Save the Children Australia

ABN 99 008 610 035
33 Lincoln Square South
Carlton VIC 3053

Save the Children Australia Response to 15 June 2017 Australian Government Discussion Paper entitled: *'Tax Deductible Gift Recipient Reform Opportunities'*

Introduction

This paper sets out the submission of Save the Children Australia (**SCA**) in response to the Discussion Paper entitled '*Tax Deductible Gift Recipient Reform Opportunities*' (**DGR Discussion Paper**). This submission primarily addresses matters that are important and relevant to SCA.

Background

Save the Children Australia

SCA is a leading independent international organisation for children and child rights. Our vision is a world in which every child attains the right to survival, protection, development and participation. Our purpose is to inspire breakthroughs in the way the world treats children and to achieve immediate and lasting change in their lives. We work towards this vision in Australia and across the globe.

What is SCA's charity and tax status?

SCA is a public benevolent institution (**PBI**) and is registered as a charity with the Australian Charities and Not-for-Profits Commission (**ACNC**).

SCA operates the SCF Overseas Relief Fund (the **Overseas Relief Fund**) through which it conducts its overseas relief activities. The Overseas Relief Fund is endorsed as a deductible gift recipient (**DGR**).

SCA is also trustee of the Save the Children Australia Trust (the **Trust**). The Trust is registered as a PBI and endorsed as a DGR. SCA's domestic activities are conducted through the Trust.

We have previously been endorsed as a DGR for the operation of a developed country relief fund for the Japan Earthquake and Tsunami in 2011.

As a PBI, SCA has recently applied for endorsement as a whole as a DGR, and that application is pending at the date of this submission.

Summary of SCA's position

We welcome the discussion on DGR reform initiated by the DGR Discussion Paper and support the stated goals of:

- strengthening DGR governance arrangements;
- reducing administrative complexity; and
- ensuring that an organisation's eligibility for DGR status is up to date.

As one of Australia's largest overseas aid agencies and with a significant domestic program, our access to DGR status enables us to more effectively perform vital functions both domestically and overseas, to have greater impact and to more effectively achieve our mission. Our ability to provide tax deductible receipts in crucial to encouraging and sustaining public donations to support our work.

For the reasons set out below, we consider that reforms to the DGR regime are both necessary and desirable to remove administrative burden, cost and complexity. Our key recommendations are as follows:

1) We support the transfer of the four registers from the Departments to the ACNC (rather than to the Australian Taxation Office (**ATO**)). In relation to the OAGDS, rather than the ATO, we consider that the ACNC is much better placed to regulate all DGR charities operating offshore, whether that be under the OAGDS and/or as PBIs.
2) In reducing administrative complexity in the DGR regime, we also call for the following broader reforms:

- A simplification and aggregation of DGR categories relating to development and welfare work. This may be achieved by reforming the concept of PBIs, to enable the PBI DGR category to cover both the PBI and OAGDS categories. This will enable organisations like SCA to have one DGR category to cover all of our work in Australia and overseas, and thereby reduce the administrative burden and cost resulting from having multiple DGR categories. It will also address the inconsistent treatment of and standards applicable to PBIS vis a vis DGRs under OAGDS.
- The introduction of appropriately robust external conduct standards (which remains an unfinished piece of regulation under the ACNC Act) as an integrity measure to regulate the overseas activities of DGRs, and clarification of the government's position in relation to reform to the 'in Australia' requirements affecting DGRs.
- The repeal or modification of the Division 50 special conditions which were introduced in 2013 for charities registered with the ACNC, to remove the unnecessary duplication between the ATO and ACNC in governing charities.
- A minor amendment to developed country relief fund, to enable such funds to be utilised for various declared disasters in developed countries.

3) We support the removal or modification of the public fund requirements, to remove unnecessary and outdated requirements relating to responsible persons and maintaining separate bank accounts for each public fund.

