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Dear Ms Bultitude

Tax Deductible Gift Recipient Reforms — response to Discussion Paper

Justice Connect's Not-for-profit Law service appreciates the opportunity to provide comment on the proposals and stakeholder questions in the Treasury's Tax Deductible Gift Recipient Reform Opportunities Discussion Paper (**Discussion Paper**).

1. Not-for-profit Law

Not-for-profit Law is a national program of the charity Justice Connect and is the only service of its kind in Australasia. We are committed to improving access to legal help for not-for-profit (**NFP**) community organisations by providing free and low cost legal assistance. We provide help directly (in the form of legal information, advice and training) and broker referrals for pro bono assistance from our member law firms and barristers. Annually, Not-for-profit Law receives more than 1,700 enquiries and nearly 300,000 unique visits to our free legal Information Hub (www.nfplaw.org.au).

Not-for-profit Law also advocates for an improved regulatory framework for the NFP sector, focused on effective and appropriate regulation that will support NFPs to be more efficient and better run while ensuring that reform takes into account the resulting impact on the sector.

Not-for-profit Law's eligibility criteria for legal advice and pro bono referrals prioritise small and medium NFPs that cannot afford to pay for a lawyer. Through working closely with small and

medium NFPs, we have a large evidence base of the common legal issues faced by these groups. With direct insight into the challenges faced by these groups, we are uniquely placed to draw upon this evidence in our law reform and policy work.

2. Overall comments

Burden on small charities

Small charities with less than $50,000 in revenue make up a third of registered charities in Australia, and two-thirds of these are entirely volunteer-run.[1] We are concerned that several proposals in the Discussion Paper would have a direct and disproportionately negative impact on these charities, adding unnecessary, additional reporting obligations for no clear public benefit.

Need for broader deductible gift recipient reform

Since the establishment of our service in 2008, we have advocated for the simplification and transparency of NFP tax concessions, including in relation to deductible gift recipient (**DGR**) endorsement.

The availability and application of DGR endorsement is one of the most frequently asked questions of our legal advice service, with our DGR webpage receiving upwards of 9,000 visits over the last two years. In our experience, many small and medium NFPs are not equipped to understand and navigate the laws relating to DGR requirements without legal assistance, due to both the complexity of the existing framework and their internal resource constraints. As a result, many small and medium NFPs are reliant on pro bono professional advice to obtain DGR endorsement. NFPs that cannot afford advice nor obtain pro bono assistance are frequently unable to access the benefits of receiving tax deductible donations, and cannot access philanthropic funding via distributions made by public ancillary funds and private ancillary funds. This in turn affects their viability and their sustainability.

Not-for-profit Law has previously made recommendations, aligned 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 that DGR endorsement should be simplified and extended to all charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**), where those charities use donated funds for purposes not solely for the advancement of religion, childcare, or primary or secondary education.[2] While we appreciate that the Discussion Paper has not proposed such extensive change, we reiterate that any attempt to reform the DGR system without addressing the fundamentally ad hoc, disparate nature of the existing system will do little to reduce the overall complexity and workability of the DGR framework.

[1] Powell, A., Cortis, N., Young, A., Reeve, R., Simnett, R., and Ramia, I. (2016) Australia's Smallest Charities 2015. Centre for Social Impact and Social Policy Research Centre, UNSW Australia, 1.

[2] Australian Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra; the Australian Government the Treasury, Not-For-Profit Sector Tax Concession Working Group, *Fairer, simpler and more effective tax concessions for the not -for -profit sector*, May 2013, 5.

Streamlining processes and reporting

In principle, Not-for-profit Law supports the proposal that DGRs (other than government entities) be required to register with and report to the ACNC as charities in order to be eligible for DGR endorsement, provided that they otherwise meet the requirements for charitable registration. However, we note that this broad proposal requires further investigation to ensure that it does not result in additional requirements for DGRs to either re-structure or establish new entities, where a DGR fund is currently operated by a non-charitable entity.

