



Anglican Church Diocese of Sydney

Ms Joanna Austin
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By email: joanna.austin@acnc.gov.au.

Dear Ms Austin

Feedback on Commissioner's Interpretation Statements on PBIs.

1. We thank you for this opportunity to provide feedback on the Commissioner's Interpretation Statements on PBIs. We understand that the ACNC is considering whether to review and refresh the Commissioner's Interpretation Statements (CIS) on PBIs, and that this review is based on the ACNC legislation in its current form, and therefore any proposal that requires legislative amendments will be out of scope for this review.
2. This submission is directed to the issue of PBIs that also have the charitable purpose of advancing religion, and will argue that the CIS should be redrafted to allow the ACNC to revert to its pre-2016 practice of allowing dual registration as a PBI and as a charity with the purposes of advancing religion.
3. Our proposal below does not require any legislative reform, because there is already sufficient latitude in under subsection 25-5(4) of the ACNC Act to allow an entity to be registered with more than one subtype. As will be demonstrated below, this was the practice of the ACNC prior to 2016, under the current form of the legislation. It is the current construction that disregards the clear statement in the legislation that permits dual registration as a PBI and as a charity with the purposes of advancing religion (subsection 25-5(4)).
4. This submission is on behalf of the Anglican Church Diocese of Sydney. The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917 (NSW)* and the *Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)*. These bodies, together with the diocesan network of 271 parishes, are accountable to the members of the Church through the Synod of the Diocese. The Diocese, through its various component bodies and through its congregational life, is a provider of a wide

range of programs including in social welfare, education, health and age care, youth work and for the homeless. In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions such as Anglican Community Services (t/as Anglicare Sydney), as well as other charitable institutions including Anglican Youthworks and 40 Diocesan schools. The Diocese is comprised of over 800 ACNC registered entities. The corporate trustee, the Anglican Church Property Trust Diocese of Sydney, is the trustee of 359 registered entities. Every one of the 271 parishes has at least one registered entity, and quite often more than one. Organisations and schools of the Diocese have approximately 88 further registrations.

Religious-purpose PBIs

5. The vast majority of the Diocese’s ACNC registered entities are not PBIs. However, there are a small number of entities which are “religious-purpose PBIs” – that is, entities with a dual purpose – the advancement of religion **through** works of public benevolence. The current form of the CIS is problematic for such entities, by forcing a choice between PBI status and being an “advancing religion” charity.
6. Until 2016, the ACNC allowed religious-purpose PBIs to be registered with a dual registration. This seems to have ceased when the CIS was issued in 2016. The number of registrations of “religious purpose PBIs” in the three years either side of the issuance of this statement are shown in the following table.¹

2013	2014	2015	2016	2017	2018	2019
16	11	6	5	0	1	0

7. The single registration recorded for 2018 is the exception that proves the rule. This entity was registered with the subtype of “advancing religion” at inception (23 March 2018). However, this subtype was relinquished on 14 Mar 2019, and its PBI status commenced on 15 March 2019.²
8. It also appears that the ACNC is taking steps to reduce the number of “religious-purpose PBIs” (i.e., dual registration as a PBI and with the charitable subtype of “advancing religion”) that predate the issuance of the Interpretation Statement in 2016.
 - As at 25 February 2018, there were 266 religious-purpose PBIs.
 - As at 19 January 2020, there were 195 religious-purpose PBIs.
 - As at 8 August 2020, there were only 170 religious-purpose PBIs.
9. We have been advised that the current practice of the ACNC is to require a charity conducted to further the purposes of a particular religion through the relief of poverty or distress (i.e., a religious-purpose PBI) to choose whether that entity is registered as a PBI or registered with the charitable subtype of “advancing religion”.

¹ Based on ACNC Register of Australian charities, <https://data.gov.au/data/dataset/acnc-register>.

² <https://www.acnc.gov.au/charity/30b86059d9b8a9d615ac6408d59aaffb#history>

Because of the fundraising implications of PBI status, many faith-based charities are forced to choose the PBI option, and forego registration as a religious charity.

10. The implication of this are best illustrated through four real-life examples. Anglicare Sydney is an example of a “grandfathered entity” with dual-purpose (in fact, multi-purpose) registration, whereas the other three examples from Anglican parishes in Sydney are unable to include “advancing religion” as a charitable purpose.
11. **Anglican Community Services (t/as Anglicare Sydney)** (ABN 39922848563) is a key social welfare arm of the Anglican Church Diocese of Sydney. Its objects are as follows.

