Tax Deductible Gift Recipient Reform Opportunities: Discussion Paper

Submission to The Treasury, Australian Government

27 July 2017

About ACOSS

The Australian Council of Social Service (ACOSS) is a national voice in support of people affected by poverty, disadvantage and inequality and the peak body for community services and the not-for-profit sector. Our vision is for a fair, inclusive and sustainable Australia where all individuals and communities have the opportunities and resources they need to participate fully in social and economic life.

Summary

The administration of the charity register by the Australian Charities and Not-for-profit Commission (ACNC) is working well and, in principle, ACOSS supports the proposal that the ACNC be generally responsible for Deductible Gift Recipient (DGR) registration, with additional resources to the ACNC to manage these functions. Benchmarks should be set for faster registration outcomes. The decision-making of the ACNC about DGR status should be arms-length from government, and organisations should be able to appeal decisions of the ACNC to the Administrative Appeals Tribunal and courts. Transitional arrangements should include support for existing organisations with DGR status (DGRs) to register with the ACNC within a timeframe of at least one year.

However, ACOSS rejects any proposal that curbs the crucial advocacy role of charities, either directly or indirectly by deterring charities from undertaking advocacy activities. Advocacy is an essential aspect of civil society organisations' ability to participate in public life and influence public policy and action. The Australian Government should be encouraging, and not inhibiting, the public participation of civil society organisations. Civil society organisations, including those with DGR status, should continue to be clearly entitled to engage in public debates consistent with its purpose even when difficult, or 'controversial' for example, to improve the well-being of people at risk of poverty or to protect the natural environment in ways that they could not possibly achieve through service delivery.

We strongly oppose advocacy activities being singled out for special attention and reporting by the ACNC. Existing ACNC guidelines clearly set out the distinction between permissible advocacy in pursuit of a charitable purpose and advocacy of a party-political nature contrary to the Act. These existing guidelines are reasonable and workable, and existing regulation through the courts and AEC should continue and not be duplicated. Charitable and DGR status should continue to be assessed on the basis of the purposes of an organisation rather than its activities.

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Main Recommendations

ACOSS proposes that:

1. The assessment and administration of DGR status should be streamlined, with the ACNC taking on the function of registering organisations for DGR status, and removal of the public fund requirement.
2. No requirements should be introduced for separate reporting on advocacy activities.
3. Charitable and DGR status should be based on purposes rather than activities.
4. There should be no annual or 'rolling' reviews of DGR status or sunset provisions.
5. There should be no requirements for DGRs, including environmental organisations, to devote a fixed share of resources to specified activities.
6. Existing regulation of unlawful and 'party-political' activities through the courts and AEC should continue and not be duplicated by the ACNC or the Australian Taxation Office (ATO).
7. Section 50-50 of the *Income Tax Assessment Act 1997* should be amended to remove the 'sole purpose' and 'governing rules' tests.

Discussion

1. Support for streamlining administration

ACOSS supports in principle the proposals to streamline administration of DGR status through registration with the ACNC (rather than specialised registers), and to remove the requirement to establish a public fund.

As far as possible, organisations should only be required to register, apply and report to a single public authority to secure and maintain DGR status. We consider that the ACNC should perform the majority of these functions, with the ATO relying substantially on information and assessments undertaken by the ACNC. The ACNC could seek expert advice from relevant government departments when an organisation applies for DGR status within the current scope of one of the four specialist registers.

It is not appropriate for government ministers to exercise discretion in regard to the initial or ongoing registration of a DGR, aside from the nomination of specifically-named organisations for DGR status. Those decisions should be made by the ACNC at arms-length from government.

Applicants who are denied registration as a DGR, or whose registration is revoked, should be given reasons in writing from the ACNC and should have appeal rights to the Administrative

Appeals Tribunal, and subsequently the courts – as is the case for charities. Existing registration should remain active until such appeals are resolved.

We agree that simplifying the registration process should lead to faster registration for successful applicants, and suggest that performance benchmarks be set (and adequate resources provided) for the ACNC for the processing of applications.

If a simplified registration process is implemented, we agree existing DGRs should be given at least a year to register after the passage of enabling legislation, and the ACNC should be pro-active in advising them on the new requirements while assisting them to meet them. We expect the ACNC would need more resources to undertake this and other additional functions proposed.

2. No special requirements for reporting on advocacy activities

We acknowledge that registration with the ACNC would entail provision of annual information statements and financial information where relevant.

We are deeply concerned, however, by the undue emphasis in the Discussion Paper on reporting on 'advocacy activities'. This appears to spring from a view, implied in the majority report of the House of Representatives Inquiry into the Register of Environmental Organisations, that charities should not advocate changes in policy on 'controversial' issues.

