IWDA INTERNATIONAL WOMEN'S DEVELOPMENT AGENCY

EMPOWERING WOMEN TO LEAD

PO Box 64 Flinders Lane VIC 8009 ABN 19 242 959 685
T +61 3 8373 2500 E iwda@iwda.org.au
www.iwda.org.au

Senior Adviser
Individual and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Treasury Officials,

Discussion Paper on Tax Deductible Gift Recipient Reform Opportunities

IWDA welcomes the opportunity to respond to the recently released Discussion Paper on Tax Deductible Gift Recipient Reform Opportunities (**Discussion Paper**).

Many of the proposals in the paper are sensible and we are appreciative of the work that has been undertaken to initiate these discussions.

However, we have five concerns which arise from the Discussion Paper:

1. A focus on activities rather than purpose
2. Erosion of the right of charities to undertake advocacy
3. Introduction of reviews and audits to investigate continual compliance with Deductible Gift Recipients (DGR) requirements over-time
4. Moving assessment of Overseas Aid Gift Deductible Scheme (OAGDS) from DFAT to the Australian Charities and Not-for-profits Commission (ACNC) or Australian Tax Office (ATO)
5. Creating certainty and trust in the regime requires addressing other areas of regulation

Focus on Activities Rather than Purpose

The common law of charity focusses on 'purposes' of the organisation for classification as a charity. In the Discussion Paper both charitable purpose and charitable activities are raised. Charity law focuses on purposes and not activities, and the DGR framework generally has a focus on purpose rather than activity. In the absence of strong and compelling reasons to the contrary, the focus of DGR reform should likewise focus on 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] Furthermore, the regulatory environment does account for other, relevant laws,

[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

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which further specifies prohibitory conditions on DGRs in pursuing their purpose.[2] We therefore **strongly oppose** the activity-level focus in the review (as suggested in questions 4-6; 12-13 of the discussion paper) as such an approach:

a. Casts doubt and uncertainty over what activities a DGR entity can lawfully undertake resulting in a chilling effect;
b. Insufficiently establishes that the current regime of 'charitable purpose' is not robust for regulating the sector.

Erosion of the Right of Charities to Undertake Advocacy

Charities undertaking advocacy has been recognised as both a legitimate activity and one essential to our system of parliamentary democracy. It is an important approach which charities can use to address the causes of social and environmental problems, rather than just the symptoms – this often requires policy change. For example, gender equality agencies made this argument consistently during the establishment of the ACNC and during previous policy review processes on charitable status – it is imperative that we be able to focus on systemic reform if we are to move to significant, long term change rather than continuing to provide band aids to individuals caught in the system.

No evidence has been put forward as to the need for new reporting obligations for advocacy activities – therefore they are **strongly opposed** on the basis that they would impose new and unjustified red tape and cost on charities.

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.

We are particularly concerned at the seeming focus on one sector over another. Requiring that a certain proportion of an environmental organisation's activities be directed towards environmental remediation represents an intrusion on the autonomy of environmental organisations and amounts to government trying to 'pick winners' in terms of what approaches charities should use to achieve their charitable purpose. Charities and their supporters are in the best position to determine what approaches are most appropriate in order to achieve their charitable purpose – therefore any new restrictions and limitations are **strongly opposed** on the basis that they would impose new and unjustified red tape on environmental charities which will make it harder for them to achieve their charitable purpose.

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.

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[2] In regards to OAGDS, for example, organisations must demonstrate compliance with the 2006 Anti-Money Laundering/Control of Terrorism Financing Act, and the Criminal Code vis-à-vis extraterritorial powers in relation to child sex tourism.

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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.

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

We welcome and accept 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. We therefore **strongly recommend** 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.

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 of 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 proselytisation 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

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this capacity or mandate currently. **It is our strong recommendation** that the assessment of eligibility under the OAGDS remain with DFAT.

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

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. Such reforms should have the outcome of:

(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

We commend the submission of the Australian Council for International Development to you, and welcome any clarifications you may have as you go forward. We wish you the best as you continue your work on this matter.

Yours sincerely,

Dr Caroline Lambert

Director, Research, Policy and Advocacy

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