Submission to Treasury

Joint Submission on Tax Deductible Gift Recipient Reform Opportunities

August 2017

Community Legal Centres Queensland

Community Legal Centres Association (WA)

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Introduction

We thank Treasury for the opportunity to provide feedback in relation to the Treasury Discussion Paper '*Tax Deductible Gift Recipient Reform Opportunities*', released on 15 June 2017.

This submission was prepared by the National Association of Community Legal Centres (NACLC) jointly with its members, the State and Territory CLC Associations, in particular Community Legal Centres NSW (CLCNSW) and is endorsed by all members.

NACLC is the peak national organisation representing community legal centres (CLCs) in Australia. Its members are the eight state and territory associations of CLCs that represent around 190 CLCs across Australia.

CLCNSW is the peak organisation for 37 community legal centres (CLCs) across NSW. The organisation leads and supports CLCs in NSW to deliver access to quality legal services, promote positive law reform and champion social justice.

Community legal centres are independent, not for profit community based organisations. They provide free legal help – including information, referral, legal education, advice, casework and representation services – to hundreds of thousands of people across Australia every year, at times when they most need it.

Summary of Submission

The Deductible Gift Recipient (DGR) framework as provided for under the *Income Tax Assessment Act 1997* (Cth) provides a vital system which enables charities and other organisations to receive gifts for which a donor can claim a tax deduction. This means that access to DGR status is an important part of ensuring ongoing funding for charities and DGRs across Australia, particularly in the face of increasing reductions in Government funding.

The CLC sector supports a clear regulatory framework for the not-for-profit sector that ensures good governance and transparency, and the work of the Australian Charities and Not-for-profits Commission (ACNC). As a result, in principle, we support some of the reforms proposed in the Discussion Paper.

We are concerned, however, that the proposed reforms in the Discussion Paper, along with the recent inquiry into the DGR status of environmental organisations, form part of a broader shift to limit advocacy by not-for-profit organisations.

Australian charities, including many CLCs, undertake important advocacy work and have a long and successful history of bringing about positive and systemic reform of laws and legal frameworks at all levels of government.

In our view, it is important to recognise the economic and public policy benefits of advocacy by not-for-profit organisations and the resulting importance and rationale for ongoing subsidies and support for this work by Government, including through granting of tax concessions.

As a result, we have serious reservations about some of the questions and proposed reforms in the Discussion Paper. We caution against reform in this area, given the absence of evidence that reform is needed, and taking into consideration the potentially unintended consequences of such reform on the quality of laws and public debate in Australia, as well as the rule of law more broadly.

Recommendations

1. The Australian Government should continue to support a strong and efficient charity and deductible gift recipient sector, including by maintaining existing taxation concessions and arrangements.

2. Administration of Deductible Gift Recipient status in Australia should be streamlined, within a clear regulatory framework, administered by the Australian Charities and Not-for-profits Commission.

3. The Australian Government should provide the Australian Charities and Not-for-profits Commission with sufficient resources to undertake its important regulatory work, including any additional responsibilities as a result of proposed reforms.

4. The Australian Government should continue to respect and acknowledge the role of charities in undertaking advocacy work, including through continuing assessment of charitable and deductible gift recipient status based on purposes rather than activities.

5. The Australian Government should undertake further and broader work and consultation in relation to proposed deductible gift recipient reform prior to implementing any such reform.

Response to Consultation Questions

Question 1. What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?

We support a clear regulatory framework for the not-for-profit sector that ensures good governance and transparency, and the work of the Australian Charities and Not-for-profits Commission. A number of CLCs have advocated for the simplification and transparency of DGR and other not-for-profit tax concessions over many years.

In principle, we support the requirement for a DGR to be a registered charity in order for it to be eligible for DGR status (other than for government entities). Ideally in our view, organisations should only be required to register, apply and report to a single public authority to obtain and continue DGR status.

Importantly however, any reform should result in reduced duplication in reporting and administrative burden on DGRs. The practicalities of such reforms should also be considered, including for example where an entity operates multiple DGRs.

