

Submission of Family Planning NSW

Tax Deductible Gift Recipient Reform Opportunities

July 2017



Senior Advisor
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/ Madam

Family Planning NSW welcomes this opportunity to contribute to the consultation around Tax Deductible Gift Recipient reform opportunities.

About Us

Family Planning NSW is the state's leading provider of reproductive and sexual health services.

We are experts on reproductive and sexual health and provide clinical services and health information to people throughout NSW.

We are an independent, not for profit organisation responsible to a voluntary board of directors and we rely on government funding, donations and self-generated income to provide our services. Our government funding comes from the Federal and NSW governments, as well as Local Health Districts.

Founded in 1926 Family Planning NSW is the oldest family planning service in Australia, providing reproductive and sexual health care services and information to the community for 90 years.

Who we are

We work to ensure everybody has access to quality reproductive and sexual health.

We respect the rights of our clients to make choices about their reproductive and sexual health and we treat each and every person with respect, dignity and understanding.

We are experts on contraception, pregnancy options, sexually transmissible Infections (STIs), sexuality and sexual function, menstruation, menopause, common gynaecological and vaginal problems, cervical screening, breast awareness and men's sexual health.

Our Sydney Centre for Reproductive and Sexual Health Research undertakes nationally and internationally recognised research which underpins our clinical practice. We publish clinical practice handbooks on reproductive and sexual health for medical professionals and are recognised leaders in this field.

What we do

We provide clinical services, health promotion and education and training at clinics in Ashfield, Fairfield, Penrith, Newcastle and Dubbo and use partnerships to deliver services in other key locations.

We also provide health information and education and training for doctors, nurses, teachers and other health, education and welfare professionals.

We see more than 28,000 clients annually at our clinics and our education services conduct courses with over 1,200 professionals each year.

Our NSW Talkline service 1300 658 886 provides a confidential, non-judgemental telephone and email information and referral service for all who need advice across NSW.

We also work to provide reproductive and sexual health services in the Pacific through funding from Australian aid and donations. Find out about our international development work here.

The Discussion Paper

The discussion paper includes some sensible and non-controversial proposals. However, it also includes some proposals that Family Planning NSW finds concerning. This submission addresses these.

Issue 1 – Focus on Activities Rather than Purpose

The discussion paper seeks to focus on activities rather than purpose of charities at consultation questions 4-6, 12-13.

A focus on activities of charities is inconsistent with the existing approach to charity law and leaves open the possibility of reforms that bring significantly higher levels of scrutiny to lawful activities – such as advocacy – and cast doubt over the legitimacy of those activities.

Charity law focusses on ‘purposes’ of an organisation for classification as a charity. “Purposes”, as stated in the organisation’s governing documents, such as its constitution, are the starting point for assessing whether an organisation is charitable.

The DGR framework also has a focus on purpose- not activities.

A purposes approach allows the governing body of the charity to devote charitable resources to the most efficient and effective way of achieving their purposes. This allows flexibility that a pure activities approach might not allow. Further, a focus on activities can easily descend into a complex and unsatisfactory rules based exercise rather than a principles based inquiry that is far more suited to the classificatory task.

Furthermore, an activity not in furtherance of a charitable purpose of itself, such as advocacy, without more, does not mean the charity has abandoned its purposes.

The current legal regime is robust in outlining the purposes for which charities can legitimately be established, as well as, in ensuring charities must demonstrate that they do not have a 'disqualifying purpose.'^[1]

Family Planning NSW therefore **strongly opposes** the activity-level focus in the review as suggested in consultation questions 4-6; 12-13 of the discussion paper.

Issue 2 – Erosion of the Right of Charities to Undertake Advocacy

The discussion paper seeks to treat advocacy as different to other activities undertaken by charities by seeking views regarding a proposal for new reporting obligations for advocacy activities at consultation questions 4-6.

Australian charities can undertake advocacy to further their charitable purposes. The *Charities Act 2013* legislates that advocacy is essential to Australia's constitutional system of parliamentary democracy.

