancement Strategy tendering processes* (Deakin: 1 May, 2015), 11.

[50] Senate Finance and Public Administration References Committee, *Indigenous Advancement Strategy*, 15, 17-18.

[51] Australian Council of Social Service, *ACOSS Response*, 6.

[52] Ibid.

environments, and contributing to improved economic and social outcomes'.[53] Just like in relation to DGRs specialising in advocacy, Congress fears that the use of organisations lacking experience in working with our peoples will result in 'fragmentation of service delivery, lack of coordination..., lack of genuine capacity development outcomes and indeed the gradual erosion, undermining and loss of Aboriginal-controlled organisations'.[54] Congress stresses that in areas such as health and education, culturally sensitive and community-based forms of service provision have proven far more effective than more generic approaches. The risk that the organisations which provide these services, many of which are small and poorly funded, could collapse under the weight of the proposed regulatory framework and thereby entrench our peoples' disadvantage is, in Congress' view, unacceptable.

Worse still, Congress believes that the maintenance of the critically important relationships of First Peoples NFPs with their stakeholders is threatened by a policy model treating our peoples as objects to be regulated and not, in the very least, as partners in the delivery of culturally appropriate services.[55] This flaw of a 'paternalistic' policy process, assuming what is appropriate for our peoples without proper consultation, has contributed to our peoples becoming the most marginalised Australians,[56] deprived of self-governance.[57] When it comes to policy affecting the interests of our peoples, the policy process must work to enhance the functioning of First Peoples NFPs, especially given the attendant benefits for our peoples' employment, and empowerment.[58] It must enhance the sustainability of such entities delivering economically and culturally appropriate solutions for our peoples.[59] It must be inclusive of our peoples' perspectives, not merely acknowledge them as stakeholders. In the context of DGR reform, Congress does not wish to see a repeat of the 'lack of consultation and engagement with Indigenous communities' from the design and implementation phases of the Indigenous Advancement Strategy ('IAS').[60] Congress is indeed concerned that the reforms, while having an ambitious aim of 'strengthen[ing] the governance

[53] Ibid 5; Financial Action Task Force, *Combating the Abuse of Non-Profit Organisations (Recommendation 8)* (Paris: Financial Action Task Force, June, 2015), 4.

[54] Finance and Public Administration References Committee, Senate, Canberra, 16 February, 2016, 35-6 (Graham Dowling).

[55] National Congress of Australia's First Peoples, *Redfern Statement*, 2.

[56] Ibid 5.

[57] National Congress of Australia's First Peoples, *Briefing for the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli-Corpuz* (Redfern: National Congress of Australia's First Peoples, March, 2017), 2.

[58] Senate Finance and Public Administration References Committee, *Commonwealth Indigenous Advancement Strategy tendering processes*, Report (Canberra: Parliament of Australia, March, 2016), 23.

[59] Ibid 24.

[60] Ibid 14.

arrangements [of DGRs]', [61] may echo the IAS in prioritising form over substance, in creating high expectations among our peoples. Yet when it comes to effectively, and sensitively, regulating the affairs of our peoples, they may follow a 'poor and confused process'. [62] We hope that the Commonwealth will not merely assume what is appropriate without adequately considering the actual circumstances of our communities.

Particularly, Congress considers that this issue - the regulatory detachment from the circumstances sought to be regulated - will be worsened by a shift to an activity-based test governing the receipt of DGR status. The test would be likely to mark certain conduct - aimed at fulfilling a First Peoples NFP's possible purpose of culturally sensitive advocacy, and human service delivery - being regarded as disqualifying an entity from DGR status on the basis of subjective, community standards which remain in flux and generally do not consider the unique situation of many Aboriginal and Torres Strait Islander communities. Congress is thus alarmed by the new test since our peoples' interests are upheld by such conduct. The ability to provide socially and culturally appropriate human services would represent successful community engagement in, for example, 'valuing the cultural skills and knowledge of community organisations and Indigenous people'. [63] It is more likely that community-based DGRs with the trust, and support, of the respective groups of our peoples whose interests they serve will be more effective at lobbying for policy alleviating their stakeholders' predicament. [64] As important as that trust, and support, is the incredible familiarity of especially First Peoples DGRs with the predicament of their respective communities. This is in stark contrast with centralised regulatory structures and bodies which remain largely divorced from the realities which face many of our communities, and which would therefore remain ignorant of their needs and wants and prioritise inappropriate or ineffective forms of service delivery.

