



Law Council
OF AUSTRALIA

Tax Deductible Gift Recipient Reform Opportunities Discussion Paper

Australian Government Treasury

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction.....	5
Responses to Consultation Questions.....	5
Question 1	5
Key responses.....	6
Background	6
Question 2	7
Question 3	8
Question 4	8
Advocacy is typically of public benefit	8
The ACNC already has powers to deal with improper advocacy.....	8
Reporting on advocacy activities and the rule of law	9
Scope.....	10
Question 5	10
Question 6	11
Question 7	11
Question 8	11
Removing the public fund requirements	12
Will this proposed reform work for the registers?.....	12
Endorsement in multiple DGR categories	14
Question 9	14
Question 10.....	15
Question 11.....	15
Question 12.....	15
Question 13.....	16
Additional Observations	16
Responsible persons.....	16
Repealing the 50-50 amendments	17
Contact.....	17

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Not-for-profit Legal Practice and Charities Committee of its Legal Practice Section for preparing this submission.

The Committee was established in March 2016 and comprises leading practitioners in the not-for-profit area from around Australia:

The objectives of the Committee include:

- to engage with financial accountability and taxation laws and policies that affect NFP organisations;
- to promote the administration of justice and the development and improvement of laws and policies affecting NFP organisations; and,
- to contribute to the implementation of the Law Council's International Strategy.

The Law Council is also grateful to the Australian Environmental Planning Law Group of its Legal Practice Section for their assistance on this submission. Finally the Law Council of Australia also acknowledges the contribution of the Taxation Law Committee of its Business Law Section.

Introduction

1. This submission, prepared by the Not-for-Profit Legal Practice and Charities Committee of the Legal Practice Section of the Law Council of Australia (the **Committee**), responds to the Tax Deductible Gift Recipient Reform Opportunities Discussion Paper – June 2017 (**Discussion Paper**). The Committee welcomes the opportunity to participate in the consultation invited by the Discussion Paper.
2. The Committee welcomes reform to the complex area of DGRs and the committee supports reform which will provide:
 - clarity and consistency in reporting and governance requirements;
 - the reduction of red tape and complexity;
 - access to clear understandable information and education, and
 - transparency and accountability.
3. The stated aim of the reforms raised in the paper is to:
 - strengthen the governance of DGRs;
 - reduce the complexity of DGR application processes, and
 - help ensure the DGR status is up to date¹.
4. The Committee notes the following concerns as to the discussion paper:
 - In spite of the general statements, the paper focusses on DGRs which are on the four existing registers and specifically listed with no consideration of how the proposal may affect other categories of DGR; and
 - Questions 4 to 6 extend to all charities so are beyond the scope of the paper.
5. The Committee encourages reform and urges Treasury to pursue wider reforms, including adoption of the recommendations of the Not-for-Profit Sector Tax Concession Working Group's Report as achieving the aims of Treasury and enabling this issues to be addressed as a whole. In particular the recommendation that all charities are made DGRs, which would support the first two aims of the discussion paper.

Responses to Consultation Questions

Question 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?

¹ Paragraph 17

Key responses

6. The scope of this consultation question goes further than the information and discussion in the background and issues in the discussion paper and would require a closer examination and consultation across all categories of DGRs.
7. In principle, it would aid simplicity and consistency and reduce red tape to have one regulator for the assessment of DGR status for all entities (government entities, registered charities and other entities).
8. Given its expertise in determining charity (including public benevolent institution) status and its intended remit to regulate the broader not-for-profit sector, the ACNC appears well placed to assess DGR status for all entities. We also recommend the ACNC register be expanded to include listing of, and reporting by, DGRs to enhance transparency and accountability and as a valuable service and resource to the public.
9. However, the Council recommends not requiring that all DGRs be registered charities or government entities, without further consultation and examination of the entities effected and the possible increase to administration for the effected entities:
 - It is unclear how entities that operate a fund, authority or institution would be treated, given that some of these entities may not themselves be eligible to be registered charities.
 - There are likely to be issues given the differing meanings in ITAA97 of government agency and in the *Charities Act 2013* of government entity. The definitions should be consistent. Otherwise some entities may fall through the gaps, not meeting the definitions of registered charity or government agency for DGR purposes. The definition of government entity is also a very difficult one to apply and potentially leaves a number of gaps. See question 2 below.
 - Ideally information on all DGRs should be contained on the one public register so as to assist with accountability and transparency. However, if registered charities are to be regulated by the ACNC, how will information on other DGRs be entered on the one register? Even if all DGRs are to have their DGR status assessed by the ACNC, how will information on government entity DGRs be kept up to date by the ACNC?
10. In the context of the four DGR registers, despite the issues identified above, the Council is supportive of transferring, as an interim step, administration of the registers (with the exception of the Overseas Aid register) to the ACNC. More detail is provided in response to Question 7 below.