We welcome indications in the Discussion Paper that the ACNC would assist existing DGRs to apply for charity registration, noting the need to avoid administrative burdens for organisations affected and to ensure the ACNC has sufficient resources to undertake this work.

Question 4. Should the ACNC require additional information from all registered charities about their advocacy activities?

Question 5. Is the Annual Information Statement the appropriate vehicle for collecting this information?

Question 6. What is the best way to collect the information without imposing significant additional reporting burden?

The importance of advocacy

Australian charities, including many CLCs, undertake important advocacy work as part of furthering their charitable purposes. In this way, CLCs are able to support and defend the people and communities we work with, who would otherwise have no access to justice. Our advocacy includes identifying and making recommendations about systemic issues in the areas we work, and championing positive law reform for the benefit of the community as a whole.

The importance of advocacy was recognised by the High Court in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, in which the Court emphasised that charities undertaking advocacy was an 'indispensable incident' of Australia's constitutional system. This decision is now reflected in the *Charities Act 2013* (Cth).

Importantly, the *Charities Act* outlines limits to charitable purpose and the ACNC has published guidance on this issue, providing important information about the permissible scope of this important work. It is clear that the law prescribes what we consider to be appropriate limits to charitable purpose; for example, charities are not able to endorse or support parties or candidates for political office or promote unlawful activity.

The importance of this work, and indeed its legislative protection, were further guaranteed by the *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth) which emphasises its purpose in protecting and promoting 'the NFP sector's freedom to advocate or oppose changes on Commonwealth law, policy and actions'.[1]

It is additionally important to recognise the economic and public policy benefits of advocacy by not-for-profit organisations and the resulting importance and rationale for ongoing subsidies and support for this work by government, including through granting of tax concessions.

The advocacy work of community legal centres

Community legal centres have a long and successful history of bringing about systemic change through policy, advocacy and law reform. This work is crucial in identifying and encouraging reform of laws, policies and practices that are not operating effectively or equitably.

By way of example, the law reform and advocacy work of CLCs includes:

- providing evidence-based information to government and law reform reviews and inquiries
- working with other legal and non-legal service providers, organisations and institutions to improve processes and increase awareness of the particular needs and perspectives of CLC client groups, and where possible avoid legal problems occurring
- strategic litigation
- supporting clients and representatives of client groups to participate in government and community forums and other policy and law reform processes
- reporting illegal conduct, for example of debt collectors or door to door salespeople, to relevant authorities and regulators
- writing to and meeting with Members of Parliament about issues affecting CLC client groups, and
- broader advocacy work, including for and with victims/survivors, consumers and others, human rights advocacy, and awareness raising.

Case studies

Protection of Older People in Retirement Housing
Between 2014-2016, the Consumer Action Law Centre (CALC) undertook law reform and advocacy work, leading a push for reform of retirement housing in Victoria, which will significantly improve the lives of older people across Victoria.

As part of this work, CALC assisted residents of a residential park to commence a group proceeding in the Victorian Civil and Administrative Tribunal (VCAT), in which they claimed that the exit fee they faced from their residential park was unlawful. In June 2016, the parties agreed to settle the proceeding, 18 months after the initial VCAT application was lodged, and years after residents first raised concerns with their park owners. The case highlighted the need for urgent legislative and regulatory reform.

At the same time, CALC built momentum for a Parliamentary Inquiry that ran from March 2016to March 2017 and received more than 750 submissions, mostly from residents, who shared personal stories with the Inquiry. The Committee ultimately made recommendations that, if implemented, would significantly improve the lives of people in retirement housing in Victoria.

[1] Explanatory Memorandum, *Not-for-Profit Sector Freedom to Advocate Bill 2013.*

Disability Discrimination
The Public Interest Advocacy Centre in NSW represented Graeme Innes AM, who is blind, in a disability discrimination claim in response to the failure by Sydney Trains (formerly RailCorp NSW) to provide reliable audible 'next stop' announcements on trains. The announcements are crucial because they allow passengers with vision impairment to know when they have reached the right station. This case tested the Disability Standards for Accessible Public Transport.