The problem of unawareness and aloofness regarding the issues facing our peoples sadly extends to most of the Australian community, and undermines the 'quality' of the activity-based test suggested by Treasury. The shallowness of the engagement, if at all, is arguably evident in the lack of a 'language for Aboriginal success', which Congress considers is not given ample media coverage. [65] And above all, the

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[61] Treasury, *DGR Reform Opportunities*, 4.

[62] Senate Finance and Public Administration References Committee, *Indigenous Advancement Strategy*, 62.

[63] Janet Hunt, *Closing the gap clearinghouse: Engaging with Indigenous Australia— exploring the conditions for effective relationships with Aboriginal and Torres Strait Islander communities*
Issues Paper prepared for Australian institute of Health and Welfare and Australian Institute of Family Studies (Canberra: Australian Government, October, 2013), 2.

[64] Ibid.

[65] Australian Broadcasting Corporation, "Don't call them disadvantaged: Successful Australians redefining what it is to be Indigenous," viewed 18 July, 2017, http://www.abc.net.au/news/2017-05-05/dont-call-them-disadvantaged/8501744.

nation's focus, if at all, on the 'Closing the Gap' annual report is arguably limited in its meaningfulness. It is a momentary reflection on perpetual marginalisation. We consider that it does not instigate concerted action by everyday Australians to take concrete measures to, at least, secure respect for our peoples.[66] This accentuates the absence of a 'relationship [between our peoples and other Australians] built on trust and integrity',[67] necessary for quality engagement by the broader populace with First Peoples' issues. If the wider community's engagement with these issues is of little quality, then what utility does a subjective test based on community standards have in determining what legitimate advocacy on behalf of our peoples have? Hence, Congress considers the consequences of the aforementioned issues rather severe, outweighing public benefit from shifting from a purpose-based test for DGR status.

Additionally, Treasury should recognise 'the importance of incorporating Indigenous perspectives', and seek to uphold 'a community development or capacity-building model' when approaching DGR reform.[68] This is particularly so because, as mentioned above, DGR reform is highly likely to have downstream effects for DGR entities' stakeholders. This can be whether the entity is engaging in advocacy on behalf of, and/or providing human services to stakeholders. Furthermore, Treasury's shaping the policy process as per the perspectives of our peoples when their interests are at stake would have the added benefit of reducing the '"enormous cynicism" among Indigenous people' towards the institutions of government established to actually serve their interests.[69] Treasury's doing so would mitigate the negative impression of government delivered by, for example, the 'focus on the closing the gaps agenda… not necessarily reflect[ing] Indigenous people's objectives and priorities'.[70] It is quite clear that confidence in the overall policy process is crucial for that in policy outcomes.[71] Treasury needs to break with the status quo of generally 'assimilationist polices [designed and implemented] without the consultation of Aboriginal and Torres Strait Islander… communities'.[72] Congress submits that an activities-based test covering First Peoples NFPs would be such a policy. It must be replaced with regulation born of a more inclusive developmental process, as argued above, and thus holistically tailored to the predicament of its stakeholders, which it seeks to regulate. While Congress applauds Treasury's inviting the views of

[66] The Guardian, "Only 58% of Indigenous Australians are registered to vote. We should be asking why," viewed 18 July, 2017, https://www.theguardian.com/commentisfree/2016/jun/30/only-58-of-indigenous-australians-are-registered-to-vote-we-should-be-asking-why.

[67] Hunt, *Closing the gap*, 1.

[68] Productivity Commission, *Better Indigenous Policies*, 4.

[69] Ibid 10.

[70] Ibid.

[71] Finance and Public Administration References Committee, Senate, Canberra, 29 June, 2015, 3 (Mick Gooda).