It is an important mechanism which charities can use to address the causes of social and environmental problems, rather than just the symptoms – this often requires policy change.

The *Charities Act 2013* (Cth) prescribes the limits to charitable purpose; for example, charities can't have a purpose of endorsing or supporting parties or candidates for political office or promoting unlawful activity.

The discussion paper asserts that 'some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community' – this assertion is made without any supporting evidence. Unsubstantiated and speculative statements about the expectations of the broader community should not serve as a basis for making public policy.

Well targeted and proportional approaches to maintain transparency and accountability for charities are supported and this can be achieved by ensuring all DGRs are registered as charities under the purview of the ACNC, as the discussion paper proposes.

Existing charity law sets appropriate boundaries for what advocacy activities by charities are acceptable, and the ACNC guidance for charities is helpful and reflective of the law – no further changes are justified or necessary.

No evidence has been put forward as to the need for new reporting obligations for advocacy activities – therefore Family Planning NSW **strongly opposes** new reporting guidelines for advocacy activities (consultation questions 4-6) on the basis that they would impose new and unjustified red tape on charities.

^[1] Disqualifying purpose includes: a purpose to promote/oppose political parties/candidates; a purpose to engage in or promote unlawful activity; a purpose to engage in or promote activities contrary to public policy (which does not include opposing specific policies of the Government). See ACNC Fact Sheet http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy.aspx

Issue 3 – Introduction of Reviews and Audits to investigate continual compliance with DGR requirements over-time

The discussion paper at consultation questions 9-10, indicates a concern that without a formal review process for periodically re-assessing DGR eligibility, organisations that have been DGR-endorsed in perpetuity, which represents most DGRs, are accessing DGR benefits without meeting the eligibility criteria. This concern is framed around assurances to the donors and in light of the ‘generous concessions’ provided.

Family Planning NSW welcomes and accepts that the transparency and accountability of DGRs is important. However, we believe reviews and audits should be conducted only at the point where systemic issues have been identified and/or certain risk thresholds amongst categories of charities and DGRs have been surpassed, rather than the five-year desk review by ACNC and ATO and organisational audits for compliance as suggested in the discussion paper.

Currently the ATO encourages DGRs to self-review annually or when circumstances change, but in practice, the ATO does not have visibility of ongoing compliance with criteria unless they undertake a review or audit of a DGR – which they can do.

At present 92% of DGRs are registered with the ACNC. These DGR entities are already governed by the ACNC regulatory framework, which requires annual reporting. The discussion paper proposes to require all DGRs (except government entities) to be registered as charities, and this will bring in even more DGRs under the ACNC regulatory framework.

A rolling review and audit process is costly and the case has not been made that such a cost is justified given the current nature of the risk. The ACNC and the ATO already have the power to undertake reviews and audits where they believe they are warranted, and it is not apparent that introducing new and costly formal review processes is necessary.

Family Planning NSW therefore **strongly recommends** a proportionate and risk-based response to this issue. Such a response would include requiring DGRs to be registered with the ACNC, as the discussion paper proposes, with the ACNC and the ATO using their existing compliance approach to ensure compliance with the law. This can involve undertaking reviews and audits using their existing powers where systemic issues have been identified and/or certain risk thresholds amongst categories of charities and DGRs have been surpassed.

The expertise of the ACNC and ATO should be respected, and they should be allowed to independently determine what types of reviews and audits are necessary, and in what circumstances. The government should not interfere with their independence.

Issue 4 – Moving Assessment of Overseas Aid Gift Deductible Scheme (OAGDS) from DFAT to the ACNC or ATO

Within Australia, strong regulatory frameworks, laws and statutory bodies exist to provide the enabling environment for Charities to undertake their work. The existing strength the regulatory environment underpins the effectiveness of the work that Charities do. When Charities work overseas undertaking aid and development work, this is often in environments where the equivalent law and regulatory mechanisms do not exist or are underdeveloped. It is important to ensure that consistently high standards are upheld by Australian Charities

working overseas, to guard against inappropriate or harmful interventions into the lives of vulnerable people and communities.