The Federal Circuit Court found RailCorp had breached federal disability discrimination law by failing to make audible announcements on 36 train journeys undertaken by Mr Innes. Sydney Trains agreed to take specific steps to continue monitoring and improving on-train announcements and Mr Innes is now 'satisfied with measures that have been put in place to make on-train announcements clear, consistent and audible.' This case has benefited all blind train travellers in NSW now and into the future.

As a result of this work, Sydney Trains has also committed to improving communication around changes and developments on the rail network with people who are blind or have low vision and is undertaking ongoing monitoring of the quality of audible announcements on the network.

Bicycle Helmets
Jeff has physical and an intellectual disability and is unable to wear a bicycle helmet. As a result, Jeff received over 26 penalty notices and $4000 worth of fines. A CLC worked with Jeff and police to ensure the charges against him were dropped and prepared a submission to the Attorney-General seeking amendment of the relevant road legislation to include an exemption where the rider is unable to wear a bicycle helmet due to a medical reason.

Missing Persons
David and Julie Rosewall's son Daniel went missing. At the time, there were no provisions in the relevant state's guardianship and administration legislation enabling them to act on behalf of Daniel as a missing person, where Daniel had not appointed a guardian or power of attorney. As a direct result of systemic advocacy and law reform work done by Loddon Campaspe Community Legal Centre to assist David and Julie, the legislation was amended to enable the effective protection and administration of the affairs of missing persons. In particular, the amendments permitted the Victorian Civil and Administrative Tribunal to appoint David and Julie as administrators to manage Daniel's affairs in circumstances where they hadn't been able to redirect his mail, resolve his lease, or otherwise deal with his legal and financial affairs. As a result, families in this position in the future will not encounter the same difficulties that David and Julie experienced.

The value of the advocacy work of CLCs has been recognised in a number of contexts, including the 2014 Productivity Commission Inquiry into Access to Justice Arrangements.

In its report, the Productivity Commission stated that CLCs play a key role in law reform, policy and advocacy, that it should be a 'core activity' of CLCs and that 'in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources'.[2] The Commission also expressed the view that 'strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities)'.

The Commission ultimately recommended that 'The Australian, State and Territory Governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services'.[3]

[2] Productivity Commission of Australia, *Access to Justice Arrangements Inquiry* (2014) Final Report, Vol 2, 709.
[3] Productivity Commission of Australia, *Access to Justice Arrangements Inquiry* (2014) Final Report, Vol 1, rec 21.1

Despite this, CLCs that receive Commonwealth funding under the National Partnership Agreement on Legal Assistance Services (NPA) have been restricted from undertaking advocacy work with Commonwealth funding. In line with the recommendations of the Productivity Commission, a direct consequence of this condition is reduced access to justice to people across Australia and increased pressure on frontline legal services, as well as the courts and health and justice systems more broadly.

Response to Consultation Questions

The Discussion Paper suggests that there are concerns 'some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community' and refers specifically to the work of some environmental DGRs.[4] However, this statement does not appear to be supported by evidence of such concerns or that there is a need for new reporting obligations for advocacy activities as a result.

In our view there is no need for reform in this area. Existing charity law sets appropriate parameters for acceptable advocacy activities and the existing ACNC guidance is sufficient. Any extra conditions for reporting would therefore place unnecessary and unreasonable logistical and administrative pressures on organisations.

DGR activity and the work of organisations such as CLCs is already subject to heavy regulation and reporting and further requirements, without commensurate funding increases, would only draw the resources of charities and DGRs away from their day to day activities, including frontline service delivery. This is particularly important given the significant proportion of registered charities that are very small with limited resources.

In light of the above and given the value of such work as recognised and protected in the Aid/Watch decision, Charities Act, and the NFP Freedom to Advocate Act, we do not support requiring registered charities to provide additional information about their advocacy activities to the ACNC.

Instead, given the important role of the ACNC in providing guidance to charities in relation to their obligations, we support ensuring that the ACNC is appropriately resourced to provide any additional education or guidance on this issue it considers necessary.