The Body Corporate is established as a public benevolent institution to further the work of the Anglican Church of Australia, Diocese of Sydney by promoting and proclaiming the gospel of the Lord Jesus Christ while undertaking works of public benevolence that reflect the love of God as shown in Christ including –

- (a) the housing, accommodation, maintenance and welfare of older people;
- (b) welfare and support services for the vulnerable, the marginalised, the disabled and those in necessitous circumstances;

Anglicare Sydney is incorporated under the *Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)* and governed by the Anglican Community Services Constitution Ordinance 1961 and six members of its governing board are elected by the Synod of the Diocese, three appointed by the Archbishop of Sydney and up to two appointed by the board itself.

Anglicare Sydney is registered as a PBI, and has 4 charitable subtypes:

- Advancing religion
- Advancing health
- Advancing social or public welfare
- Purposes beneficial to the general public

12. **St John's Anglican Benevolent Society** (ABN 35746045801) was established by, and is operated by, St John's Anglican Church, Glebe. The objects of the Society are set out in its Constitution.

St John's Anglican Benevolent Society (the Society) has been established by the parish council of St John's Anglican Parish, Glebe (the Parish) to enable the Society to attract tax deductible gifts and donations for benevolent activities which are directed towards the relief of poverty and misfortune including sickness, suffering, distress, misfortune, disability or helplessness”.

The Constitution requires that the board of management be appointed by the parish council of St John's, Glebe. The church understands the work of the Society to be the expression of its Christian mission to serve the poor in their local community.

St John's Anglican Benevolent Society is registered as a PBI (only).

13. **St John's Community Services Limited** (ABN 40 107 907 335), also known as "Rough Edges" was established to further social welfare work of St John's Anglican Church, Darlinghurst. The Rector (senior minister) of the church is the chair of the board, and all members of company must be members of the church. The current chair, Rev. Martin Robinson, was the Chair of Anglicare Sydney from 1993-2005. The purpose of the entity is "to make provision for the direct intervention and relief of poverty, homelessness, suffering, distress, misfortune, or helplessness of persons in the Darlinghurst community and surrounding suburbs."

St John's Community Services Limited has dual registration with the ACNC – as a PBI, and with the charitable purpose of "advancing social or public welfare". Since more than two thirds of its funding comes from donations to a tax-deductible DGR fund, its PBI status is crucial. The Constitution of St John's Community Services Limited makes no reference to the Christian character of its benevolent purpose, in order not to jeopardise its DGR status.

14. **St Matthews Foundation Limited as the Operator of a PBI** (ABN 42255903152) is a sub-entity of St Matthews Foundation Limited (ABN 58142976814), which was established by, and is operated by, St Matthew's Anglican Church, Manly. The object of the foundation is set out in its constitution.

The Object of the Company is to support ministries of the Church, including by (but not limited to):

- a) operating a Public Benevolent Institution that is aimed at relieving poverty or distress of people in need through soup kitchen, chaplaincy, counselling or any other means directly or in collaboration with the Church;
- b) operating a public fund for the purposes of providing religious instruction in government schools in Australia;
- c) acting as trustee and performing and discharging the duties and functions incidental thereto where this is incidental or conducive to the attainment of the Object; and
- d) doing such other things as are incidental or conducive to the attainment of the Object.

St Matthew's Foundation Ltd is registered with the subtype of "Advancing religion".

The object of the PBI sub-entity is set out in its Constitution.

The object of the Welfare Fund is as follows:

- a) to solicit and receive Gifts and Deductible Contributions from the public for use exclusively to support the Public Benevolent Institution (PBI Purposes); and
- b) to hold and invest Gifts and Deductible Contributions and apply moneys from the Welfare Fund for such PBI Purposes as are determined by the Board.

The PBI sub-entity is registered as a PBI (only).

15. In our submission to the ACNC Legislation Review, we demonstrated that a significant number of faith-based charities are nonetheless **not** registered with the charitable purpose of advancing religion. According to the ACNC’s Annual Report for 2016, 32.0% of all charities had the charitable purpose of advancing religion (“Religious Purpose Charities”), and 30.8% of charities specified “religious activities” as their “Main Activity” for the purposes of the ACNC Register (“Religious Activity Charities”).

However, our analysis in that submission demonstrated that a further 20% or so of all charities were “faith-based” charities (such as St John's Anglican Benevolent Society and St Matthew’s Foundation Ltd as the Operator of a PBI), but this was not reflected in their ACNC registration. We estimated that 51.1% of all charities were faith-based.³

16. One reason (though not the only reason) for this under-registration of faith-based charities is the Commissioner’s 2016 Interpretation Statement on PBIs.