Background

11. Currently entities can be endorsed as a DGR for their own operations (e.g. public benevolent institutions) or endorsed as a DGR for the operation of a fund, authority or institution (e.g. a school for the operation of a school building fund).
12. Special conditions may apply to a DGR category and if there are special conditions these are set out in the relevant table in subdivision 30-B. The special conditions (if any, and depending on the category) can require the DGR to be any of:
 - a registered charity
 - an Australian government agency
 - not an ACNC type of entity, or

- operated by any of the above.

13. Currently the special conditions relating to the registers require:

- a developing country relief fund to already either be a registered charity or operated by a registered charity;
- a public fund on the register of harm prevention charities to also already either be a registered charity or operated by a registered charity;
- a public fund on the register of cultural organisations has no special conditions in item 12.1.1 of section 30-100 but subdivision 30-F requires that the public fund is operated by a cultural organisation which is an entity with the principal purpose of the promotion of the arts. On this basis it is likely that the existing cultural organisations will be either eligible to be a registered charity or would be a government entity but further analysis of the register would be required to check this; and,
- a public fund on the register of environmental organisations has no special conditions in item 6.1.1 of section 30-55 but subdivision 30-E requires that the public fund is operated by an environmental organisation which is an entity with the principal purpose of the protection and enhancement of the natural environment or provision of information or education or carrying on of research about the natural environment. On this basis it is likely that the existing environmental organisations will be either eligible to be a registered charity or would be a government entity but further analysis of the register would be required to check this.

Question 2

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

14. The second consultation question as to whether there are DGRs (other than government entities) that could not meet the proposed new requirement to be a registered charity (*or operated by a registered charity*) would require further examination of all categories for DGRs other than those on the registers.

15. Most of the categories already are restricted to the requirement to be charities or government agencies but there are likely to be some minor areas where this requirement will cause difficulties, for example:

- Many specifically listed charities such as the Australian Sports Foundation and a number of political think tanks which would not be eligible to be registered charities;
- Membership groups and community service groups may operate funds, authorities or institutions, such as Approved Research Institutions or necessitous circumstances funds and many parents associations operate school building funds, which will not be eligible to be registered charities but the fund or institution could be made to be a separate entity and registered as a charity; and
- Given convolutions in the definition of 'government entity', some war memorials, libraries, museums and galleries may not be 'government entities', but yet may also not be 'charities'.

16. If the only options to become a DGR are registered charities or government agencies, we urge Treasury to also amend the definitions of government entity in the *Charities Act 2013 (Cth)* and government agency in the ITAA97 to be consistent.

Question 3

Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?

17. The ability for information to be withheld from the ACNC register is adequately covered by the ACNC Act. This question is best further considered in the context of the specific information required to be reported to the ACNC.

Question 4

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

18. The question and the consultation paper appear to suggest that there are concerns that advocacy activities may risk DGR and charity status and that they may not be consistent with an entity's purpose.

Advocacy is typically of public benefit

19. However, advocacy is typically of public benefit and can help achieve an entity's purpose:

- The starting position is that the generation by lawful means of public debate directed to achievement of a charitable purpose (such as the protection and enhancement of the natural environment) typically contributes to the public welfare;² and is consistent with public policy as it supports the constitutional system of government in Australia.³ This position was reached after focused consideration by the highest court in Australia in *Aid/Watch Inc v Commissioner of Taxation* and following extensive consultation with the community reflected in sections 11(b) and 12(1) (l) of the *Charities Act 2013 (Cth)*.
- In some circumstances, advocacy may also be more efficient than other activities in achieving a DGR's or charity's purpose and so provide a greater public benefit than would otherwise be the case.⁴

The ACNC already has powers to deal with improper advocacy

20. The particular advocacy ends or means may affect whether it contributes to public welfare.⁵ However, this is true of the ends and means of NFPs in general and the ACNC already has extensive information gathering and enforcement powers that it can use where required.

