public interest
ADVOCACY CENTRE

Harmonising DGR Regulation Without Imposing New Burdens: Submission to Treasury Tax DGR Reform Opportunities Paper

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact on disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC is funded from a variety of sources. Core funding is provided by the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government for its Energy and Water Consumers Advocacy Program and from private law firm Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, donations and recovery of costs in legal actions.

PIAC's work on charities and not-for-profit accountability

PIAC has taken an active role in supporting the not-for-profit sector with the aim of:

- enhancing the capacity of individuals and not-for-profit organisations to undertake advocacy and related activities on public interest issues;
- enhancing community awareness of and engagement in government; and
- promoting and enhancing transparency and accountability in the exercise of government power.

In making this submission, PIAC draws on its experience in realising these goals through:

- partnership with the Whitlam Institute and the Social Justice and Social Change Research Centre, University of Western Sydney in a project examining contracts between government and non-government agencies, resulting in the publication of *A Question of Balance: Principles, contracts and the government-not-for-profit relationship*[1] in July 2009;

[1] Eric Sidoti et al, *A Question of Balance: Principles, contracts and the government-not-for-profit sector*, Public Interest Advocacy Centre, The Whitlam Institute at the University of Western Sydney and the Social Justice & Social Change Research Centre, the University of Western Sydney, available at https://www.piac.asn.au/wp-content/uploads/09.07.31_A_Question_of_Balance_.pdf (accessed 27 June 2017).

- a submission to the Australian Senate *Inquiry into the disclosure regimes for charities and not-for-profit organisations*[2]; and
- submissions to the Henry Review of Taxation focusing on the need to reform the complex taxation regime for charities and not-for-profit organisations[3], and on the 2009 National Compact Consultation paper[4] (both of which preceded the establishment of the Australian Charities and Not-for-profits Commission in 2012).

PIAC is also a registered charity with the Australian Charities and Not-for-profits Commission, and is a public benevolent institution under the *Income Tax Assessment Act 1997*. This means that PIAC currently qualifies for deductible gift recipient status, and therefore some of the proposals outlined in the discussion paper have the potential to directly affect PIAC, including through changed reporting requirements.

Summary

The charities and not-for-profit sector is a large, and increasingly important, part of the Australian economy and society. PIAC has long supported a regulatory framework for this sector that promotes good governance, accountability and transparency.

This framework should be as consistent as possible across the sector, although harmonisation should not come at the expense of increased, and unjustified, administrative burdens on charities, including those that enjoy DGR status.

PIAC also believes that charities and not-for-profits have an important role to play in democratic debate, including in advocating for legislative and policy change to address systemic issues. This includes environmental organisations, who should be able to determine which strategies they adopt to achieve their purpose, rather than having them determined by government regulation.

Based on these principles, PIAC supports, or supports in principle, recommendations that aim to increase harmonisation across the sector (including questions 1 and 7) or to reduce the administrative burden imposed on charities and not-for-profits (question 8).

However, we reject recommendations that seek to unnecessarily increase the reporting obligations for all charities in terms of the advocacy they undertake (question 4), and to mandate that environmental organisations must spend 25% or even 50% of their budgets on environmental remediation work (question 12).

PIAC also expresses concerns that the case has not been made for the introduction of 'rolling reviews' of DGR status (question 9), and of specifically listed DGRs (question 11). If these requirements are adopted, they should be accompanied by appropriate safeguards.

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2 Brenda Bailey and Deirdre Moor, Public Interest Advocacy Centre, *Not-for-profit Accountability: Submission to the Inquiry into the disclosure regimes for charities and not-for-profit organisations*, available at https://www.piac.asn.au/wp-content/uploads/08.09.10-Charity_Sub.pdf (accessed 27 June 2017).

3 Deirdre Moor, Public Interest Advocacy Centre, *Taxing Charity: A Submission to the review 'Australia's future tax system'*, available at https://www.piac.asn.au/wp-content/uploads/09.05.01_Taxing_Charity.pdf (accessed 27 June 2017).

