



Law Council
OF AUSTRALIA

Legal Practice Section

13 February 2020

The Manager, Indirect Taxes and Not-for-Profit Unit
Individuals and Indirect Tax Division
Treasury
Langton Crescent
PARKES ACT 2600

By email: DGR@treasury.gov.au

Dear Sir/Madam

Exposure draft of Treasury Laws Amendment (2020 Measures No. 2) Bill 2020

Exposure draft

1. Thank you for the opportunity to respond to the exposure draft of *Treasury Laws Amendment (2020 Measures No. 2) Bill 2020 (Bill)*. The Bill seeks to amend Division 30 of the *Income Tax Assessment Act 1997 (Cth) (ITAA)* to introduce a new general category of deductible gift recipient (**DGR**) for 'community sheds'.
2. The Law Council's Charities & Not for Profits Committee (**the Committee**) has a number of recommendations in relation to the definition of community shed and the content of the accompanying explanatory materials.
3. In relation to the definition of community shed, there are several improvements we recommend as outlined in the marked-up version of the Bill as attached.

Registered charity

4. A number of local councils operate community sheds and so the Committee recommends that the special conditions in the second column of the table in subsection 30-20(1) of the ITAA be amended to allow for a local governing body to be endorsed as a DGR for the operation of an institution of a community shed.

Public institution

5. As currently drafted, the proposed insertion in section 30-20 and the definition do not actually require the community shed to be a public institution. The Committee's proposed drafting amendments rectify this issue.
6. Further, it is recommended that paragraph 1.10 of the explanatory materials be amended by deleting the last phrase 'and not be carried on for private profit or gain' as this does not relate to the requirement for a public institution but is relevant for the charity status.

Purposes and activities

7. The proposed definition requires the institution to meet both:
 - (i) a purpose test – there to be the dominant purposes of both advancing mental health **and** preventing or relieving social isolation; and
 - (ii) an activity test – primarily:
 - providing a physical location;
 - supporting individuals;
 - undertaking activities; and
 - in the company of others.

Purposes

8. The Committee recommends that there should be a **single** dominant purpose which is the purpose of preventing or relieving social isolation.
9. The Committee's understanding of community sheds is that the dominant purpose is to prevent or relieve social isolation and the prevention or relief of social isolation has the consequence of advancing mental health. There is research which shows the detrimental effect of social isolation on people's mental health. It is the act of getting people together to relieve or prevent the social isolation which advances their mental health. Advancing mental health is not a separate purpose.
10. This purpose could be expressed as 'to advance mental health **by** preventing or relieving social isolation', however the Committee does not recommend this as the 'preventing or relieving social isolation' then arguably becomes an activity rather than a purpose.
11. As expressed, the current definition arguably requires the purpose of 'advancing mental health' to be separate and different to the purpose of 'preventing and relieving social isolation' rather than the natural consequence of preventing or relieving social isolation.
12. It is confusing and difficult to have **two** purposes which must be dominant. It is not clear whether you need to have each of these purposes being equal e.g. 50/50, or whether together they just need to be dominant compared to other purposes e.g. it can be 5% advancing mental health and 60% preventing or relieving social isolation.
13. The explanatory materials require an entity to be able to demonstrate both how it supports the purpose of advancing mental health as well as being able to demonstrate how it supports the purpose of preventing or relieving social isolation. The example suggests an activity test for advancing mental health as requiring specific information or resources on mental health. There is no recognition or acceptance in the explanatory materials that preventing or relieving social isolation advances the mental health of the participants.
14. Community sheds with activities specific to advancing mental health are already eligible to be a health promotion charity. For this category of community shed there should be no requirement to have separate activities specifically related to advancing

mental health. A shed should be able to demonstrate via research that the activity conducted at the shed and the manner in which people are targeted and included, has the effect of preventing and relieving social isolation (and improving mental health as a result).