² *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, [46]-[48] (French CJ, Gummow, Hayne, Heydon, Crennon, Kiefel and Bell JJ).

³ *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, [45] (French CJ, Gummow, Hayne, Heydon, Crennon, Kiefel and Bell JJ).

⁴ See the Law Council of Australia, Submission to the House of Representative Standing Committee on the Environment Inquiry into the Register of Environmental Organisations (Submission 662, 5 June 2015) 6-7.

⁵ (2010) 241 CLR 539, [49] (French CJ, Gummow, Hayne, Heydon, Crennon, Kiefel and Bell JJ).

Reporting on advocacy activities and the rule of law

21. In addition to there being no apparent need to collect information on advocacy activities, there would be substantial difficulties in collecting such information. That is for the following reasons.

22. First, the meaning of advocacy activities is uncertain:

- The extensive case law on the (now over-ruled in Australia) political purpose doctrine demonstrates the difficulty experienced by the courts even in identifying the scope of the narrower notion of 'political';⁶ as well as the readiness of some courts to interpret 'political' activities very broadly beyond support for a political party or candidate to seeking to maintain or change domestic or foreign law or government policy⁷ and even propaganda.⁸ Accordingly, there is likely to be some uncertainty even when considering a core set of 'political' activities.
- The next question is how far advocacy extends beyond a core set of 'political' activities? Jurisdictions such as the United States and Canada apply (more permissive) restrictions to a broader range of activities such as 'carrying on propaganda, or otherwise attempting, to influence legislation' (US)⁹/ 'political activities' (Canada)¹⁰; in distinction to more restrictive treatment of partisan political activities directed to supporting or opposing a political party or candidate.
- Does 'advocacy' include education of the public, as opposed to promulgation of a particular point of view? The Register of Environmental Organisations 2017 Statistical Return Form distinguishes between 'campaign/advocacy' and 'education/information provision' activities. The political purpose doctrine cases also frequently drew a distinction between the two, but it was a very troublesome demarcation as any attempt to provide information is inevitably attended by the conscious and unconscious biases of the persons involved.¹¹
- Would advocacy include discussions with government agencies about compliance by a DGR or charity? Such discussion would typically cover the application of legislation and may extend to government decisions about the manner of implementation of that legislation to the DGR or charity.
- Further, frequently the nature of an activity can only be properly understood in light of the purpose behind the activity.¹² This will make it difficult for entities to easily determine the advocacy nature of activities. For instance, if a peak body DGR arranges a meeting of its members at the request of a member DGR to discuss a proposed advocacy campaign by the one member: is the peak body carrying out advocacy activities in facilitating the meeting; are the members who

⁶ See, eg, *Public Trustee v Attorney-General* (1997) 42 NSWLR 600; Santow, 'Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass?' (1999) 18 *Australian Bar Review* 225.

⁷ *McGovern v Attorney-General* [1982] Ch 321.

⁸ *Alliance for Life v Minister of National Revenue* (1999) 174 DLR (4th) 442. Cf *A-G v New South Wales Henry George Foundation Ltd* [2002] NSWSC 1128.

⁹ IRC 501(c)(3).

¹⁰ Income Tax Act (RSC, 1985, c1 5th Supp) 149.1, 149.1(6.1), 149.1(6.2).

¹¹ Cf *Alliance for Life v Minister of National Revenue* (1999) 174 DLR (4th) 442; *A-G v New South Wales Henry George Foundation Ltd* [2002] NSWSC 1128; *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10; *Re Koepler's Will Trusts* [1986] Ch 423.

¹² *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, [26] (Gummow, Hayne, Heydon and Crennan JJ).

did not call the meeting but are providing feedback to the member conducting the campaign engaging in advocacy activities?