[72] National Congress of Australia's First Peoples, *Briefing*, 5.

stakeholders as to DGR reform, it advocates for a bottom-up approach incorporating actual stakeholder experiences, when it comes to the design and implementation of reform, that too one occurring over a realistically set timeline. This will help remedy the failures of the approach by the Department of Prime Minister and Cabinet in engaging communities for the IAS,[73] given its following a 'top-down approach,' for example.[74]

Congress also finds Treasury's suggestion of broader community expectations as a yardstick for advocacy activities' legitimacy[75] particularly concerning because it is, above all, a subjective blunt instrument for judging what is arguably a core function for several DGR entities, such as Congress. It is symbolic of regulatory overreach, violation of NFP autonomy, as well as regulatory neutrality. Normally, such neutrality keeps regulators clear of 'pick[ing] winners',[76] particularly when it comes to DGR entities like Congress that engage in politically contentious advocacy. Congress, however, fears the undesirable consequences of the loss of this neutrality, particularly when combined with the fact that advocacy-focused First Peoples DGRs can be perceived by all levels of government as an annoyance, or at best merely alternative service providers who may be discriminated against on economic bases in a competitive tendering process, regardless of their cultural connection with the recipients of their services, or the beneficiaries of their advocacy. Indeed, the experience of many First Peoples NFPs under other similarly centralised regulatory structures such as the IAS has been that they are treated as expendable extensions of the executive branch following the aforementioned paternalistic regulatory approach, not partners - actually respectful of our peoples' 'set of values... community nuance, histories and cultures'[77] - in the policy process concerning the interests of our peoples. Hence, their possibly sound advocacy, and reasoned policy suggestions aimed at alleviating the crippling disadvantage of our peoples, would be ignored as noise in a highly polarised landscape of Aboriginal and Torres Strait Islander affairs.[78] They would not be able to contribute to fostering the favourable policy environment required to improve our peoples' - their

[73] Senate Finance and Public Administration References Committee, *Indigenous Advancement Strategy*, 15, 17-18.

[74] Ibid 15.

[75] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 3.

[76] Ibid.

[77] Finance and Public Administration References Committee, Senate, Canberra, 29 June 2015, 38 (Kirstie Parker).

[78] See eg Australian Broadcasting Corporation, "Constitutional recognition: Australia's founding document should not embody 'racist past', Pat Dodson says," viewed 18 July, 2017, http://www.abc.net.au/news/2017-06-23/pat-dodson-calls-for-removal-of-stains-in-racist-constitution/8644312; Paul Daley, "Only 58% registered to vote".

stakeholders' - quality of life. To put it pejoratively, government, in thus 'pick[ing] winners' [79] - organisations possibly not quite critical of existing regulatory strategies - would eliminate likely meaningful voices from the policy conversation. We submit that this would undermine governments' ability to serve the interests of our peoples in fostering a policy 'echo chamber'. And of course, in general, poorly designed regulation reflecting the views of a few, like-minded, entities may threaten the viability of NFPs by undermining the incentive for members of the public to donate to any NFP, irrespective of DGR status. The sector may lose the trust of the public in being seen as even an extension of the government. [80]

Audits & New Self-Reporting

Besides, the above discussion on audits, and self-reporting, regimes concerning NFPs in general arguably applies to Aboriginal and Torres Strait Islander NFPs. Again, Congress stresses the delicacy of the circumstances targeted by the regulatory framework, given the acute disadvantage suffered by Aboriginal and Torres Strait Islander peoples. It would also like to highlight the following issues.

Congress submits that First Peoples NFPs, including those with DGR status, delivering human services to our communities would be disproportionately affected by the proposed reforms. This is especially because in 2015, over 67% of First Peoples NFPs earned an income less than 1 million, [81] that too in a sector where more than half of overall income is concentrated among the the largest 1% of charities. [82] 39.5% of the combined income of Aboriginal and Torres Strait Islander corporations came from governments. [83] Thus, First Peoples NFPs are quite fiscally vulnerable, magnifying the impact of higher compliance costs from the proposed auditing, and self-reporting, regimes. The impact can be increased by the absence of complete coordination of services across differing levels of government, [84] which creates bureaucratic excesses ultimately shouldered by DGR entities, and their stakeholders. In this regard, Congress also calls for continued cooperation between the ACNC and ATO through intelligence sharing, [85] and best-practice guidance to help mitigate duplication, [86] particularly in reporting requirements for DGR

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[79] ACT Council of Social Service, *Resource Paper to Support Coordinated Response*, 3.