As part of the implementation of this proposal, we also recommend:

- further consideration be given to the practicalities for entities that operate multiple DGRs
- specifically listed DGRs be required to report to the ACNC as if they meet the requirements for registration as charities (see below).

Not-for-profit Law welcomes the proposal to remove the burdensome requirements for charities on the Register of Harm Prevention Charities, Register of Cultural Organisations and Register of Environmental Organisations to establish and maintain public funds, where the purposes of the public fund are the same as the entity. We recommend that further consideration is given to the potential impact of removing public fund requirements where the entity running the public fund and the public fund itself do not have the same purposes, to ensure that such reform does not require the establishment of a separate entity.

Some proposals unworkable and unnecessary

Not-for-profit law is strongly opposed to the proposals for additional reporting about advocacy activities and a requirement for environmental organisations to spend a percentage of their annual revenue on remediation work. We are also of the view that there is no evidence to support rolling reviews of DGRs or a sunset period for specifically listed DGRs.

3. Responses to stakeholder questions

Below are our responses to the specific questions posed in the Discussion Paper. We have not responded to all questions, rather concentrating on those most relevant to our clients and our experience.

Q4. Should the ACNC require additional information from all charities about their advocacy activities?

Not-for-profit Law does not support a requirement that all registered charities provide additional information about their advocacy activities to the ACNC.

Requiring charities to provide additional information about advocacy activities will send a message, whether intentionally or otherwise, that advocacy by charities is discouraged. Any such message may act as a deterrent and undo the advancements that have clarified the legitimate position of advocacy in modern Australian charity law. The law is unequivocal in recognising that charities can promote or oppose a change to any matter of law, policy or practice in furtherance

or aid of their charitable purposes, provided that they do not engage in or promote activities that are unlawful or contrary to public policy, or promote or oppose a political party or candidate for political office.[3] Advocacy in furtherance of charitable purposes is a valid and important function of charities.

The *Charities Act 2013* (Cth) (**Charities Act**) contains the charitable purpose of 'advancing public debate'.[4] However, the Discussion Paper fails to address the distinction between the 'activities' of a charity and the 'purpose' of a charity. As a general principle, it is the purpose of an organisation that determines whether or not it is a charity. The activities of a charity are a signpost as to whether an organisation is fulfilling its charitable purpose, that is, the activities must always be sufficiently connected with a charitable purpose.

Additional burden not justified — existing reporting requirements are adequate and proportionate

Throughout the Discussion Paper, several references are made to *reducing* the reporting burden for DGRs and charities. Not-for-profit Law supports appropriate reporting obligations for charities, including DGRs, and measures to remove any unnecessary or duplicative reporting. However, the proposal to require charities to provide additional information about their advocacy activities is not appropriate; it will place an unnecessary extra reporting burden on all charities when there are already mechanisms for obtaining additional information for particular charities if there are concerns. Given that more than a third (37.1%) of registered charities are very small, with less than $50,000 in revenue, and four in five of these have no paid staff,[5] it is important that their limited resources can be directed towards the fulfilment of their charitable purposes rather than spent on additional reporting.

Section B of the ACNC Annual Information Statement (**AIS**) requires a registered charity to describe the activities it has undertaken in furtherance of its charitable purpose or purposes. Not-for-profit Law considers that supporting organisations to understand and act in accordance with these existing legal obligations is more effective than extending reporting requirements. For example, the ACNC's 2016 guidance on political campaigning and advocacy, '*Charities, elections and advocacy - Political campaigning and advocacy by registered charities*', provided clear guidance on advocacy in the context of elections. It assisted charities to have clarity on the acceptable parameters of political campaigning and advocacy, removing the need for most charities to invest time and funds to seek independent legal advice on this issue.

The existing compliance framework is adequate

Not-for-profit Law is unconvinced by the statement at paragraph 15 of the Discussion Paper: "*there are also concerns that some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community.*" No evidence is given in support of this statement and we do not accept it as a sound basis for increasing the reporting obligations

[3] *Charities Act 2013* (Cth) s 11.

[4] *Charities Act 2013* (Cth) s 12(1)(l).