4 Brenda Bailey and Deirdre Moor, Public Interest Advocacy Centre, *Valuing the not-for-profit sector: Comments on the National Compact Consultation Paper*, available at https://www.piac.asn.au/wp-content/uploads/09.09.30-PIAC_Sub_on_National_Compact.pdf (accessed 27 June 2017).

PIAC 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?

PIAC supports in principle the requirement for a DGR to be a registered charity in order for it to be eligible for DGR status, provided it does not create duplication in reporting requirements, or lead to undue administrative burdens, for affected not-for-profits.

The not-for-profit sector is a large, and increasingly important, part of the Australian economy, and society. In 2015, there were at least 50,908 charities registered with the Australian Charities and Not-for-profits Commission (ACNC)[5]. These organisations reported a combined $134.5 billion in income, with over 1.2 million staff and almost 3 million volunteers. Obviously, the overall not-for-profit sector – which includes organisations that have deductible gift recipient status but are not currently registered with the ACNC – is even larger.

Given the scale of the work undertaken by charities and not-for-profits, and the valuable contribution they make across a variety of different areas of public life (including health, education, social services and housing), PIAC has long supported a regulatory framework for this sector that promotes good governance, accountability and transparency. This is essential to ensure that public trust is maintained in these organisations, and that they retain the confidence of members (where relevant), donors and other funders (including governments at all levels).

Indeed, one of the objects of the ACNC, as defined section 15.5 in the *Australian Charities and Not-for-profits Commission Act 2012* ('the Act') is 'to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector.'

PIAC supports the current role of the ACNC as the relevant oversight body for the charities sector. We further support the principle that, as far as possible, the regulatory framework should be consistent across different types of charities and not-for-profits. However, we do not believe that harmonisation should be embraced if it creates duplication, or simply increases the administrative burden experienced by these organisations.

This principle is also reflected in section 15.5 of the Act, with a subsequent object 'to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.'

Therefore, PIAC supports in principle the requirement for all DGRs to be registered charities in order for them to be eligible for DGR status. However, where this creates new reporting arrangements for organisations, these should be accompanied by a reduction in administrative obligations elsewhere.

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5 Australian Charities and Not-for-profits Commission, *Australian Charities Summary Report 2015*, available at http://www.csi.edu.au/media/Australian_Charities_Summary_Report_2015_links.pdf (accessed 27 June 2017).

Question 2.

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

PIAC is not in a position to answer this question.

Question 3.

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

PIAC is not in a position to answer this question.

Question 4.

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

PIAC does not support requiring registered charities to provide additional information about their advocacy activities to the ACNC, for two main reasons.

First, the introduction of this new reporting requirement does not appear to be aimed at addressing a demonstrated need. The Discussion Paper does not present evidence that significant numbers of DGRs are currently engaging in advocacy beyond that allowed under the *Charities Act 2013*. PIAC is also unaware of widespread breaches of existing regulations that would justify the imposition of this additional administrative burden across the sector.

Even if, as the Discussion Paper states on page 6, '[t]here are concerns that charities and DGRs are unsure of the extent of advocacy they can undertake without risking their DGR status', increasing the reporting obligations on charities and DGRs does not appear to be the solution best-suited to addressing these concerns. Ensuring the ACNC is resourced to provide further education and guidance about the extent of permissible advocacy is a more appropriate strategy, and one that does not impose 'unnecessary regulatory obligations'.

Second, PIAC is concerned that the introduction of this new reporting requirement is instead aimed at increased 'policing' of the advocacy undertaken by charities and not-for-profits, with a likely 'chilling effect' on them, and the vital role they play in Australia's democratic discourse.

Advocacy is a legitimate, and often necessary, strategy employed by many charities and not-for-profits, including those that have DGR status, to help achieve their respective charitable purposes. This is recognised by the existing law. As noted by the ACNC on their website:

> The Charities Act makes clearer the existing law on advocacy and political activity by charities. A charity can advance its charitable purposes in the following ways:
>
> - involving itself in public debate on matters of public policy or public administration through, for example, research, hosting seminars, writing opinion pieces, interviews with the media

- supporting, opposing, endorsing and assisting a political party or candidate because this would advance the purposes of the charity (for example, a human rights charity could endorse a party on the basis that the charity considers that the party's policies best promote human rights), and
- giving money to a political party or candidate because this would further the charity's purposes.[6]