4) We do not support any additional reporting requirements or restrictions relating to the advocacy activity of charities. Notwithstanding, we do support the proposal to require all DGRs (where possible) to become registered charities. We also support the current regulatory approach of the ACNC to continue to assist charities to understand their obligations in relation to advocacy under the *Charities Act 2013* (Cth) (**Charities Act**), and the investigation by ACNC of complaints or identified risks, and imposing of appropriate sanctions.

In the below section, we specifically address the consultation questions posed in DGR Discussion Paper, focusing on the questions relevant to our work, as well as the broader reform questions that are important for the charitable sector.

<u>Responding to consultation questions relevant to SCA</u>

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

No. We consider that the ACNC should not require charities to report on their advocacy activities. We are not convinced of the need for such reporting.

Moreover, such as reporting requirement would presumably also require charities to explain how the activity furthers their purposes (reflecting the legal position under the Charities Act). This type of additional reporting will result in a significant increase in the administrative burden on charities, as well as giving rise to difficult definitional and practical questions in recording and working out whether a particular activity constitutes 'advocacy'.

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

We do not think additional information is required for the reasons set out above in response to question 4.

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

In our view, the best way to regulate advocacy by charities, without imposing a significant additional reporting burden on all charities, is to continue with the current regulatory approach of the ACNC. This approach involves providing education and training to charities, releasing guidance and factsheets (particularly in an election period), investigating charities where complaints have been received from the public or issues raised by the media or where risks have been identified, and imposing sanctions, where appropriate, following an investigation (ranging from education, to enforceable undertakings, to removal of responsible persons, to de-registration).

4. ***Question 7: 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?***

(i) We support the proposal to transfer the registers from Departments to the ACNC

We support the proposal to transfer the administration of the four DGR registers from the relevant Departments. However, in our view:

- Responsibility for these registers should be transfer to ACNC, and not the ATO; and
- The ACNC should be provided with resources and support to develop its capacity and capability to undertake this task, including input and collaboration, where appropriate, from the relevant departments with subject matter expertise (such as DFAT for charities undertaking overseas aid work).

In transferring the administration of the four DGR registers from the relevant Departments to the ACNC, we recommend that the process be streamlined to remove the requirements for treasury and/or ministerial approval, and for funds to be declared by way of a notice in the Gazette (as required under s30-85 for developing country relief funds under the OAGDS). This will remove the in appropriate political element in the current assessment process and the undue delays experienced by charities required to obtain these additional approvals, particularly as compared to other types of DGR charities, such as PBIs and Health Promotion Charities (**HPCs**), that may apply directly to the ACNC.

In relation to the OAGDS regime, we propose that the ACNC take on this responsibility rather than the ATO for the following reasons:

- The ATO does not have the necessary capability and expertise in overseas aid and development;
- The ACNC is better placed to independently and impartially assess compliance with OAGDS, whereas the ATO is not independent and impartial due to its role as a revenue collecting body;
- The ATO does not have the same range of regulatory tools available to the ACNC as the charity regulator to regulate charities undertaking this type of work overseas (ranging from education to enforcement activities);
- It makes sense for the ACNC to assess whether an entity qualifies under the OAGDS as this aligns with current practice for other DGR categories, with the ACNC currently determining whether an entity qualifies for the charitable subtype of a PBI or Health Promotion Charity, and the ATO endorses these entities as DGRs based on this ACNC determination;
- The ACNC already works closely with DFAT in regulating all charities that work overseas, and assisting DFAT in implementing Australia's international obligations in relation to terrorism and money-laundering by administering the ACNC Governance standards; and
- In due course, the ACNC will administer the external conduct standards for all charities operating overseas, and these standards will likely cover matters currently dealt with under the OAGDS (relating to terrorism and anti-money laundering,) - it therefore makes sense for the ACNC to have responsibility for these matters rather than both the ATO and ACNC regulating the same subject matter.