[5] Powell, A., Cortis, N., Young, A., Reeve, R., Simnett, R., and Ramia, I. (2016) Australia's Smallest Charities 2015. Centre for Social Impact and Social Policy Research Centre, UNSW Australia, 1.

of all registered charities. We acknowledge that 'activities' are what the community sees, but we note that as a matter of law it is the purpose(s) for which the activities are conducted that is of prime importance.

In terms of community concerns, it is important to note that the public can approach the ACNC about a particular charity's conduct via 'Form 6A: Raise a concern about a charity', available on the ACNC website. The ACNC has the power to revoke a charity's registration[6] (which in turn, will generally result in the charity losing its DGR endorsement) and/or apply administrative penalties.[7] Where a charity is a federally regulated entity, the ACNC also has the power to warn charities that they are not acting for their charitable purpose, direct charities to do or not do something, ask a court to make a charity do or not do something[8] and apply administrative penalties.[9] In Not-for-profit Law's view, the existing framework supports transparency and gives adequate powers to the ACNC to investigate where the ACNC is aware of a charity which may be at risk of having a disqualifying purpose, or has engaged in conduct that seriously or deliberately breaches the Charities Act or the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**).

Q5. Is the Annual Information Statement the appropriate vehicle for collecting this information?

Not-for-profit Law does not consider it is appropriate to require registered charities to provide additional information about their advocacy activities through the AIS or otherwise (see above, our response to Question 4).

Q6. What is the best way to collect the information without imposing a significant additional reporting burden?

As noted above in our response to Question 4, Not-for-profit Law supports investment in the ACNC's ability to create resources to educate and support charities to understand their obligations. It is preferable that the charitable sector is informed of the ACNC's view as to the parameters of advocacy activities under the Charities Act and the ACNC Act, as opposed to burdening all charities with additional reporting obligations.

Q7. What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

Not-for-profit Law supports measures to reduce the complexity of organisations seeking DGR endorsement on the Register of Environmental Organisations, the Register of Cultural Organisations, the Register for Harm Prevention Charities (collectively, the **Registers**) and through

[6] *Australian Charities and Not-for-profits Commission Act 2012* (Cth), Division 35.
[7] *Australian Charities and Not-for-profits Commission Act 2012* (Cth), Division 175.
[8] *Australian Charities and Not-for-profits Commission Act 2012* (Cth), Part 4-2.
[9] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Division 175.

the Overseas Aid Gift Deduction Scheme (**OAGDS**).[10] In addition to the cumbersome requirements — for example, for governing documents, membership requirements for environmental organisations, lengthy application timeframes and additional reporting requirements — there is also concern about the perceived unfairness of the involvement of Ministerial decision-making in DGR endorsement.

Not-for-profit Law recommends the use of Registers be discontinued and the role of assessing DGR applications for environmental, cultural and harm prevention charities be transferred to the ACNC, rather than the ATO (noting that this would only be possible if charitable registration is made a pre-requisite to DGR for environmental and cultural organisations). In our view, this would provide a fairer, more transparent and standardised approach. The ACNC is the agency best placed to assess and categorise charitable purposes.

We also recommend that as part of the implementation of this reform, the specific reporting requirements for these categories of DGR are discontinued, with the AIS sufficient to capture necessary information.

We appreciate that the proposal for all entities on the Registers to register with and report to the ACNC may increase the reporting burden for DGR-endorsed cultural or environmental organisations that are established under state or territory incorporation laws because they may have obligations to complete an annual return to their state or territory regulator, in addition to the AIS. Not-for-profit Law continues to advocate for a 'report once' approach whereby state and territory regulators do not require a separate annual report if a charity submits an AIS to the ACNC, following amendments to this effect in Tasmania, the ACT and South Australia.

In our view the ACNC is delivering high quality education and support to the charity sector and is well placed to take on functions currently undertaken by the Registers. We have had clients report back that without further legal advice, they have been better able to navigate the DGR application process for public benevolent institution and health promotion charity endorsement following the ACNC assuming responsibility for these assessments. ACNC guidance material and their consultative approach to developing ACNC Commissioner's Interpretation Statements have been welcomed by charities and practitioners, and have equipped us to better help our clients.

