

17 February 2023

Personal and Indirect Tax, Charities and Housing Division
Treasury
Langton Cres
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(Submitted by email: charitiesconsultation@treasury.gov.au)

Public consultation on Deductible Gift Recipient (DGR) Registers Reform

Justice Connect welcomes the opportunity to comment on the the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductible Gift Recipient Registers Reform (exposure draft legislation)* and accompanying explanatory materials.

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive.

We have been serving the community for more than 25 years. We are a registered charity.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist, national Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit organisations and social enterprises, many of which are registered charities or entitled to be registered charities. We handle more than 1,800 enquiries annually from a diverse range of organisations which are primarily small-to-medium sized and mostly volunteer run.

In 2022 we handled 164 requests related specifically to deductible gift recipient (DGR) endorsement and, in addition to our resources, we provided more than 1,400 hours of free legal assistance to organisations on this complex issue.

Our [DGR resources](#) on our website received over 4,900 unique views during 2022, with our DGR Guide being downloaded more than 1,900 times. In 2021 we also launched our ‘DGR Tool’, an online app that helps users to make sense of the complex laws regulating DGR status which has seen 5,634 users. We also regularly deliver training and webinars on understanding DGR status.

Our submission

Overall comments



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Our overall recommendation is that DGR endorsement should be extended to all charities registered with the ACNC, provided that charities do not use donated funds for purposes solely for the advancement of religion, childcare, or primary or secondary education.

In the meantime, **we support the current proposal to simplify administration of the four unique DGR categories** set out in the exposure draft legislation.¹ The proposal will ensure consistency, reduce red tape and remove inefficiencies in determining DGR endorsement. We are particularly pleased that the estimated application process timeframe will be significantly reduced “from up to two years to around one month”.²

We make three recommendations to strengthen and simplify the current proposal:

1. The Australian Charities and Not-for-profits Commission (**ACNC**), rather than the Australian Taxation Office (**ATO**), should be responsible for assessing applications for endorsement in these four DGR categories.
2. Charities endorsed in one of the four DGR categories should not be required to maintain a gift fund.
3. Organisations already endorsed in one of the four categories should be given education to understand the changes and legal support to amend their governing documents.

We expand on each recommendation below.

Recommendation 1: The ACNC should be responsible for assessing applications for endorsement in these four DGR categories

We recommend that the role of assessing applications for endorsement in one of the four categories be transferred to the ACNC, rather than the ATO.

It is our view that the ACNC is the agency best placed to assess charitable purposes. Indeed, the ACNC already determines eligibility for two common DGR categories: Public Benevolent Institutions and Health Promotion Charities. This approach of having one regulator making assessments will also help streamline the administrative process, as in our experience many organisations want to apply for charity and DGR status at the same time.³ Having one regulator responsible for making these assessments will reduce duplication and ensure consistent interpretations and decisions.

Recommendation 2: Charities endorsed in one of the four DGR categories should not be required to maintain a gift fund

¹ We have also supported this proposal in past submissions, see: Not-for-profit Law, [Submission on The Treasury’s Tax Deductible Gift Recipient Reform Opportunities Discussion Paper](#) (3 August 2017) 5-6.

² Exposure Draft Explanatory Materials, *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductible Gift Recipient Registers Reform* (Cth), [1.6]

³ E.g. if an organisation applies to register as a charity with a subtype of ‘advancing the natural environment and a DGR in the new category of ‘environmental organisation’, the ACNC could consider both questions at once.

Under the proposed changes, charities in the four DGR categories will be endorsed ‘as a whole’ rather than ‘for the operation of a fund, authority or institution’. However, they will be required to maintain a gift fund. A charity already listed on one of the four registers will be permitted to treat its public fund as its gift fund until it establishes a gift fund.

In our view, it is unnecessary for an organisation endorsed ‘as a whole’ to maintain a gift fund. Any gifts or donations made to the organisation must be used for the organisation’s purpose and therefore do not need to be quarantined. Other organisations endorsed ‘as a whole,’ such as Public Benevolent Institutions and Health Promotion Charities, are not required to maintain a gift fund.

Removing the requirement to maintain a gift fund is a simple and sensible approach that will be readily understood by charities. It will also make it easier for charities (in particular small-to-medium sized) to update their governing documents, as discussed below.

Recommendation 3: Organisations already endorsed in one of the four categories should be given education to understand the changes and legal support to amend their governing documents

We strongly recommend that work be done to ensure that organisations already endorsed in one of the four categories are aware of the impact of the proposed changes and are given adequate legal support to amend their governing documents.

The proposed changes will affect organisations already endorsed in one of the four categories in two key ways:

- The winding up provisions contained in the governing documents of already endorsed environmental organisations and harm prevention charities will be “treat[ed]... as providing that if the public fund is wound up, any surplus assets for the public fund are to be transferred” to another DGR endorsed organisation, and
- Public funds maintained by organisations already endorsed as an environmental organisation, harm prevention charity, or cultural organisation will be “treat[ed] as being the gift fund mentioned in section 30-130 of the [*Income Tax Assessment Act 1997 (Cth)*]”.

Education

We recommend that charities be supported to understand changes to their endorsement. In particular, if our second recommendation is not accepted and these four DGRs are required to maintain a gift fund, charities will need help to understand the new gift fund requirements. There are key differences between public funds and gift funds, and different requirements that organisations need to understand. For example, public funds must invite and receive public contributions, which is not a requirement of a gift fund. A gift fund is also not required to be governed by a committee of persons with a degree of responsibility to the community.