Putting undue emphasis on the reporting of advocacy activities would deny organisations a role in pursuing their charitable purpose through robust discussion of issues on which views are diverse and strongly held, such as racial discrimination, inequality, the causes of poverty and unemployment, the design of the tax system, and the role of fossil fuels in global warming. Yet it is only through robust debate of these and other controversial issues that major reforms that improve people's lives and protect the environment are achieved.

Advocacy is an essential aspect of civil society organisations' ability to participate in public life and influence public policy and action. Advocacy is the act of having a voice in the public arena, and is an essential element of a free society. The Australian Government has an obligation to encourage public participation by civil society organisations. ACOSS strongly opposes attempts to silence or constrain the voice of civil society organisations.[4]

[4] For further discussion of the essential advocacy role of civil society organisations and recommendations for protecting this role, see Human Rights Law Centre (2017) *Defending Democracy*, available at https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5936933d579fb38a23dc2eda/1496748893178/DefendingDemocracy_online_June2017.pdf.

3. Reporting should be based on purposes rather than activities

It is a long-standing tradition of charity law and practice that charities have special tax status by virtue of their dominant purpose, not their activities. If organisations are required to regularly detail their activities and the resources devoted to them this would constrain their work, either through policing of requirements or self-censorship.

It may be appropriate for organisations funded directly by government to account for activities for which they are funded, but government monitoring and regulation of the activities of DGRs would undermine the purpose of gift deductibility: to encourage people to contribute to the cost of services or activities that governments are not yet ready or able to provide or fund on their own.

4. No annual / rolling reviews and sunset provisions

ACOSS does not support the proposed annual or 'rolling' reviews of existing DGRs. Any additional information requirements should be clearly and specifically justified and could be provided in conjunction with the Annual Information Statement. The ACNC already has adequate powers to undertake investigations on its own motion or in response to complaints.

Beyond this, further information requirements or audits would impose unnecessary costs on both DGRs and government. They are likely to discourage organisations from registering or from engaging in activities that might be viewed by the government of the day as controversial.

For similar reasons, we do not support the proposed five-year 'sunset' provision for specifically listed DGRs.

5. No requirements for DGRs to undertake specified activities

Regarding the specific questions raised about advocacy by DGRs, we oppose the House of Representatives Committee's proposals that environmental organisations (or any other charity or DGR) be required to devote a fixed proportion of their resources to specific activities such as direct services to individuals in need, or environmental remediation.

ACOSS has argued for many years that the Public Benevolent Institution (PBI) requirement to provide direct services to people in need is narrow, outdated and inappropriate. Donors should decide whether to contribute to organisations that meet their charitable purpose through direct services, policy development and lobbying, or in others ways consistent with their charitable purpose.

As discussed, arguments that charities should be regulated according to their activities miss the point. Charities are defined by their purpose, not the way in which activities are undertaken.

6. Existing regulation for unlawful and 'party-political' activities are appropriate and sufficient

It is well established that supporting a political party, as distinct from supporting, opposing, or comparing policies, is not a valid charitable purpose. The guidelines published by the ACNC provide sensible advice on how charities can distinguish in practice between advocacy in pursuit of a charitable purpose and 'political' purposes. Those guidelines should continue to apply to charities, and extend to DGRs not previously registered. They should continue to be sensitively administered by the Commission.

No case has been made for new sanctions. It is important that the ACNC retain the flexibility to deal with breaches of charity registration requirements in a manner that is calibrated to the circumstances of each case. Revocation of registration should not be the only compliance tool available to the ACNC, and should continue to be used sparingly.

Remedies are available through civil and criminal and law where an organisation (or its members or officers) engages in unlawful activity that harms individuals, businesses, or the community. The courts, rather than the ACNC, ATO or government ministers should adjudicate on compliance with those laws. Similarly, the Australian Electoral Commission (AEC) is responsible for ensuring compliance with electoral laws. Involvement of the ACNC or revenue authorities in enforcement of these other laws could undermine the jurisdiction of the relevant authorities and would also confuse matters.

7. Flaws in the income tax law in regard to charities should be removed

The proposed streamlining of registration of DGRs would bring more organisations within the scope of the tax law as it applies to charities. In conjunction with that reform, the government should seek to amend that legislation to address two key flaws in section 50-50 of the *Income Tax Assessment Act 1997.*

The first problem is that the Act requires charities to apply their income and assets *solely* for the purpose for which the entity is established. This is arguably narrower than the traditional test of charitable status: that they should pursue their *dominant* purpose, along with other *ancillary* (related) purposes.

The Act also requires charities to comply with all of the 'substantive requirements in their governing rules'. This term is ambiguous and would be difficult to comply with if strictly enforced (Tax Ruling 2015/1 discusses how 'solely' and 'substantive requirements' might be interpreted).

Our proposed solution is to remove both of these requirements, which do not add any value to the regulation of charities for tax purposes, from the Act.