Q9. 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?

Not-for-profit Law submits that a formal rolling review of DGRs is unnecessary. The ACNC has powers to revoke charitable registration under Division 35 of the ACNC Act and the ATO has powers to revoke DGR endorsement under section 426-55 of Schedule 1 to the *Taxation Administration Act 1953.* In our view, the resources required to undertake a formal rolling review

[10] Not-for-profit Law encourages Treasury to consult with organisations with DGR endorsed overseas aid funds through the OAGDS directly, as our service does not have an evidence base of NFP organisations' experience of the OAGDS.

of all existing DGRs would be better applied by the ACNC and the ATO responding to particular cases of concern that are brought to their attention and pro-active monitoring as part of a risk-based approach.

Not-for-profit Law is not in favour of annual certifications by all DGRs for two reasons.

First, we are not aware of any evidence that this improves compliance or even that there is a lack of compliance — it simply creates a 'tick box' approach. We note that the ACNC already has power to apply penalties for false statements made in an AIS.

Second, requiring DGRs to make annual certifications would be unduly complex, particularly as there is no clear guidance and support for DGRs on assessing their eligibility for DGR. Currently, the complexity of the issues in the ATO Worksheets on how to conduct an annual DGR self-review[11] means that many small and medium NFPs are not be equipped to make these assessments without legal or accounting advice. We support annual self-assessment as best practice and recommend investment in the development of guidance material and resources to equip NFPs to make these assessments.

Q10. What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this?

Not-for-profit Law does not consider it is appropriate to prioritise a particular category of DGR for review. As stated under Question 9, a better approach is to focus on particular cases of concern that are brought to the ACNC's or ATO's attention, and for those regulators to decide if there are any risk profiles (which could be based on size or other factors, not solely related to DGR type) that need pro-active monitoring.

Q11. What are stakeholders' views on the idea of having a general sunset rule of five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

Not-for-profit Law would support a requirement that specifically listed, non-government DGRs also be required to register with and report to the ACNC as if they are charities (noting this may be possible if the not-for-profit ambit of the ACNC Act is enlivened, or the ACNC Act is amended for this purpose). However, we oppose any attempts to remove specifically listed DGRs from the *Income Tax Assessment Act 1997* (**ITAA**) if they are not eligible for charitable registration.

Regardless of whether ACNC registration occurs or not, we strongly oppose the implementation of a general sunset clause for specifically listed DGRs.

[11] See https://www.ato.gov.au/Calculators-and-tools/Worksheet-1--review-of-a-DGR-endorsed-as-a-whole/ and https://www.ato.gov.au/Calculators-and-tools/Worksheet-2--review-of-a-DGR-endorsed-for-the-operation-of-a-fund,-authority-or-institution-it-owns-or-includes/.

Obtaining specific listing as a DGR in the ITAA can take several years and it is undesirable that an NFP's resources would be used to re-engage in what is often a political, and always time-consuming and resource intensive, process. Unless the existing DGR categories are substantially amended, it is unlikely that the circumstances giving rise to specific listing would change within a five year period.

While it is appropriate that any specifically-listed DGRs which are no longer operational are removed from the ITAA (and this could occur if they were registered with the ACNC), we do not endorse any sunset clause for DGRs that are currently operating. It would be highly undesirable that a specifically listed NFP is placed in a position of funding uncertainty simply because they are approaching the expiration of a five year period, especially given obtaining specific listing is so often a political exercise.

Q12. 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?

Not-for-profit Law does not support a requirement for environmental organisations to commit a certain per cent of their annual public fund expenditure to environmental remediation. This requirement goes against the purpose-based approach in charity and DGR law, could have a chilling effect on contributions to public policy debate and would place an unnecessary reporting and compliance burden on environmental DGRs. For environmental organisations which are registered charities, such a requirement may also be inconsistent with the ACNC Act's object of an 'independent' Australian not-for-profit sector,[12] by constraining charities' autonomy and independence to determine how their charitable purposes should be fulfilled. Further, requiring the ACNC to enforce such a requirement, through effectively auditing charities' expenditure on remediation activities, may put the ACNC in conflict with its own objects.