- Recent reports in Canada and the UK (in relation to the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (UK) c 4) demonstrate the conceptual and practical difficulties in identifying and reporting on advocacy/political activities.¹³ They emphasise the chilling effect of such requirements on advocacy and also the potential for perceptions of politicisation of regulatory action in such circumstances.

23. Second, more than a third of registered charities have less than \$50,000 in annual revenue and four fifths of these charities have no paid staff.¹⁴ Characterising and apportioning activities into advocacy and non-advocacy will be a difficult task for which such charities are ill equipped.

24. Third, it is fundamental to the rule of law that laws should be 'prospective, open and clear', 'relatively stable' and formulated under a framework of open, clear, stable and general rules to as to permit people to be 'guided' by the law.¹⁵ However, the uncertain boundaries of 'advocacy activities' and of their measurement are likely to pose material difficulties to legislating clear guidance for charities in reporting on advocacy activities. As the Canadian experience suggests, the risk of vague boundaries is that large numbers of charities will misreport their advocacy activities as a matter of course and so be at risk of enforcement action within the broad discretion of the regulator.

Scope

25. This question appears to go beyond the scope of the Discussion Paper as it relates to all charities not just DGRs. Therefore, if it is proposed to make any change, we recommend consulting with the broader charity sector before finalising any such change.

Question 5

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

26. The AIS already requires each registered charity to list its main activities for the relevant year and to describe how those activities helped to achieve the charity's purpose. Accordingly, if advocacy is a main activity of a charity, the AIS already collects information on those activities.

27. Given the answer to question 4 is that the ACNC should not request additional information from all charities about their advocacy activities, it follows that the annual information statement is not the appropriate vehicle for collecting more specific information than the information that registered charities are already obliged to provide.

¹³ Consultation Panel on the Political Activities of Charities, 'Report' (31 March 2017); Lord Hodgson, 'Third Party Election Campaigning – Getting the Balance Right' (Cm 9205, March 2016).

¹⁴ A Powell et al, 'Australia's Smallest Charities 2015' (Research Report, Centre for Social Impact and Social Policy Research Centre, UNSW, 2016) 1.

¹⁵ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198-202. For discussion of the core elements of the rule of law, see, eg AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan & Co, 10th ed, 1959) Pt II Ch IV; John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 235-40; Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 5.

Question 6

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

28. The answers set out above to questions 4 and 5 make it clear that in the committee's view there is no basis for obtaining the information.

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?

29. The committee supports consistency in both the time and manner of assessment of DGR applications and would support the consideration of eligibility for the registers (other than the Overseas Aid register) to be administered by the ACNC.

30. At present in dealing with the registers, there are different requirements for Responsible Persons, different approaches to the drafting of requirements from the model rules, some errors in law in the Department Guidelines, errors in relation to pursuing purposes outside Australia (other than the Overseas Aid Register), lack of clarity in relation to the 'non conduit rule', and for most applications an unnecessarily lengthy application and approval process. These factors could all be addressed by moving the administration to the ACNC.

31. As with public and private ancillary funds, any additional reporting should be streamlined so that those DGRs which are registered charities or operated by registered charities could report once to the ACNC and the information be passed on to the ATO.

32. The ACNC is recommended rather than the ATO to prevent additional government costs with a two-stage assessment.

33. DGR status should be noted on the ACNC register as the public should be able to access all relevant information on charities and DGRs on one register to minimize confusion and increase the value and usefulness of the public register.

34. It is not recommended to transfer the Overseas Aid Register to the ACNC as this register assesses whether the entity should be an 'approved organisation' with different purposes (being development) and criteria to the requirements of the public relief fund which is currently assessed and endorsed by the ATO. We recommend just the assessment processes currently performed by the ATO for Overseas Aid organisations in relation to Relief funds, are transferred to the ACNC, and the Register remains with DFAT.

35. The ACNC would require additional resources to enable it to take on additional duties.

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?

Removing the public fund requirements

36. Removing the public fund requirements is an excellent proposed reform as it would reduce complexity, confusion and unnecessary red tape and administration. However to do this for all DGRs currently requiring a public fund will require greater examination of all the tables in subdivision 30-B and potentially amendments to the ITAA97.