[80] Australian Charities and Not-for-profits Commission, *Charity Compliance Report*, 3; *ACNC Act* s 15-5(1)(a).

[81] Australian Charities and Not-for-profits Commission, "Explore Sector Detail".

[82] Natasha Cortis et al, *Australian Charities Report*, 53.

[83] Sara Hudson, *Program and funding maze*, 22.

[84] Productivity Commission, *Introducing Competition and Informed User Choice into Human Services: Reforms to Human Services Productivity Commission Draft Report* (Melbourne: Productivity Commission, June 2017), 19.

[85] Senate Economics Legislation Committee, *Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014 [Provisions]*, Report (Canberra: Parliament of Australia, June, 2014), 18.

[86] Ibid 29.

entities.[87] This should occur within the context of national harmonisation of charities regulation. The ACT and SA frameworks should be applauded for agreeing to shift their regimes to echo the ACNC's,[88] to prevent duplication, and thus the compliance burden, for DGR entities complying with the law at different levels of government.[89] Congress also submits that, should the proposed self-reporting regime be implemented, it 'should not unnecessarily duplicate the reporting requirements of the ACNC, but instead focus on the specific requirements for endorsement as a DGR [entity]'.[90] This will help make the regime more targeted to the specific risk of, say, possible abuse of DGR status, rather than a blunt instrument imposing a blanket compliance burden for NFPs, particularly those working to advance the interests of our peoples.

Congress reminds Treasury that charities have considered their reporting burdens to have increased from 2011-2014, with the burden at the federal level impeding the achievement of charitable outcomes.[91] This does not bode well for First Peoples NFPs, particularly First Peoples DGRs. Worse still, a significant number of First Peoples DGRs that are charities would already face arguably onerous obligations under funding agreements with the Commonwealth.[92] In this regard, compliance costs would be derived from an excessive 'level of information required and the frequency of reporting… seemingly driven… [less] than an objective consideration of what level of reporting is necessary to ensure funding outcomes are achieved'.[93] Again, this calls into question whether the proposed reforms would be appropriately targeted at the specific risk they apparently seek to mitigate. Also, Congress notes that DGR entities already have to notify the ATO of their failure to meet DGR requirements.[94] This presupposes a form of continuing due-diligence to facilitate self-reporting to the ATO on said failure. Interestingly, the ATO, while not legally

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[87] House of Representatives Standing Committee on the Environment, *Register of Environmental Organisations Inquiry*, 83.

[88] Senate Economics Legislation Committee, *Repeal Bill*, 18.

[89] Ibid 17.

[90] House of Representatives Standing Committee on the Environment, *Register of Environmental Organisations Inquiry*, 83.

[91] Ernst & Young, *Charity Regulatory and Reporting Burdens*, 6; Senate Economics Legislation Committee, *Repeal Bill*, 8.

[92] Sara Hudson, *Program and funding maze*, 22.

[93] Ernst & Young, *Charity Regulatory and Reporting Burdens*, 6-7.

[94] House of Representatives Standing Committee on the Environment, *Register of Environmental Organisations Inquiry*, 76; Australian Taxation Office, "Self-governance checklist for non-profit organisations," viewed 17 July, 2017, www.ato.gov.au/Non-profit/Your-organisation/In-detail/Checklists/Self-governance-for-not-for-profit-organisations/.

requiring DGR entities to do so, encourages them to complete an annual self-assessment, even providing a standard form.[95]

