

3 December 2024

Not-for-profits Unit  
Treasury  
Langton Cres  
Parkes ACT 2600

Submitted by Email to: [charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Sir/Madam,

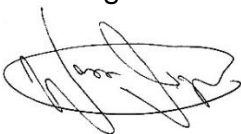
***Taxation Administration (Community Charity) Guidelines 2024 Exposure Draft***

Philanthropy Australia thanks the Treasury for the opportunity to provide feedback on the *Taxation Administration (Community Charity) Guidelines 2024 (Guidelines)* exposure draft.

This submission sets out Philanthropy Australia's comments on the exposure draft, including proposed changes for consideration.

Should the Treasury wish to discuss the matters raised in this submission further, please do not hesitate to contact our Executive Director, Policy and Sector Development, Krystian Seibert. ([kseibert@philanthropy.org.au](mailto:kseibert@philanthropy.org.au)).

Kind Regards



**Maree Sidey**  
Chief Executive Officer

## General Comments

The Guidelines are the final component necessary before a new deductible gift recipient (DGR) category for 'community charities' can commence.

Secured through the advocacy of Philanthropy Australia, Community Foundations Australia and our members and partners, this significant reform will make it easier for community foundations to receive funds, including from private ancillary funds, and also facilitate granting to organisations and groups without DGR status.

In doing so, it will provide an enhanced regulatory environment to support the growth of community philanthropy in Australia.

In addition, although less widely understood, the new DGR category will also provide an alternative way of accessing DGR status for other types of organisations, particularly those operating across multiple DGR categories and/or for whom the public ancillary fund structure is unsuitable. Such organisations must currently either operate multiple DGR endorsed entities, or seek to be specifically listed in the tax laws, which is a complicated and time-consuming process.

Overall, Philanthropy Australia supports the Guidelines and believes that they provide a workable framework that underpins the new DGR category. We do, however, believe that a number of changes to the exposure draft are necessary to simplify the Guidelines and address some practical issues.

These changes are specific and targeted, and they are feasible to action as part of promptly finalising the Guidelines following this consultation, to enable the commencement of the category as soon as possible.

Following the category's commencement, Philanthropy Australia also believes it is important to clarify the arrangements for how it will be administered, especially the decision-making process for making the necessary ministerial declarations for endorsement under the category.

The making of these declarations will, in effect, be subject to ministerial discretion, and it would be appropriate for a policy statement to be developed which sets out how the discretion will be exercised in a practical sense. This would provide transparency regarding the use of the discretion, helping to promote more certainty and consistency of outcomes.

The policy statement could include information about:

- The types of entities that are eligible to apply for a ministerial declaration, given that the scope of the DGR category potentially extends beyond community foundations;
- The process of applying for a ministerial declaration and the timeframes involved; and
- The factors that will be considered by a minister when deciding whether to declare an entity, including specific examples.

The policy statement should be accompanied by guidance about other aspects of the administration of the DGR category, developed by the Australian Taxation Office (ATO) with input from the ATO's Not-for-profit Stewardship Group and other relevant stakeholders.

Additional specific comments about the Guidelines are set out in the next section.

## Specific Comments

### Simplification of the Guidelines

Philanthropy Australia supports the need for proportionate and risk-based regulation for philanthropic entities. Given that such entities, and their donors, can benefit from various tax concessions, regulation helps to ensure that such entities fulfil their philanthropic purposes to benefit the community. In doing so, it contributes to supporting public trust and confidence in these entities, contributing to fostering a culture of giving in Australia.

However, as the Productivity Commission notes in the final report of its philanthropy inquiry, *Future Foundations for Giving*, there are trade-offs involved when making regulations and the benefits of regulation must be balanced with the costs of regulation, in the form of compliance burdens imposed.

In this regard, it is noted that many of the entities that will be endorsed under this DGR category will be relatively small, and in many cases primarily supported by part-time staff and/or volunteers. Regulatory complexity can have a disproportionate impact in such a context, and therefore it is of added importance to ensure that any regulatory obligations imposed by the Guidelines are proportionate and risk-based.

Given that entities will have to be registered with the Australian Charities and Not-for-profits Commission (ACNC), and subject to the various requirements of the ACNC regulatory framework, Philanthropy Australia believes that the following changes should be considered to minimise unnecessary duplication and overlap between that framework and what is proposed in the Guidelines.

- *Guideline 11 (Trustees and Corporate Directors)* – This appears to impose duties that duplicate those in ACNC Governance Standard 5 (Duties of Responsible People). One rationale for this duplication may be that the ACNC Governance Standards only apply to registered charities, rather than the individual trustees and directors of those charities, as a result of constitutional limitations on the powers of the Federal Parliament. However, if this is the case, these same limitations would likely constrain the ability of the Guidelines to apply duties to individual trustees and directors. Consideration should be given to removing this guideline, or alternatively, replacing it with a reference to the requirements of the ACNC Governance Standards.
- *Guidelines 15, 16 and 17 (Accounts, Financial Reports and Audits)* – These appear to duplicate ACNC reporting requirements, at least to an extent, although it may be argued that these actually impose additional requirements, given that the ACNC reporting requirements do not require financial reports to be prepared consistent with the accounting standards for registered charities with revenue of under \$500,000 per year. However, if this is the case, then it is questioned why such additional requirements are necessary, and why the requirements under the ACNC regulatory framework do not provide sufficient transparency and accountability. Consideration should be given to removing this guideline, or alternatively, replacing it with a reference to the ACNC reporting requirements.