37. In summary we recommend:

- Where the entity operating the public fund has the same principal purposes as the relevant DGR category there should be no requirement for the public fund and the entity should be endorsed as a DGR as a whole
- Where the entity operating the public fund has wider purposes than the relevant DGR category there should be modified requirements for the public fund such as a name, written rules and the gift fund requirements; and removing the requirement for a separate bank account, invitations to the public and administration by a committee with a majority of Responsible Persons.

38. There are two main types of public fund:

- 'Type A' - The public fund where the organisation operating the public fund has the principal purposes of the DGR category and the public fund is applied only for those principal purposes. This type is required for the harm prevention, cultural and environmental registers and for specific listing, and may exist, but is not required, for the other categories of DGR requiring public funds.
- 'Type B' - The public fund which can be operated by an entity having wider purposes and the public fund must only be applied for the purposes relevant to the DGR category in which it is endorsed. Examples of this type include the developing country relief fund, the school building fund, and the scholarship fund.

39. The question may be more appropriately considered in terms of the four registers and specific listing as this appears to be the scope of the background and issues raised in the discussion paper, but the committee also makes some brief comments in relation to differing treatment depending on whether the public fund is Type A or B, (as defined above).

40. Though not expressly stated in the discussion paper, presumably if the public fund requirement is removed, these entities will be required to comply with subdivision 30-BA and maintain a gift fund ensuring that gifts for the principal purpose of the DGR category are recorded and applied only for the principal purpose. This would remove the unnecessary and cumbersome aspects of the public fund as identified in paragraph 45 of the discussion paper, such as having a separate bank account and a committee with a majority of Responsible Persons administering the public fund. Our comments are made on the assumption that this is the proposed reform.

Will this proposed reform work for the registers?

41. For each of the harm prevention, cultural and environmental registers, the organisation operating the public fund must have the principal purpose of the relevant DGR category and the public fund must be applied for this purpose. This is the same as the gift fund requirement for DGRs endorsed as a whole so the removal of the extra requirements of a public fund will be simple and ease administration and red tape.

42. Ideally the relevant items in the tables in subdivision 30-B will be amended to remove the reference to a public fund and just refer to the organisation such that the organisation is endorsed as whole and no longer endorsed for the operation of the public fund;
43. In respect of developing country relief funds, under item 9.1.1 in section 30-80, most of the public funds which come into this category will be operated by a registered charity with wider purposes than the DGR category, as the requirements in section 30-85(2) require the public fund to have been established by an approved organisation (approval by DFAT) which must have the purposes of *development* whereas the public fund must be solely for the *relief* of people in a developing country.
44. By removing the public fund requirement, either:
- there may be an integrity issue with the possibility of tax deductible gifts being used for wider purposes than just relief; or
 - all the approved organisations which operate a developing country relief fund will need to create a separate trust for the relief fund so that it is an entity capable of obtaining an ABN and therefore being registered as a charity. This will create further administration and red tape for approved organisations wishing to operate under the Overseas Aid Gift Deduction Scheme.
45. Further examination and consultation may be required to identify whether there is an integrity issue with allowing tax deductible gifts to be held in a gift fund and applied for relief purposes only or whether the additional administrative burden requiring a separate trust will result in a significant benefit to governance and accountability in relation to the operation of developing country relief funds.
46. It may be possible to remove some of the requirements of a public fund where it is a Type B public fund as with a school building fund, but care needs to be taken to ensure the integrity of the tax concession where it is given only for buildings, and the organisation which operates the fund has wider 'non DGR' purposes, such as operating a school. A modified public fund could still be required for Type B public funds so as to still require a separate name, written rules, clear accounting, application only for the purpose of the DGR category, revocation clause, and separate receipts. But no requirement for the majority of responsible persons, a separate bank account nor public fundraising.
47. It is noted that requiring the organisation operating the public fund to provide financial reports to the ACNC will not necessarily identify the purposes for which tax deductible donations are being applied, unless specific reporting on the public fund is required by legislation.
48. As there is no legislative requirement for specifically listed entities to maintain a public fund, and the public fund for these entities are Type A public funds, the committee endorses the removal of the public fund requirement from specifically listed entities. This would require inserting in subdivision 30-BA a requirement for maintaining a gift fund for specifically listed entities, as this currently only applies to organisations seeking endorsement as a DGR.
49. The consultation question refers to removing the public fund requirements "for charities". If the public fund requirements are to be removed in respect of the four registers and specifically listed entities and ideally for all Type A public funds, at least, then it should be removed for government entities as well as charities. There would seem to be no compelling reason to retain public funds for Type A government entities.

