

**Submission from Warlows Legal
on the Tax Deductible Gift Recipient Reform Opportunities discussion paper
dated 15 June 2017**

We welcome the opportunity to contribute to the discussion on reform to the DGR system and support the aims of good governance in the sector and reduction of administrative complexity which underlie the proposals. We respond below to consultation questions 1 - 11. We do not comment on questions 12 and 13 regarding environmental organisations.

1. ***What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?***

A significant benefit of such a requirement would be transparency; information on all DGRs (if all were charities) would be publicly available on the ACNC register via the annual reporting system. Currently, DGRs which are not charities do not face this public scrutiny.

However, not all DGRs are stand alone organisations. Some DGRs are arms of (non-charitable) not-for-profits that qualify for DGR status. In our view it would be too restrictive and impractical for all not-for-profits with DGR arms to have to register those arms as separate charitable entities. The additional administrative costs in establishing and running a separate entity (or entities) could be a disincentive for not-for-profits to run DGR arms.

2. ***Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?***

Those listed by name in section 30-105 of the Income Tax Assessment Act 1997 that are not registered charities may need to be individually considered. In addition, as mentioned above, it seems overly onerous for DGR arms of not-for-profits to have to register as separate charities even if, in theory, they could meet the requirement for charitable status.

3. ***Are there particular privacy concerns associated with the proposal for private ancillary funds and DGRs more broadly?***

There may be particular organisations which have legitimate reasons to keep information confidential. However, this is provided for in the current system for registered charities under which charities can apply to have certain information withheld from the public record (for example commercially sensitive information or information likely to cause harm), and which enables private ancillary funds to withhold information to protect the identity of donors. There appears to be no reason why these criteria for confidentiality should not apply in the same way to all DGRs, including private ancillary funds, in the event that all DGRs were required to register as charities. A duty to disclose the information on the ACNC register could be the general rule, with any exception considered on a case-by-case basis.

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

Yes. There is ACNC guidance on appropriate advocacy by charities and there should be a means by which to check charities' compliance. It is also important that information on charities' advocacy activities is made available to donors (in the same way as charities' other activities) so that they can make informed decisions about which organisations to support.

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

Yes. In our view there should be a single all-encompassing Annual Information Statement. Relevant information should then be made publicly available on the ACNC register.

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

An additional paragraph in the Annual Information Statement regarding advocacy activities does not, at face value, appear to be too great a burden.

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?***

We are strongly in support of this proposal for the reasons given in the consultation paper, namely simplifying the DGR application process, reducing delay, reducing government administration and reducing the compliance burden for the NFP sector.

Delay

We have extensive experience in assisting organisations through the DGR application process and the current system often involves unnecessary delay and extensive paperwork, incurring time and resources for an organisation which could otherwise be dedicated to pursuing its purposes. Completing applications involves a few more hours' work per application and double handling and drafting, and the turnaround time for assessment can be over a year for some Registers.

Compliance

Transferring the administration of the four DGR Registers to the ATO could, if managed properly, significantly reduce the compliance burdens on the sector without compromising the thoroughness of the application process.

Logistics

Issues of expertise and capacity need to be considered however. If the proposal to transfer the administration of all four Registers to the ATO is taken forward, it will be important to ensure that the ATO has sufficient in-house expertise and capacity to administer the full DGR portfolio. Paragraph 43 of the discussion paper proposes that "*the ATO would be able to call on the expertise in the relevant government agency on a case by case basis, if required*", but that process could be lengthy and would require resources within the ATO to deal with referrals to other agencies and to liaise with that agency. This may increase (or at

least fail to reduce) the administrative burdens on government departments and the time taken to process applications. We would query how in practice a single regulator would administer all four Registers without having to regularly consult with other departments. We make the following suggestions:

- To build in-house expertise at the ATO, a relevant individual with experience in dealing with DGR applications for a particular Register could transfer from each of the four government agencies to the ATO. These individuals could make up a small specialist team at the ATO which would be responsible for dealing with any matters on the four Registers requiring particular expertise. This would avoid queries having to pass between government bodies and would help to create a more streamlined process.
 - In order to increase capacity within the ATO, its not-for-profit responsibilities could transfer to the ACNC. This would arguably also be in keeping with the ACNC's role as the regulator of not-for-profit entities as well as charities.
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 would urge caution with regard to the proposal to remove the public fund requirements for charities given the level of governance assurance they provide, in particular the 'responsible persons' requirement. We do however in principle support the removal of the confusion over the two definitions of responsible person in the tax and ACNC legislation (mentioned at paragraph 50 of the discussion paper).

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?***

Although an increase in compliance requirements for the sector should, in our view, in general be avoided, we agree that some level of review is important to protect the integrity of the DGR status. A formal rolling review programme would have the benefits of thoroughness and fairness because all DGR entities would be reviewed at some point, but with 28,000 organisations the example of a five-year cycle (paragraph 56 of the discussion paper) would mean reviewing 5,600 organisations per year (over 100 a week), which would place a significant administrative burden on any government body carrying out the reviews and would probably require a dedicated team. A longer timeframe might be more realistic.

We also agree that alongside a rolling review, self-certification in the Annual Information Statement would be an appropriate way of supporting compliance without excessively adding to existing reporting obligations. A light-touch approach would seem suitable, with organisations being reminded of their compliance obligations (and penalties for breach) and being asked to confirm compliance rather than being required to submit extensive evidence. Consideration could be given to including some specific questions in the Annual

Information Statement which would assist in highlighting any organisations requiring a more in-depth review.

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

In the first instance, the considerations could be (a) risk (based on the organisation's activities and/or area of operation, including operation overseas); (b) length of time since DGR status was granted; and (c) income, with greatest weight given to (a) and least weight to (c). A points-based system based on these considerations could identify those to be reviewed first.

11. ***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?***

A general sunset period, after which specifically listed DGRs would have to reapply for DGR status, would in our view place too large an administrative burden on organisations and the ATO and might also create uncertainty in the sector and for donors during the reapplication/assessment period – in particular due to the web of agreements between some of the entities listed by name and many community organisations (a prime example being the Australian Sports Foundation, which has over 900 member organisations which fundraise through the ASF to enable donations to be tax deductible). We would instead suggest including specifically listed DGRs, including existing listings, in the formal rolling review programme discussed above.

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