## **Requirement to Operate Only in Australia**

*Guideline 10 (Operated Only in Australia)* would, in effect, mean that an entity endorsed under this category could only send funds outside of Australia by making a distribution to another DGR that operates outside of Australia.

Philanthropy Australia does not support the inclusion of this requirement and submits that it should be removed.

In the case of public and private ancillary funds, which can only make distributions to DGR entities, such a requirement makes sense.

However, this new DGR category specifically enables entities endorsed under the category to provide 'money to entities that are not deductible gift recipients, where expenditure of that money by the other entity will further a purpose of the community charity' (Note to *Guideline 13 (4)(a)*). It is unclear why this should be limited to providing money to such entities within Australia, and not those outside of Australia.

For an example of the impact of this restriction as currently drafted, Philanthropy Australia draws the Treasury's attention to the submission by the Intrepid Foundation.

Given that entities endorsed under the category will have to be registered with the ACNC, they will be subject to the ACNC External Conduct Standards, providing various safeguards over how funds are distributed outside of Australia, including a requirement to keep appropriate records. This would be sufficient to ensure that funds are only used for proper purposes, and in accordance with the Guidelines.

If necessary, the guideline can be redrafted to specify that funds distributed overseas must only be used for proper purposes and consistent with the Guidelines, and that the ACNC External Conduct Standards apply to any activities, including distribution of funds, outside of Australia.

## **Commencement of Minimum Annual Distribution Requirement**

*Sub-section 3 of Guideline 14 (Minimum Annual Distribution)* provides that the minimum annual distribution requirement only commences in the financial year after an entity is established.

This is considerably shorter than the requirement for public ancillary funds, which provide that no distribution is required during the financial year in which the public ancillary fund is established or during the four financial years following the financial year in which the fund is established.

Philanthropy Australia believes there would be benefit in retaining the extended period that applies to public ancillary funds, given this provides a window of time for an entity to fundraise and build up its assets to a level that can support longer-term sustainability.

## **Allowing Portability of Sub-funds**

Sub-funds are one way for donors to engage in a structured approach to philanthropy. They can be thought of as a form of 'giving account' sitting within a larger public foundation, which is often a public ancillary fund. They are a common offering of many community foundations, as well as other organisations seeking to facilitate and grow philanthropy in Australia.

As currently drafted, *Guideline 25 (Portability)* would mean that an entity endorsed under the DGR category would be unable to transfer a sub-fund (or a giving account) to another entity. Also, it would appear that a sub-fund would be unable to be transferred to a public ancillary fund, nor to a private ancillary fund.

This is due to the requirement to transfer all the first entity's net assets to the second entity, which is a significant departure compared with the current arrangements for public ancillary funds under the *Taxation Administration (Public Ancillary Fund) Guidelines 2022*.

The effect of the restriction would be to limit donor choice and flexibility, inhibiting the efficient management and allocation of philanthropic assets. It could also hinder the ability to 'incubate' new and emerging community foundations.

Three practical examples of the potential impact of this restriction are below.

- A donor may establish a sub-fund in a community foundation endorsed under this category. Then as their philanthropic activities evolve, they may wish to establish a private ancillary fund and request that the assets held against the sub-fund are transferred to the new private ancillary fund. Based on the current drafting of the Guidelines, this would not be permitted.
- Alternatively, a donor may establish a sub-fund in a community foundation endorsed under this category. At some point they may believe that another entity is better suited to hold and manage the sub-fund, and request that the assets held against the sub-fund are transferred to this other entity. This could arise for various reasons, including the donor moving to a different community, and wishing to shift the focus of their philanthropic activities to that community. Based on the current drafting of the Guidelines, this would not be permitted.
- A community foundation endorsed under this category may have a role 'incubating' a new community foundation, with the emerging foundation using a sub-fund to fundraise and build up its assets. At some point, the emerging foundation may wish to establish a stand-alone entity and request that the assets held against the sub-fund are transferred to the new entity. Based on the current drafting of the Guidelines, this would not be permitted.

Philanthropy Australia submits that the portability arrangements should be re-drafted to allow transfers of sub-funds to other entities, including other community charities or ancillary funds.

In addition, although the legislative provisions for the DGR category preclude making a community charity making distributions to another community charity, consideration should be given to whether the portability provisions can be re-drafted to provide scope for transfers of assets between community charities for certain other specific and limited purposes.

For example, in the context of a natural disaster, some community foundations may wish to support disaster relief activities in another locality, by making contributions to a community foundation operating in that locality. Such transfers would not be permitted based on how the Guidelines are currently drafted.

### **Other Matters**

Philanthropy Australia also draws the attention of the Treasury to the other matters raised in the submissions of Community Foundations Australia and Herbert Smith Freehills.