Although the ACNC also notes that 'while a charity can support a political party or candidate, this support must be a way of achieving its purposes rather than a goal in itself (for example, it can't have a hidden purpose of fundraising for a political party).'[7]

The lawfulness of charities engaging in political advocacy has been confirmed by the High Court. In *Aid/Watch Incorporated v Commissioner of Taxation*, the Court observed that '[p]olitical speech by charities enriches the political process by encouraging political debate, facilitating citizen participation and engagement and promoting political pluralism.'[8]

From a community legal centre perspective, the importance of advocacy has been recognised by the Productivity Commission. In its 2014 *Access to Justice Arrangements* Report, the Commission stated that '[f]rontline service delivery should be prioritised, *along with advocacy work where it efficiently and effectively solves systemic issues which would otherwise necessitate more extensive individualised service provision*" [emphasis added].[9]

The Productivity Commission further recommended that '[t]he Australian, State and Territory Governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.'[10]

PIAC therefore believes that the important role of advocacy by charities and not-for-profits in achieving their charitable purposes should be facilitated by government and the ACNC, rather than be subjected to increased reporting and policing.

PIAC notes with concern the 'singling out' of environmental DGRs, and the advocacy activities they undertake, in the Discussion Paper. This occurs in relation to the question of reporting (p6[29]), stating that the lack of certainty around the extent of permissible advocacy 'is a particular concern for environmental DGRs, which must have a principal purpose of protecting the environment.' It is also evident in the discussion of the *Parliamentary Inquiry into the Register of Environmental Organisations* from page 11 onwards (see question 12 and 13, below).

PIAC supports the ability of environmental charities and not-for-profits to engage in advocacy activities as a useful strategy to achieve their purposes, just like any other organisation across the sector. We also endorse the strong defence of this advocacy put forward by the EDOs of Australia in their submission to the House of Representatives *Inquiry into the Register of Environmental Organisations* in May 2015.[11]

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6 Australian Charities and Not-for-profits Commission, *Legal meaning of charity*, available at https://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Char_def/ACNC/Edu/Edu_Char_def.aspx (accessed 28 June 2017).

7 Ibid.

8 *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539.

9 Productivity Commission, *Access to Justice Arrangements: Inquiry Report*, September 2014, page 31.

10 Ibid, page 62.

11 EDOs of Australia, Submission No 403 to House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations*, 21 May 2015.

Question 5.

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

Based on our answer to question 4, PIAC does not believe that charities and not-for-profits should be required to provide additional information about their advocacy activities, through the Annual Information Statement or elsewhere. However, if the Government nevertheless decides to impose such a requirement on all registered charities, PIAC believes this should be provided to the ACNC, via the Annual Information Statement, rather than to another body (such as the Australian Taxation Office).

Question 6.

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

Based on our answer to question 4, PIAC does not believe that charities and not-for-profits should be required to provide additional information about their advocacy activities. The best way to avoid 'imposing significant additional reporting burden' in this area is not to add to the existing Annual Information Statement requirements.

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?

PIAC supports in principle the transfer of the administration of the four DGR Registers to the ATO. As outlined in the Discussion Paper, this would simplify the application process for charities and not-for-profits from across these respective areas (overseas aid, harm prevention, environmental organisations and cultural organisations). It would also contribute to greater harmonisation of registration procedures for all new charities and not-for-profits (with application to the ACNC in the first instance, followed by DGR consideration by the ATO).

However, PIAC is also aware of alternative proposals that both functions – the registration of charities, and the consideration of their eligibility for DGR status – could be undertaken by the one body, specifically the ACNC. This would further reduce the regulatory burden on the charities and not-for-profit sector, as well as strengthening the regulatory role of the ACNC as a 'one-stop-stop' for all relevant organisations. PIAC therefore suggests that this approach be considered by Treasury as part of the further development of proposals outlined in this Discussion Paper.

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?

PIAC supports in principle the removal of public fund requirements for charities, thereby allowing organisations to be endorsed in multiple DGR categories.