50. An additional benefit of removing public funds will be simplification of the 'in Australia' special conditions for those entities operating public funds while there are still differing rules for charities and for the DGR fund.

Endorsement in multiple DGR categories

51. The Committee agrees that it would reduce confusion, red tape and administrative burden if entities could be endorsed in multiple DGR categories.
52. However, such a change will require significant changes to the eligibility for DGR, which we understand is beyond the scope of the discussion paper. The categories of DGR rely on a principal or sole purpose of the relevant DGR category referred to in the tables in subdivision 30-B. For instance, considering the registers, which have been the main focus of the discussion paper, the developing country relief fund requires a sole purpose of relief, and the remaining three categories require a principal purpose test.
53. Paragraph 46 of the discussion paper is incorrect in stating that a separate public fund is required for each general category if an organisation wishes to seek DGR status in more than one category. An organisation in most cases will need to set up separate entities, either a trust or an incorporated entity, where there is a principal purpose test (for example, where a public fund is not required such as for a public benevolent institution) or a Type A public fund is required. Setting up separate public funds is only an option where the eligibility requirements allow a type B public fund. For instance, a charitable secondary school whose principal purpose is to promote education may operate a public fund solely for scholarships and a public fund established solely for the construction or maintenance of a school building, as well as operate a public library, without having to have separate entities. The school cannot apply any of the tax deductible gifts for the advancement of education but only for the purposes of one of the DGR categories.
54. The reform could be achieved by allowing all charities to be DGRs or insertion into subdivision 30-B of an additional category of DGR requiring all of the purposes of the applicant to be two or more of the DGR purposes permitted in the tables in subdivision 30-B (other than the purposes of the specifically listed entities).

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?

55. The Committee is against rolling reviews for DGRs. Review of DGRs should be a risk-based exercise (see Question 10).
56. Annual certification should not be adopted. DGRs other than specifically listed DGRs are already required to notify the Commissioner when they cease to be entitled to endorsement. Certification therefore only appears to add the benefit of reminding the board/responsible persons of the need to check continued eligibility.
57. Regulatory theory suggests that responsive regulation is likely to be more effective in eliciting appropriate behavioural responses from the regulated. Responsive regulation typically involves education and support in relation to the majority that are trying to do the right thing. It is only when circumstances such as compliance history suggesting an unwillingness to cooperate and comply with requirements that more forceful compliance activities, such as a mandatory certification – with penalties attached, are appropriate.

58. Education and support could be provided in a form such as the ATO's annual Non-profit News Service email reminder to Not-for-profits to self-assess their continued eligibility for tax concessions.
59. While this is beyond the scope of the Discussion Paper, revamping DGR eligibility to better align with charity status as suggested in the Not-for-profit Sector Tax Concession Working Group Final Report would reduce the administration and compliance costs of reviews.

Question 10

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

60. If there is to be a review, the entities reviewed in the first instance should be those where the greatest risk of non-compliance is identified.

Question 11

What are stakeholders' views on the idea of having a general sunset rule of no more than five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every, say, five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

61. Review every 5 years would result in instability and lack of sustainability for these entities. It would adversely affect the ability to plan, obtain funding, obtain and retain employees and would disadvantage the public it is seeking to benefit if the programs may cease on withdrawal of DGR endorsement.

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?