Question 9. What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?

As outlined above, we support a clear regulatory framework for the not-for-profit sector that ensures good governance, transparency and accountability.

However, there does not appear to be evidence of any need for a new review process, for example in the form of evidence of misuse or inappropriate access to DGR status.

In addition, if all DGRs are required to be registered with the ACNC as suggested under Question 1, then we suggest that this new rolling review process in addition to the existing ACNC regulatory framework and requirements would be unnecessary and administratively burdensome. For example, the ACNC already has powers to revoke charitable registration under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and the Australian Tax Office has powers to revoke DGR endorsement under the *Taxation Administration Act 1953* (Cth).

[4] Discussion Paper, 4.

Without such evidence and in light of the above, as well as the likely cost associated with such reviews, we do not support the introduction of a formal rolling review program. Further, at this stage we do not support the proposed annual certifications, on a similar basis.

Importantly, if DGRs are required to make annual certifications, it is important that there are adequate protections for not-for-profit employees and volunteers acting in good faith when certifying that their charity continues to be eligible for DGR status.

Question 12. Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered? In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?

Environmental organisations across Australia play a vital role in protecting the environment. These include Environmental Defender's Offices (EDOs), which are free CLCs dedicated to helping people understand and participate effectively in decision-making around planning, heritage and environmental issues. EDOs provide legal advice and support to the community on public interest environmental issues, advocate for better environmental laws, and provide legal education to the community.

While on-ground works and environmental remediation are important components of the work of many environmental organisations, the other work of these organisations including raising environmental awareness, monitoring and seeking to strengthen environmental protection laws, new research on species, ecosystems or environmental innovation and advocacy for the protection and management of the environment is also of importance in environmental protection and fulfilment of their charitable purposes.

We do not support the imposition of limitations on the ability of such organisations to undertake these activities or other activities related to their charitable purposes that they assess as most likely to contribute to the protection of the environment, which is the likely effect of the proposed reforms.

Government prescription of the specific activities of a DGR, or how an organisation should achieve its charitable purpose is not appropriate.

As a result, requiring that an environmental organisation commit a certain proportion of annual expenditure from their public fund to environmental remediation is an inappropriate intrusion on the autonomy and strategic decision-making of these independent not-for-profit organisations.

Importantly, it would also reduce the ability of donors to make decisions about where to allocate funding in the form of tax deductible gifts. In addition, what is essentially a mandatory 25% diversion of funding would force established charities, including EDOs, to divert money away from their recognised areas of expertise and public benefit and is likely to impose an additional administrative burden on environmental organisations.

Accordingly, we oppose the proposal and draw Treasury's attention to the submission made by the National Network of Environmental Defender's Offices for further information in relation to this question.

Question 13. Stakeholders' views are sought on the need for sanctions. Would the proposal to require DGRs to be ACNC registered charities and therefore subject to ACNC's governance standards and supervision ensure that environmental DGRs are operating lawfully?

If all DGRs are required to be registered with the ACNC, as is proposed in Question 1, we consider that the existing regulatory framework and powers of the ACNC are sufficient to oversee the operation of all charities and to sanction them where necessary, including environmental organisations. There does not appear to be any evidence to suggest that environmental organisations operate in a way that legitimates additional or specific regulatory measures or sanctions.

Conclusion

In conclusion, we support a strong and clear regulatory framework for the not-for-profit sector, which may include streamlining of DGR status and increased regulatory responsibility for the ACNC. However, what appears to be missing from the Discussion Paper is a clear rationale or vision for reform of DGR status in Australia. As a result, we suggest that the Australian Government undertake further and broader work and consultation in relation to proposed reform in this area prior to undertaking reform. As outlined above however, in undertaking such reform, it is vital that the advocacy and work undertaken by charities and DGRs to the benefit of people and communities across Australia, is permitted and supported.

We would welcome the opportunity provide further information on the issues outlined in this submission.

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We pleased to note that in addition to this submission, a number of individual CLCs and national networks of CLCs have made, or intend to make, submissions in response to this Discussion Paper.