As outlined in the Discussion Paper, the requirement for a separate public fund to be created for each general category for organisations seeking DGR status in more than one category creates duplication, and unnecessary administrative burden. We also note the arguments that different terminology used by the ACNC and ATO (around 'responsible entities' and 'responsible persons') may cause confusion, and that the proposal would help to alleviate these concerns.

PIAC is not in a position to comment on whether regulatory compliance savings are likely to arise for charities who are also DGRs.

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?

In terms of rolling reviews, PIAC is not convinced that the case has been made for the introduction of this new review process. For example, should the requirement for all DGR charities to be registered with the ACNC be implemented (see discussion under question 1, above), it is possible that the ACNC's reporting and governance requirements, as well as its compliance and auditing functions (which can result in the deregistration of charities), may obviate the need for additional 'rolling reviews' of DGR-qualified organisations.

Even if the Government decides to introduce such reviews, PIAC would argue that, in the absence of evidence of widespread and deliberate inappropriate access to these tax concessions, the regulatory approach adopted should be 'minimalist' in nature, including:

- Reviews every ten years, rather than every five, and
- A presumption that DGR status will be retained unless there is clear evidence of ineligibility (to avoid funding uncertainty).

With respect to a requirement for DGRs to make annual certifications, PIAC does not support this proposal. It is unclear what value is added by this 'self-assessment'. Given the acknowledged complexity of application for and assessment of DGR eligibility, it also has the potential to expose the organisation, and its 'responsible persons', to serious sanctions for inadvertent errors (as noted on page 11 of the Discussion Paper: 'Penalties, under the tax legislation, could apply if an organisation certified it met the eligibility criteria and, through the review or otherwise, it was subsequently found not to be eligible for DGR endorsement').

If the requirement to make annual certifications is ultimately introduced, it should be accompanied by protections for people acting with good faith and due diligence when certifying their charity remains eligible.

Question 10.

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

PIAC does not express a view on who should be reviewed in the first instance, or on any criteria for determining this.

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?

As with the proposal for the introduction of 'rolling reviews' (see discussion under question 9, above), PIAC is not convinced that the case has been made for the introduction of a general sunset rule of no more than five years for specifically listed DGRs.

This question pre-supposes there are specifically listed DGRs who continue to enjoy this status but who no longer fall within the 'exceptional circumstances' that initially justified their listing. In the absence of evidence of this, PIAC does not support the introduction of a new administrative burden for organisations that have already satisfied the onerous process for specific listing.

However, if the Government decides to introduce an automatic review mechanism for these types of organisations, PIAC would argue that:

- The review period should be ten years, rather than five (consistent with our suggestion in response to question 9 in relation to rolling reviews), and
- The review should not automatically revoke the DGR status of specifically listed organisations, but instead be reported as a recommendation, through the Government to Parliament, with formal action then required to cause de-listing.

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?

PIAC strongly opposes any requirement that environmental organisations commit a specific proportion of their public fund (either 25 per cent or 50 per cent) to environmental remediation.

PIAC believes that, while assessment of the 'purpose' of a charity to determine whether it should enjoy DGR status is legitimate, government prescription of how the organisation should achieve that purpose is not.

Specifically, section 30.265 of the *Income Tax Assessment Act 1997* (Cth) states that, for an environmental organisation to be include in the Register of Environmental Organisations:

> (1) Its principal purpose must be:
> (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or
> (b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.

This definition makes it clear that this purpose can be achieved in multiple ways. As noted by the EDOs of Australia in their 2015 submission to the Tax White Paper Task Force:

> Examples of beneficial charitable activities to protect the environment include:
>
> - advocacy for law reform to address systemic environmental issues;
> - awareness-raising and community education;
> - promoting access to justice, including by way of legal representation;
> - third party (community) enforcement of environmental law breaches;
> - encouraging public participation in decision-making; and
> - advocating for enhanced protection of particular natural areas, such as a new national park or Aboriginal place.[12]

PIAC believes that government should be officially neutral about which of these strategies or activities an environmental organisation adopts, provided they are clearly linked to achieving its relevant, and legitimate, purpose. It is not for government to determine how best to achieve the goals of individual organisations.