62. As noted for question 4, the starting position is that lawful advocacy activities are for the public benefit and assist in achieving the goals of the charitable entities. Accordingly, the reason for the 25% remediation proposal is unclear.
63. Seeking to characterise and apportion activities into 'remediation activities' and other categories, as required by the Register of Environmental Organisations 2017 Statistical Return Form is likely to raise similar practical compliance and rule of law issues to those identified for advocacy activities under the response to Question 4.
64. There will also be many instances where remediation is inappropriate – the category includes to protect the environment whereas a remediation requirement suggests that it is necessary to wait until the environment is damaged before the charity can act, for example an organisation protecting an area of natural environment from invasive weeds or feral animals. It should be for the organisation to determine how best to apply its funds to further its purposes, for example an organisation seeking to ban the use of plastic bags through education and advocacy may question using donors' funds to organize employees or volunteers to pick up plastic bags from dump sites or foreshores or launch boats to clear waterways.

65. As noted in the Law Council's previous submission to the House of Representatives Standing Committee on the Environment Inquiry into the Register of Environmental Organisations, the potential efficiency benefits of strategic advocacy and other indirect activities in achieving a purpose have been recognised by the Productivity Commission in its 2014 report on Access to Justice Arrangements.¹⁶
66. The Committee notes that another view has been expressed by the Australian Environmental Planning Law Group of the Legal Practice Section of the Law Council, that contrary to the stated intent of the reforms, inefficiencies resulting from requiring environmental organisations with expertise in strategic advocacy to divert funds to remediation work could lead to poorer environmental outcomes.

Question 13

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?

67. There is no justification or need for additional sanctions. The ATO and the ACNC's powers are already substantial and there is nothing in issues raised in the discussion paper that would warrant extension of powers.
68. Further, it is a fundamental principle of the rule of law that the same laws should apply to all persons, so that they are treated equally.¹⁷ Environmental DGRs should be subject to the same broad regulatory regime as other DGRs.

Additional Observations

Responsible persons

69. In paragraph 49 of the discussion paper there appears to be a conflation of the requirements for a public ancillary fund and the requirement imposed upon the entities on the registers such as the register of environmental organisations. There is in fact a broader definition of responsible person applicable to the registers than the ATO requirement for a responsible person. The proposed changes are not directed to public ancillary funds. The general proposition, though, that it is more difficult to satisfy responsible person requirements in rural and remote Australia than it is in the capital cities remains valid.
70. The Committee notes another view by the Taxation Committee from the Law Council of Australia's Business Law Section:
- Paragraphs 14 and 49 of the discussion paper mention the confusion stemming from the different uses of the concept of 'responsible person' by the ATO and the ACNC respectively, and the difficulty of satisfying the ATO requirement in rural and remote Australia. Both points are well made. But an additional problem is an apparent lack of consistency in the interpretation of the concept by the ATO on the one hand, and by the departments administering the three specific registers on the other. For example, it appears that the longstanding ATO practice of

¹⁶ Law Council of Australia, Submission to the House of Representative Standing Committee on the Environment Inquiry into the Register of Environmental Organisations (Submission 662, 5 June 2015) 6-7.

¹⁷ See above n 15. Cf TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' 115 (April) *Law Quarterly Review* 221, 222-3.

accepting persons who belong to a professional association with a code of ethics is not necessarily accepted by the other government departments.

- all of these issues are best dealt with by removing the 'responsible person' requirements altogether. Given the extensive duties to which company directors, association committee members and trustees are already subject to, and the governance guidelines applicable under the ACNC legislation, there would seem to be little purpose seemed by requiring some of them (or indeed, a majority of them) to satisfy an additional requirement defined by the concept of 'degree of responsibility to the community as a whole', which:
 - is difficult to define;
 - anachronistic (and arguably discriminatory) in its approval of some professions and roles, but not others;
 - can make it difficult to constitute boards; and
 - adds significantly to compliance costs.

Repealing the 50-50 amendments

71. The Charities & Not for Profits Committee and many participants in the NFP sector have drawn to the attention of the government concerns about, and have sought repeal of, those amendments made by Schedule 11 of Part 5 to the *Tax Laws Amendment (2013 Measures No. 2) Act 2013*. The government is encouraged to repeal those amendments, which have become known as the 50-50 amendments, as soon as possible.

Contact

72. For further comment or clarification on any of the matters raised in this paper please contact Jennifer Batrouney QC, Chair, Charities & Not-for-Profits Committee on (T) 03 9225 8528 or at (E) Jennifer_batrouney@vicbar.com.au