Congress also submits that higher compliance costs for NFP entities generally serving our peoples' causes would stress their finances to the point that they cannot afford compliance resources. The grave consequences would be manifest in such NFPs, especially those that may be some of the smallest in the broader sector,[96] being less capable advocates for their local communities' interests by losing DGR status. This is because the latter is key to a DGR entity's viability in facilitating higher donations, as discussed above. These organisations' loss of DGR status would result from their, for example, ceasing to comply with necessary governance standards, or failing to follow administrative processes to secure DGR status. In particular, Congress highlights the arguable challenge for First Peoples NFPs that are charities to objectively measure their adherence to what can be quite abstract charitable purposes like 'promoting reconciliation, mutual respect and tolerance'.[97] This particularly complicates their ability to secure, and then maintain DGR status, given their obligations under, for example, *ACNC Act* s 25-5(2). Interestingly, the predicament of First Peoples organisations was recognised by the Senate Finance and Public Administration References Committee in their competing with 'well-resourced and experienced [organisations]..., including large not-for-profit associations and the university sector' for IAS funding.[98] Treasury should note that First Peoples organisations were considered ill-equipped to deal with the shift to a competitive funding process[99] under the IAS. Many lacked 'the capacity... or the resources to put together the kind of application required with the tender.[100] It is likely that these organisations' predicament continues, and Congress is thus concerned by the impact the likely high compliance costs generated by the proposed reforms would have on those with DGR status.

Furthermore, these issues have serious consequences for the communities of our people served by such NFPs. This is because policy favourable to their needs, and culturally sensitive services tailored to their circumstances, are less likely if the DGRs seeking to advance their interests are hamstrung by large compliance burdens. Hence, Congress calls on the Treasury to seriously reconsider proceeding with the proposed reforms. In particular, Congress does not wish to see the failures of the IAS repeated, including

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[95] House of Representatives Standing Committee on the Environment, *Register of Environmental Organisations Inquiry*, 81.

[96] Australian Charities and Not-for-profits Commission, "Explore Sector Detail".

[97] *Charities Act 2013* (Cth) s 12(1)(f). See also *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25-5(5) item 6 ('*ACNC Act*').

[98] Senate Finance and Public Administration References Committee, *Indigenous Advancement Strategy*, 21.

[99] Ibid.

[100] Finance and Public Administration References Committee, Senate, Canberra, 29 June 2015, 2 (Mick Gooda).

the imposition of a compliance burden on NFPs without proper consultation; without respect for the fact that there are some entities meeting the needs of their stakeholders without the need for additional government intervention. As Congress has submitted, this will jeopardise the benefits arising from cultural competence of First Peoples DGRs leading advocacy on First Peoples' behalf, or the delivery of human services to First Peoples communities. [101]

Conclusion

Congress, a recipient of DGR status, and the peak national representative body for Aboriginal and Torres Strait Islander peoples, [102] has argued that the proposed reforms are not examples of sound regulation. It has done so through two lenses: the adverse effects on the overall NFP sector, and those on First Peoples NFPs. In looking through these lenses, Congress considered the impact on NFPs' advocacy functions, as well as the greater compliance burden from proposed auditing, and self-reporting regimes.

Also, Congress highlights that the proposed reforms, in negatively affecting an organisation like itself with severe funding constraints, [103] are likely to have undesirable consequences for most Aboriginal and Torres Strait Islander organisations. This is because Congress acts as a coordinator for, and unifier of, these organisations to ensure the strength of the voice of our peoples. Therefore, it is likely that policies impeding the functioning of Congress would undermine that strength in preventing Congress from being the effective representative of our peoples. Furthermore this would contribute to the perpetuation of the aforementioned cycle of disadvantage of our peoples; something we are sure will particularly be of concern to the Commonwealth.

Finally, it is worth highlighting the vital role which the ability of Aboriginal and Torres Strait Islander organisations to freely advocate for our rights has played in the development of policies which have improved the lives of our peoples. The increase in the Australian public's awareness of Aboriginal and Torres Strait Islander issues, and much of the progress which has been made towards combatting our disadvantage, are the result of decades of advocacy and protest. The recently released Redfern Statement, which provides a working platform for future Aboriginal and Torres Strait Islander policy, is a prime example of this. More broadly, the history of our organisations being treated as charities has significantly improved our social inclusion: the development of the Aboriginal Medical Service and the Aboriginal Legal Service, for instance, has not only promoted our rights and wellbeing, but also assisted many other charitable organisations. Congress fears that the proposed reforms would put an end to this crucial work and thus silence the voices of Australia's First Peoples. Hence, we would strongly caution the Treasury against implementing the proposed reforms.

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[101] Senate Finance and Public Administration References Committee, *Indigenous Advancement Strategy*, 23.

[102] National Congress of Australia's First Peoples, "About us".

[103] Ibid.