Legal support



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While we understand the intention of the current proposal is to reduce the impact of the changes on affected charities, in our significant experience we know they will lead to an unworkable situation in which a charity's governing document will no longer be a single source of truth for its members. As a constitution operates as a binding contract between the members and the organisation, the risk is that outdated clauses may still be enforceable even though the legislation has changed.

In relation to the changes to winding up clauses, we are of the view that an organisation should only have to consult its governing document – rather than needing to understand complex overlaying tax legislation. Requiring an organisation to consult both its governing document and legislation to determine where surplus assets must be distributed is confusing and undermines the integrity of a governing document.

Charities affected by the changes to public funds are likely to have a number of clauses in their governing documents establishing their public funds and the special committees of responsible people that are required to oversee them. Until their governing documents are amended, the requirement to maintain a public fund will remain.

From our experience, the process of amending an organisation's governing document can be confusing, complex and time consuming, especially for small-to-medium sized organisations that do not have ready access to legal assistance. Organisations must be supported to access legal assistance to amend governing documents.

More work must be done to simplify DGR laws

Finally, while we welcome these proposed reforms and the reduction in red tape they will deliver to some charities, they do not fix systemic problems with the DGR system.

From our experience, access to DGR endorsement continues to be one of the most misunderstood and resource intensive areas of the tax system for not-for-profits. Problems with the current regulatory framework have been explored in successive government reviews⁴ and as lawyers helping small-to-medium not-for-profits we see the following key issues in practice every day.

1. DGR categories are ad hoc and incoherent

Over the past one hundred years, successive governments have created new DGR categories in an ad hoc manner.⁵ There are currently 52 categories. Organisations also have the option of applying to be specifically listed by name in the *Income Tax Assessment Act 1997* (Cth) as a DGR but the process for granting such requests is opaque and once listed, there is no clear reporting mechanism or process for listings to be reviewed.⁶

⁴ E.g. Australian Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra; Not-For-Profit Sector Tax Concession Working Group, *Fairer, simpler and more effective tax concessions for the not-for-profit sector*, May 2013.

⁵ Not-For-Profit Sector Tax Concession Working Group, above footnote 3

⁶ For a more detailed analysis, see Fiona Martin, 'Tax Deductibility of Philanthropic Donations: Reform of the Specific Listing Provisions in Australia', *Australian Tax Forum*, Vol. 33(3), 2018

As a result, the current framework is piecemeal and is not underpinned by a coherent or contemporary conception of the public good. This leads to inequities where a war memorial repair fund or a fund for the provision of religious instruction in government schools can access DGR endorsement but a neighbourhood house cannot.⁷

2. *The rules for endorsement are too complex*

Each of the 52 DGR categories has its own eligibility criteria which is often described in technical, bureaucratic or old-fashioned language. For example, the requirements of the Public Benevolent Institution DGR category can only be fully understood by reference to 90 years' worth of case law and a lengthy Commissioners Interpretation Statement. For some categories, charities must demonstrate that their whole organisation fits into an established DGR category. For others, charities can apply to have only part of their organisation endorsed. Organisations often face challenges when they have a diversity of purposes and activities that do not fit neatly into one DGR category.⁸

According to the latest ACNC Charities Report, over 65% of Australia's registered charities are classified as 'extra small', 'small' or 'medium'.⁹ Many of these charities are not equipped to understand and navigate DGR endorsement without legal assistance, and as a result, are locked out of the benefits of receiving tax deductible donations and philanthropic funding. From our experience, the system is particularly inaccessible for people and groups from culturally and linguistically diverse backgrounds.

This complexity does not just burden charities at the application stage: it also creates an ongoing compliance cost as charities with DGR endorsement must ensure they do not lose their endorsement by accidentally straying from their given category.

3. *The categories do not support a contemporary not-for-profit sector*

In our view, current DGR categories are out of step with community expectations and hold charities back from taking contemporary approaches to address complex social and environmental problems.

There are many not-for-profits performing activities which are highly valued by the community, but which are not eligible for DGR endorsement. For example, not-for-profits that focus on a variety of interrelated social or environmental issues are often unable to fit into a single DGR category. Additionally, organisations with a focus

⁷ In our experience, neighbourhood houses often struggle to obtain DGR status as they have a diversity of purposes and activities. See footnote 8 for more detail.

⁸ E.g. a neighbourhood house might provide services for people in need (such as people experiencing family violence or people with disability) but also run community programs aimed at promoting social cohesion in the community more generally. Such a charity would not be eligible for endorsement as a Public Benevolent Institution, as it does not have an exclusively benevolent purpose. It would need to set up a complex business structure to quarantine its benevolent activities into a separate entity or find another charity with DGR endorsement to auspice the benevolent project: activities which divert precious resources and energies away from the charity's core work.

⁹ Australian Charities and Not-for-Profits Commission, [Australian Charities Report 8th Edition](#), 7 June 2022.

on preventing harm to individuals and communities (for example, preventing poverty) are often unable to secure DGR endorsement.

The solution already exists: extend DGR status to more charities

Justice Connect has previously made recommendations that **DGR endorsement should be simplified and extended to all charities registered with the ACNC, provided that charities do not use donated funds for purposes solely for the advancement of religion, childcare, or primary or secondary education.** This recommendation aligns with the Productivity Commission's Contribution of the Not-for-profit Sector 2010 report and the Not-for-profit Sector Tax Concession Working Group's 2013 report.¹⁰

While we understand that the exposure draft legislation does not contemplate such extensive changes, we encourage Treasury to consider this proposal as part of any future reform.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signatures redacted).

Yours sincerely,



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¹⁰ Above, footnote 4.

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