Commissioner’s Interpretation Statement on Public Benevolent Institutions.

17. The Commissioner’s Statement provides the following principles:

- A PBI must have benevolent relief as its main purpose, and that relief must be specifically targeted at people in need and provided to relieve the needs of those people (5.1.2)
- The terms “main”, “predominant” or “dominant” can be used interchangeably when referring to the purposes or objects of an organisation (5.5.1)
- The main purpose of a PBI must be to provide relief to people in need. If an entity has other purposes that are not benevolent, it will be ineligible to be a PBI unless those purposes are ancillary or incidental to the main benevolent purpose (5.5.2)
- An entity’s motives are not directly relevant to determining its main purposes. For example, if an entity’s main purpose is advancing religion it will not be eligible to be registered as a PBI. However if the entity is motivated by religious faith and its main purpose is benevolent, it may still be eligible (5.5.3)

18. The CIS distinguishes between a “religious purpose” and a “religious motive”, where a religious “motive” is not relevant to charitable purpose. A faith-based charity can still be eligible for PBI status if their religious objects are merely a “motive” and not a purpose.

19. This seems to have been how most PBIs have understood eligibility for registration – of the 10,711 PBIs currently registered, only 170 are also registered with the charitable purpose of “advancing religion”. This is notwithstanding the fact that many of the largest PBIs in Australia are faith-based (such as St Vincent's Health Australia Ltd,

³ <https://treasury.gov.au/sites/default/files/2019-03/ACDS-310865.pdf>

Mercy Hospitals Victoria Limited, BaptistCare NSW & ACT, St Vincent's Private Hospitals Ltd, Catholic Healthcare Limited, Ozcare and Mission Australia).

20. The problem stems from the fact that the Commissioner's Statement (and TR 2003/5, which the Commissioner's Statement replaced) address the situation where a religious purpose is in **conflict** with the benevolent purpose.⁴ The statement does not give sufficient guidance as to the situation where the religious purpose is **concurrent, coordinate and concomitant** with the benevolent purpose.
21. The CIS is at odds with some case law. One example is the decision of the Board of Review in the Hobart City Mission Case; Case 101 (1945) 12 CTBR 823 (which is cited – selectively – in TR 2003/5). In that case the Board of Review examined the relationship between the “religious” and “relief” work of Hobart City Mission and held: “Ostensibly and perhaps primarily its purpose may be religious, but the facts are opposed to the view that this is its principle purpose. After fully considering the actual work (as distinct from the expressed objects) of the Mission, we have no doubt that in the minds of the public the relief activities are of greater importance than the religious”. The board continued: “Even if we were of opinion that both phases of the Mission's work – the religious and the material – were of equal importance and called for an equal division of the time of the two officials, we think it would be open to us to find in favour of the taxpayer's claim”.⁵
22. We submit that the Christian purpose of good works is indeed a “religious purpose” for the purposes of charity law and should not be miscategorised as merely a “religious motive”, as the CIS seeks to do.
23. PBIs arising from Christian faith are based on the model of Jesus Christ, who came to minister to the needs of the poor and oppressed. Jesus declared that he had come to “preach good news to the poor” and “sent to proclaim freedom for the prisoners and recovery of sight for the blind, to release the oppressed...” (Luke 4:18). Jesus demonstrated this in his ministry – he had compassion on the hungry and fed them, he healed the sick and comforted those in distress. A Christian is a follower of Jesus Christ, and consequently those who model themselves on Jesus will necessarily share his priority to minister to those in need. A key teaching in this regard is the parable Jesus told in Matthew 25.

³⁴ "Then the King will say to those on his right, 'Come, you who are blessed by my Father; take your inheritance, the kingdom prepared for you since the creation of the world. ³⁵ For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you

⁴ TR 2003/5 - para 154. Religious organisations can be public benevolent institutions only where their primary purpose and predominant activity is the direct relieving of poverty, sickness, suffering, distress, misfortune and helplessness. An example was the Hobart City Mission: see Case 101 (1945) 12 CTBR 823. If the benevolent activities are subsidiary to, or coordinate with, the religious purposes they will not qualify (citing Case T13, www.ato.gov.au/law/view/document?DOCID=%22JUD%2F86ATC188%2F0001%22)

⁵ See also *O'Farrell v. Council of the Municipality of Bathurst* (1923) 40 WN (NSW) 78.

invited me in,³⁶ I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.'³⁷ "Then the righteous will answer him, 'Lord, when did we see you hungry and feed you, or thirsty and give you something to drink?'³⁸ When did we see you a stranger and invite you in, or needing clothes and clothe you?'³⁹ When did we see you sick or in prison and go to visit you?'⁴⁰ "The King will reply, 'I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.' (Matt 25:34-40, NIV translation).