In making this recommendation, we note that DFAT currently has the relevant capacity, capability and expertise in assessing overseas aid and development work under the OAGDS. Given this, in transferring the administration of the OAGDS to the ACNC, it will be vitally important to ensure that the ACNC is provided with sufficient support and resources to take on this responsibility. This may involve moving the relevant OAGDS unit from DFAT to the ACNC, or developing mechanisms for close internal collaboration and support between DFAT and the ACNC. Input from DFAT could be obtained internally by the ACNC when assessing an application for registration under the OAGDS, but this should not slow down the registration process for applicant charities.

(ii) Specific issues in reforming the DGR regime to reduce administrative complexity

The proposal to transfer the four registers from the relevant departments to the ATO/ACNC has been proposed in the DGR Discussion Paper as a mechanism to reduce administrative complexity in the DGR regime. In seeking to achieve this goal of reduced administrative complexity, we raise the following reform issues that we believe should also be considered:

(A) DGR categories should be simplified and aggregated for welfare and development work in Australia and overseas

As an overseas aid organisation with a growing domestic programs, we currently hold three DGR endorsements (OAGDS, NCF and PBI), and have previously held an additional DGR developed country relief fund to respond to the Japanese earthquake and tsunami. Each of these endorsements has its own requirements and rules that must be complied with. The existing system is complicated, inconsistent and cumbersome.

These different DGR categories mean that fundraising and administration is fragmented. For example, we have to run separate appeals for overseas aid under OAGDS and for domestic benevolent work in Australia as a PBI, and ensure that our receipting and banking is delineated. This adds to the administrative and costs burden.

In light of this, we support a simplification and aggregation of DGR categories relating to welfare and development work so that a single endorsement can cover our work in Australia, in developing countries, and in developed countries requiring disaster relief.

This could be achieved by modernising the concept of PBIs so that this category covers both benevolent work by PBIs and the type of aid and development work currently regulated under the OAGDS. This would not require any significant change to, or broadening of, the existing concept of PBIs. We note the concept of PBI has already evolved under the ACNC Commissioner's Interpretation Statement on PBIs which expressly acknowledges that PBIs may undertake overseas work, and that such development assistance may be considered 'relief' for PBI purpose. Paragraph 5.9.6.2 states:

> *In an international development and relief context, people in receipt of relief or humanitarian assistance work (work which is provided during and in the aftermath of humanitarian crises), will generally be considered "people in need". Additionally, people who are in receipt of development assistance will also be considered "people in need", where that assistance is provided to necessitous people in developing countries.*
>
> *Development assistance is understood as being activities that improve the long-term well-being of people in developing countries, which build their capacity and provide long-term sustainable solutions to needs stemming from poverty and distress. Development assistance is thus preventative in that it stops such needs recurring. It is equally "relief" in the PBI context because it relieves the needs of the people assisted.*

A modernised PBI category could supersede the OAGDS category, and as a consequence of this, there would be only one set of guidelines to cover welfare, relief and development work in Australia and overseas. This change would ensure that the quality of, and accountability for, domestic and overseas development projects, that are supported by tax deductible donations, is maintained.

In this regard, we are concerned that there is currently no equivalent guidelines or mechanism like the OAGDS guidelines to ensure PBIs abide by sound development principles, either for their projects in Australia or overseas. Importantly, the new (modernised PBI) guidelines could rectify this by drawing on the principles in the OAGDS guidelines and applying these to PBIs undertaking overseas work to address this gap in oversight and accountability.

(B) External conduct standards

The ACNC's external conduct standards are yet to be enacted in the ACNC regulations (notwithstanding that they were due to commence on 1 July 2013).[1] We understand that the intended purpose of the external conduct standards (as described in the explanatory memorandum) are to be principle-based minimum standards which:

- regulate funds sent by not-for-profits outside Australia and activities engaged in by such entities outside Australia; and

[1] According to the explanatory memorandum to the ACNC Bill 2011 at paragraph 1.59.