The introduction of an 'activities-based' test would also dramatically increase the administrative burden experienced by environmental organisations. As noted in the dissenting report to the *Inquiry into the Register of Environmental Organisations*[13]:

> The weight of evidence rejects the premise … that there exists a dichotomy between advocacy and 'on ground' work. The evidence instead shows that it will increase red tape and treat environmental organisations differently to other not for profit organisations.
>
> Moving away from a purpose test to one based on activities creates red tape on both ends and acts as a brake on innovation through constraining the manner in which organisations can seek to achieve their objectives.

PIAC also notes that there is no evidence that government prescription of the types of activities that environmental organisations must undertake will achieve the best possible results for the environment.

Mandating that all environmental organisations spend either 25% of 50% of their budget on environmental remediation work also undermines the ability of donors to choose where to allocate their tax deductible gifts. Those who wish to support organisations who undertake this type of activity should be free to do so – in the same way that those who wish to donate to environmental bodies who instead concentrate on other, no less legitimate activities (such as advocacy, awareness-raising or community education), should equally be supported.

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12 EDOs of Australia, *Re:think Tax Discussion Paper – Chapter 7 – Not-for-Profit Sector submission*, 1 June 2015, available at http://www.edo.org.au/justice1 (accessed 3 July 2017).

13 House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations: Final Report*, 4 May 2016, 91, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Report (accessed 3 July 2017).

PIAC further notes with concern recent media reports that environmental organisations 'have been asked to break down their expenditure into the amounts spent on '"on ground environmental remediation", "campaign and advocacy", "research" and other administration.'[14] This new detailed reporting on expenditure, requested by the Department of the Environment and Energy, could be seen as a precursor to the imposition of the types of restrictions outlined in the Discussion Paper, including a requirement that a proportion of an environmental organisation's expenditure must be allocated towards 'on ground environmental remediation'.

Finally, PIAC opposes the introduction of an 'activities-based' test for environmental organisations because of the negative precedent such a test would set for other types of charities, with the possibility of additional governmental prescription of the types of strategies these organisations may adopt.

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?

PIAC supports the current regulatory powers of, and regulatory approach adopted by, the ACNC and therefore believes that requiring all DGRs to be ACNC registered (as proposed in question 1, above), would be sufficient to adequately oversee the governance standards of all charities and not-for-profits (and not just environmental DGRs).

PIAC notes that the ACNC already has significant enforcement powers (especially in relation to federally regulated entities), including:

- issuing warnings;
- issuing directions;
- making enforceable undertakings;
- seeking injunctions;
- suspending or removing responsible persons;
- disqualifying people from being responsible persons;
- cancelling a charity's registration; and
- applying administrative penalties.[15]

As noted in their *Regulatory Approach Statement*, the ACNC can:

> revoke the registration of an organisation that has been established as a charity merely to launder money or as a front for conducting serious criminal activity. Revocation may also be appropriate where the charity has significantly and persistently failed to comply with governance standards or reporting obligations under the ACNC Act… If a charity's registration is revoked, it would lose its

[14] Lenore Taylor, 'Government's letter to conservation groups has ominous implications', *The Guardian Australia* (online), 15 July 2017 https://www.theguardian.com/environment/2017/jul/15/governments-letter-to-conservation-groups-has-ominous-implications.

[15] Australian Charities and Not-for-profits Commission, *How we ensure charities meet their obligations*, available at https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/Regulatory_powers/ACNC/Regulatory/Reg_powers.aspx (accessed 4 July 2017).

> charitable status under Commonwealth law, including its access to Commonwealth tax concessions (including, where relevant, deductible gift recipient status)…[16]

These are, appropriately, serious sanctions for serious misconduct. However, PIAC also acknowledges and welcomes the ACNC's commitment to co-operatively managing non-compliance, and specifically that: 'We work collaboratively with charities to address concerns, including through education and advice. When charities do not meet their obligations, we take appropriate and proportionate action to help protect charities, their beneficiaries and the public.'[17]

PIAC therefore believes that the ACNC should continue to perform this role, not just in relation to environmental organisations, but across the charities and not-for-profit sector.

[16] Australian Charities and Not-for-profits Commission, *Regulatory Approach Statement*, page 10, available at https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx (accessed 4 July 2017).

[17] Ibid, page 2.