15. The explanatory materials suggest a shed would give effect to the purpose of preventing or relieving social isolation by being open and welcoming to all members in the community. There are a number of recreational and other groups which are open to all members in the community but without a purpose of preventing or relieving social isolation. To demonstrate a purpose of preventing or relieving social isolation, a shed needs to be able to show more than just being open to all in the community (unless all in the community are at risk of social isolation). A shed should identify and target particular people or categories of people in the community experiencing or at risk of social isolation.
16. It may be helpful if the explanatory materials gave some guidance by what is meant by 'social isolation'.

Activities

17. The activity test is for a shed to, primarily:
 - provide a physical location;
 - support individuals;
 - undertake activities; and
 - in the company of others.
18. The Committee queries whether there is a different meaning by the use of '*dominant*' in the purpose test and '*primarily*' in the activity test. The health promotion charity category of DGR uses the expression '*principal activity is to promote the prevention or the control...*' is there a different meaning by the use of '*primarily*' in the context of the community shed? It will be helpful if there is an explanation or guidance in the explanatory materials, including what is meant by the term 'primarily'.
19. The explanatory materials explain what is meant by 'providing a physical location' and to some extent 'supporting individuals', however does not expand on the meaning of 'undertaking activities' which we recommend should be included to be clear that this expression is to be interpreted widely.
20. The Committee notes paragraph 1.20 of the explanatory materials refers to '*support or encouragement*' in the second line, and then to '*support and encourage*' on the third line. This should be clarified.
21. In relation to the requirement to 'undertake activities and work on projects' (as currently stated in the draft definition, though we recommend this is amended to just refer to 'undertake activities'), we note some confusion:
 - Para 1.14 refers to '*work on projects or undertake other activities*';
 - Para 1.18 refers to '*pursuing activities or undertaking projects*'; and
 - Para 1.20 refers to '*work on activities or projects*'.

The FAQs have no explanatory information about the activity aspect of the definition.

22. All the references in the explanatory materials present this aspect of the definition as **either** undertake activities **or** work on projects which is why the Committee recommends simplifying the definition to undertaking activities, as working on projects is a sub-set of undertaking activities.
23. The Committee suggests that the FAQs the section on how the new shed category differs from a health promotion charity is incorrect. The eligibility criteria for a health promotion charity is broader, not narrower, than the community shed category as it encompasses charities with the principal activity of preventing or control of any disease in human beings, including both physical and mental diseases. The criteria for the new shed category is more limited in that it sets out both a purpose requirement and an activity requirement and the participants are limited to those suffering or at risk of social isolation within permitted restrictions.

Restrictions

24. There are a number of restrictions a community shed may wish to have in relation to ensuring its target group of socially isolated people feel comfortable or able to attend. This may include restrictions other than gender or being an indigenous person, such as age (to target people above a certain age), disability, language, newly arrived or retired.
25. A community shed may also wish to exclude minors from memberships due to significant child safety compliance requirements.
26. To require no criteria for membership seems contrary to the requirement to fulfil a purpose of preventing or relieving social isolation.
27. The absence of restrictions are not a defining aspect of a community shed. The Committee therefore recommends deletion of this part of the definition.
28. Rather than refer to a shed welcoming people across the community as a means of demonstrating the purpose of preventing or relieving social isolation, this purpose is better explained by requiring identification and focus or targeting of those experiencing or at risk of social isolation. It is then consistent with that purpose to have restrictions on participants if otherwise those targeted participants will not attend.
29. Charity law permits limitation on who can benefit where it is consistent with the charitable purpose. In this regard, Paragraph 141 of Taxation Ruling 2011/4 states:

Limitations to groups with particular characteristics within a community – residents of a particular geographic area, the adherents of a particular religion, those following a particular calling or profession, or sufferers of a particular disability or condition – can be consistent with the public requirement, unless the limits are incompatible with the nature of the benefit.

30. If anything must be stated, the definition could be redrafted to state that any restrictions on participation must be consistent with the dominant purpose or preventing or relieving social isolation.
31. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair of Committee, Jennifer Batrouney QC on jennifer_batrouney@vicbar.com.au.

Yours sincerely

Margery Nicoll.

Margery Nicoll
Acting Chief Executive Officer