There are real and significant risks to working in every developing country, which create compelling reasons for ensuring all agencies involved in international aid and development work meet agreed activity standards.

OAGDS and self-regulatory regimes like the ACFID Code of Conduct have been developed by highly experienced practitioners working in international settings. These regimes help to reduce the risk of harm to Australian NGOs, the Australian Government and most importantly the people whom Australians seek to assist through humanitarian and international development work.

The OAGDS ensures that Australian NGOs are prepared to work in complex and changing environments. This in turn ensures the protection of children, appropriate controls to guard against the financing of terrorist activities, and that generous Australian donations are not misappropriated for use in proselytization activities. The need to protect against these risks should be a non-negotiable priority of the Australian Government, and should not be outweighed by concerns for administrative efficiency.

There is no evidence of the diminishing relevance or importance of these standards. Given this, there is no case to abolish the OAGDS. The required expertise and remit to monitor and assess the standards of the OAGDS rests with DFAT. The ATO and the ACNC do not have this capacity or mandate currently.

Family Planning NSW **strongly opposes** moving assessment of eligibility under the OAGDS from DFAT to the ACNC or ATO.

Issue 5- Creating certainty and trust in the regime requires addressing other areas of regulation

Integrity and transparency are important features of the sector and critical to its ongoing viability and sustainability. However, the current provisions with relation to section 50-50 of the *Income Tax Assessment Act 1997*, place unnecessary compliance risk on charities, despite the introduction of Tax Ruling 2015/1, through governing rules and sole purpose conditions.

The special conditions were enacted, with effect from 1 July 2013, in Tax Laws Amendment (2013 Measures No 2) Bill 2013 requiring an entity to:

- a) comply with all the substantive requirements in its governing rules; and
- b) apply its income and assets solely for the purpose for which the entity is established (the solely condition).

The key concerns with these conditions are:

- If a purpose is incidental or ancillary to the original purpose for which a charity is formed, it is arguable that charity may fail the solely condition. This is the plain and ordinary meaning of the word 'solely'.

- For NFPs that are not charities, the sole purpose requirement is not the correct test and the 'dominant' purpose requirement has been accepted by the Courts. The enactment of the special conditions has fundamentally altered the basis on which income tax exemption for NFPs is determined.
- For the governing rules condition, it is difficult to say that any legislative requirement is not substantive.
- Both the governing rules condition and the solely condition operate with a guillotine effect, in the sense that (a) it is not possible to substantively comply with the substantive requirements in the governing rules; and (b) the solely condition will be failed wherever there is a misapplication of income or assets, irrespective of intention or amount.
- If some form of audit and review process is introduced, as the discussion paper proposes, the current wording of section 50-50 means that there is a high risk that many charities and DGRs could lose their endorsement given the very narrow drafting of the section.
- For example, a charity which also runs a for-profit business to generate income which is used to further their charitable purpose could fail the 'apply its income and assets solely for the purpose for which the entity is established' test and hence lose access to tax concessions associated with being a registered charity.

The success of integrity measures such as rolling reviews are predicated on the sector being clear around their obligations with regard to both the Australian Charities and Not for Profits Commission Act 2012 and Income Tax Assessments Act 1997.

It is important that any reform of the DGR framework also include reform to section 50-50 of the Income Tax Assessment Act 1997. Family Planning NSW strongly supports reforms with the following outcomes:

- (a) repealing the governing rules condition;
- (b) including a common rule that says, for the avoidance of doubt, that the 'solely' condition is not breached where an entity pursues purposes or conducts activities that are incidental or ancillary to a purpose for which the entity is established.

If you require further information please contact Karen Gannon at kareng@fpnsw.org.au. Family Planning NSW is happy to provide further comment and feedback throughout the consultation process.

Adj. Prof Ann Brassil
CEO
Family Planning NSW
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