For environmental organisations, the ITAA applies a 'principal purpose' test.[13] If organisations are required to ensure a certain per cent of their funds are committed to "environmental remediation", the judgment and expertise of an organisation to determine how they best achieve their purpose will be undermined. Remediation might be an ineffective way of achieving an organisation's purpose – for example an organisation looking at the health of coral on the Great Barrier Reef may have greater impact and better fulfil its purposes by focusing on education activities and research (for example, into eradicating the Crown of Thorns starfish).

Even for environmental organisations focused on remediation, an arbitrary quota could lead to distortions in best practice as groups contort themselves to fit within the guidelines rather than having a greater impact with varied levels of this work. For example, an organisation might best achieve its purposes by spending year one of their operations planning and researching, year two

[12] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) 15-5(1)(b).

[13] *Income Tax Assessment Act 1997* (Cth) s 30.265.

testing their plan, and year three rolling out their remediation work. Or via varied percentages each year dependent on weather conditions rather than arbitrary limits. What if plans are made that would satisfy the limits but then funding to implement remediation falls short, crucial staff leave, or insufficient volunteers are available?

Consistent with charity law, regulation of environmental DGRs should look at whether the organisation meets the purposes test in the ITAA, rather than the activities they conduct to pursue these purposes.

Not-for-profit Law is also concerned that such change would raise issues around definition, apportionment and recording for environmental organisations. Evidence from Canada, where charities have limitations on the per cent of political activities they can conduct, shows that there is significant uncertainty and confusion in the sector about what activities are covered.[14] Even with guidance from the relevant regulator, organisations could struggle to determine which activities would be considered "environmental remediation", and how to apportion funds towards such activities. This would place an unnecessary regulatory burden on organisations, and draw time and resources away pursuing their purposes, all for no public benefit.

Further, a per cent commitment to certain activities could result in environmental DGRs being unsure *what* activities they can lawfully pursue in furtherance of their purposes. Again, charities in Canada reported that "the lack of clarity [in what activities they could conduct], whether in rules or their application, means some charities view political activities as too risky to carry out and engage in self-censorship".[15] We fear similar changes for environmental DGRs in Australia could undermine the sector's role in healthy democratic debate and a strong civil society.

Not-for-profit Law is concerned that concurrent to the opportunity to respond to the Discussion Paper, the Register of Environmental Organisations 2017 statistical return form asks organisations for a percentage breakdown on the amount expended from their public fund towards certain activities, including 'On-Ground Environmental Remediation'.[16] This information was not requested in previous years and we consider it inappropriate to request information for a reporting period when there was no guidance issued or previous indication this would be a requirement. We oppose any reform requesting such data in the absence of clear explanatory information and guidance. The timing of this request seems to presuppose implementation of the reform mooted in this question, disrespectful of genuine consultation.

[14] Consultation Panel on the Political Activities of Charities, *Report of the Consultation Panel on the Political Activities of Charities* (March 31 2017), Canada Revenue Agency http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html.

[15] Ibid.

[16] See http://www.environment.gov.au/about-us/business/tax/register-environmental-organisations/forms.

Q13. 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?

As noted above, Not-for-profit Law supports the requirement for DGRs to be registered charities with the ACNC. Registered charities cannot have disqualifying purposes,[17] which include the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy. Further, ACNC governance standard 3 requires organisations to comply with Australian laws.[18] As noted above, the ACNC has powers to investigate where concerns are raised about the conduct of particular charities.

Not-for-profit Law would welcome the opportunity to participate in further consultation or discussion regarding the proposed reforms in the Discussion Paper.

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[17] *Charities Act 2013* (Cth) s 11.
[18] *Australian Charities and Not-for-profit Regulation 2013* (Cth) reg 45.15.