- empower the ACNC Commissioners to take enforcement action in relation to any registered entity's operations offshore where there is a contravention of these standards (and such enforcement action could include giving warnings and directions, seeking enforceable undertakings, seeking injunctions, or suspending or removing responsible persons).

  We understand that the external conduct standards will be based on the requirements of the Financial Action Task Force's (FATF) Special Recommendation VIII (SR VIII), and help combat the terrorist and criminal activities covered in the FATF recommendation.

  In considering DGR reform, it would be helpful to understand when these standards will be established in the regulations, and how they will interact with the governance and integrity measures discussed in the DGR Discussion Paper. In particular, the external conduct standards are likely to be a sound integrity mechanism for applying a consistent standard for all charities and DGRs operating overseas, and could replace the requirements currently included under the OAGDS guidelines (which only relate to this type of DGR category) relating to terrorism and money laundering.

(C) Reform for developed country relief DGR funds

Under the current DGR regime, the ATO Commissioner requires a separate DGR developed country relief fund to be established for each new disaster declared under section 30-86 of the 1997 Tax Act, notwithstanding that the provision itself does not require this. As a consequence of this, in 2013, SCA was unable to establish one DGR fund that could cover disaster relief work in Japan and Christchurch following the tsunami and earthquake in those places that year.

This requirement to establish separate DGRs funds for each new disaster in a developed countries inhibits our ability to use such funds to act quickly in galvanising public support and providing emergency relief. It also increases our administrative burden (and therefore overhead costs) and restricts use of funds as between natural disasters, and as between our work in developed and developing countries. We are unable, for example, to deploy designated emergency preparedness funds in our developing country relief fund for emergency relief in a developed country, even if the need is great.

For this reason, we welcome reforms to this DGR category to enable one relief fund to be established and utilised as an umbrella fund for all declared disasters in developed countries.

Moreover, the introduction of the external conduct standards could be used to address the inconsistency in the current DGR regime, whereby developed country relief funds do not have any criteria or guidelines similar to the OAGDS to which we must adhere in undertaking relief work in developing countries.

(D) "In Australia' reforms

The DGR Discussion Paper does not address the reforms to the 'in Australia' special conditions in Division 30, which have been proposed for many years (with successive attempts to introduce amendments made between 2008 and 2014) but which remain to be tabled. We understand that reform of the 'in Australia' requirements remains government policy, but progressing these reforms is no longer a priority of the government.[2]

Any change to the 'in Australia' special conditions for DGRs could have a significant impact on the DGR regime for overseas aid organisations and in particular, PBIs. Our view is that the current law in Section 50-50 and as recognised by the ATO currently, is clear on this point, that is, that for a PBI, all that is required is that the organisation is located in Australia, and this does not require modification. The ongoing uncertainty regarding whether or not such requirements will change is creating ongoing unnecessary cost, with organisations such as SCA maintaining multiple DGR categories in anticipation of future reforms (and specifically, a concern that PBIs may be restricted from undertaking the current degree of overseas activities). In order to remove this uncertainty and resulting cost to charities, we would welcome confirmation that the proposed amendments will not be pursued.

[2] Based on comments made by the then Assistant Treasurer, the Honourable Josh Frydenberg MP in 2015.

5. ***Question 8: What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?***

   We welcome reforms to remove or modify the public fund requirements, including the responsible person requirement and requirement for maintaining separate bank accounts. These requirements are outdated, unnecessary and lead to undue complexity (and therefore overhead costs). Clear reporting mechanisms, combined with the gift fund requirements in Division 30, can be used to ensure accountability and proper expenditure of DGR funds during operations and on winding up.

   In relation to the proposal to allow organisations to be endorsed under multiple DGR categories, we note that SCA is currently seeking endorsement as a DGR as a whole as a PBI, it is endorsed for the operation of a DGR fund and has established a trust with DGR endorsement, each with its own set of rules.

   The ongoing need to maintain multiple DGR category endorsements (due to the uncertainly around the potential future 'in Australia' reforms –see above) gives rise to ongoing unhelpful administrative and compliance burdens (and overhead costs).

   As discussed above, we would support reforms to simplify and aggregate DGR categories, so that SCA could have one endorsement as a whole to cover its welfare, relief and development work in Australia and overseas.

6. ***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?***

   We welcome the introduction of an annual DGR certification requirement, and this could be incorporated into the Annual Information Statement submitted to the ACNC. However, if such a requirement was introduced, it would be helpful for the ACNC to develop a self-assessment tool and provide guidance on each DGR category to support charities in undertaking this annual self-assessment.

   We do not oppose a formal rolling review program, but we are not convinced that this is the best allocation of resources for ensuring compliance with the requirements of the DGR categories. Instead, we support a regulatory approach whereby the ACNC releases guidance on relevant DGR categories, there is a period of training and consultation in relation to that guidance (which will trigger an internal review by DGR charities), and then spot audits are undertaken in relation to high risk categories identified by the ACNC or in response to complaints received or issues highlighted by the public and media.

7. ***Question 10: What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this?***

   Reviews and spot audits should be undertaken based on DGRs that are identified as being high risk by the ACNC or ATO. Such DGRs may include PBIs which operate overseas and which are not subject to the OAGDS. This review would ensure that there is an appropriate level of accountability and oversight of such entities in relation to use of tax deductible funds applied offshore, pending the introduction of the external conduct standards to be administered by the ACNC

8. ***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?***

   As a matter of principle, charities (whether they be environmental charities or otherwise) should be free to engage in law reform and advocacy activities, where such charities consider that advocacy activities further their own charitable purposes.

The important role that charities play in contributing to law reform and public policy debate, and the public good that is served by such advocacy activities, was acknowledge by the High Court in *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42. This position was subsequently reflected and entrenched in the Charities Act, which confirmed that a charitable purpose includes a purpose of opposing or promoting a change in law or policy where that is in furtherance of another charitable purpose. The Charities Act also includes an important and significant limitation on such political purposes, as it provides that a purpose of promoting or opposing a political party or candidate for office constitutes a disqualifying purpose, and will thereby prevent an organisation from being charitable.

In our view, the position under the Charities Act strikes an appropriate balance in enabling charities to engage in advocacy in furtherance of their purposes, but prevents such charities from pursuing partisan political purposes. We do not believe that there is any need to introduce additional restrictions to limit the advocacy activities of charities, whether they be environmental charities or otherwise, beyond the limits provided under the Charities Act. Moreover, we are concerned that any new limit which focus on activities, rather than purposes, will depart from the established position under the Charities Act, and introduce requirements that are difficult and burdensome to comply with in practice.

Instead of imposing such a limit on advocacy activities, we support the proposal to require all DGRs (including environmental DGRs), where possible, to be registered as charities with the ACNC, so that such DGRs must conform to the requirements that apply to all charities under the Charities Act. If a DGR is not eligible to be registered as a charity (for example, a not-for-profit sports organisation), then similar requirements to those under the Charities Act could be extended to those DGRs to limit any advocacy activities to being in furtherance of their not-for-profit purposes and not in furtherance of a partisan political purpose.

We also support the ACNC in continuing its role in assisting such charities to understand the legal requirements relating to advocacy activities under the Charities Act, and in investigating any instances where a complaint has been received or a risk of non-compliance has been identified in relation to such advocacy activities.

Finally, in regard to the use of tax deductible donations for advocacy activities, we note that businesses can claim a tax deduction for business expenses, including sponsorships and political activities, where the business believes such activities are reasonably necessary to produce assessable income. As matter of consistent treatment, no sound policy reason exists to limit the ability of charitable DGRs to use tax deductible donations received from the public for advocacy activities which further their charitable purposes.

Next steps

These detailed submissions are provided in relation to the DGR issues which affect SCA's operations.

If you have any queries regarding our submission, please contact **Simon Miller (Legal Counsel and Company Secretary) simon.miller@savethechildren.org.au,**