24. In response to this teaching from Jesus, Christians have from the earliest times responded to human need with love and compassion, which was not something distinct from their religious practice, but a practical expression of their "religion".

Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress, and to keep oneself from being polluted by the world. (James 1:27)

25. The outworking of this, historically, has been many, many Christian charities of a public benevolent character, in which the purpose of the charity is both religious and benevolent concurrently. Such an organisation might have a statement of objects along the lines of the following:

The purpose of the entity is to demonstrate the love of Christ for all people by means of the relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness of persons in Australia.

26. Such an entity could be described as a "Christian PBI". It is a *public* benevolent institution, because the benevolence is for "all people" and not limited to members of a particular religion. But it is a "Christian" PBI, because the benevolence is distinctly and irreducibly Christian in character. Christians believe that God has a special concern for the vulnerable; they believe that all people are made in God's image and loved by him; they believe that in serving the poor they are acting on Christ's behalf; they believe that in serving the poor they are serving Christ himself; and so on. These beliefs are reflected both in how acts of benevolence are performed, and who performs them. That is, there are distinctively "Christian" ways to care for the destitute, which are not identical to Muslim ways or Jewish ways or secular ways.

As mentioned at the outset, the law expressly states that an entity that is registered as a PBI can be registered under another class. In fact, it will almost certainly be required. This is because a PBI (and a Health Promotion Charity) is an 'institution'. The inclusion of PBIs (and HPCs) in the table in section 25-5(5) creates confusion, and is a category error, as neither is itself a purpose. They are particular types of institutions developed for the purpose of taxation laws.

PBIs and HPCs correspond to other charitable purposes listed under section 12 of the *Charities Act 2013* (Cth), such as the subtype of "advancing health", "advancing education", "advancing social or public welfare" and (at least in the case of Christian

PBIs as described above) “advancing religion”. This is almost certainly why the note to Subsection 25-5(4) states “An entity could be registered as an entity with a purpose of advancing social or public welfare, and also be registered as a public benevolent institution.”

Of the 10,711 entities registered as a PBI, 73% are also registered with one or more charitable purposes. The following table shows the number of PBIs also registered with that charitable purpose.⁶

Preventing or Relieving Suffering of Animals	16
Advancing Culture	489
Advancing Education	812
Advancing Health	1498
Promote or Oppose a change to law/policy/practice	130
Advancing Natural Environment	102
Promoting or Protecting Human Rights	377
Purposes Beneficial to the General Public	1225
Promoting Reconciliation, Mutual Respect and Tolerance	392
Advancing Religion	170
Advancing Social or Public Welfare	5074
Advancing Security or safety of Australia	312

27. However, notwithstanding a concurrent religious and benevolent purpose, this is not how many Christian PBIs are registered with the ACNC. Christian organisations have had to obscure their religious “purpose” to ensure that they qualify for PBI status (because of the fund-raising implications). This may be because of the wording of CIS 5.5.2 “If an entity has other purposes that are not benevolent, it will be ineligible to be a PBI”.
28. One way this is done is by re-categorising an organisation’s purpose into “mission” and “objects”. The following two tables compare two similar organisations – Mission Australia and World Vision.

Mission Australia			
Mission and Vision: Inspired by the person and work of Jesus Christ, the Mission exists to meet human need and spread the knowledge of the love of God, with a vision to see a fairer Australia by enabling people in need find pathways to a better life.			
Objects: The Mission has, as its dominant purpose, to make provision for the direct relief of poverty, sickness, suffering, distress, misfortune, disability or helplessness of persons in Australia.			
ACNC Registration	✓PBI	✓Advancing social or public welfare	✗ Advancing Religion

⁶ Some PBIs have multiple purposes. There are only 2,892 PBIs (23%) that do not have another charitable purpose.

World Vision			
<p>Mission Statement: “World Vision” is an international partnership of Christians, described in the document entitled “Covenant of Partnership” of which the Company is a part, whose mission is to follow our Lord and Saviour Jesus Christ in working with the poor and oppressed to promote human transformations, seek justice and bear witness to the good news of the Kingdom of God.</p>			
<p>Objects: The purpose for which the Company is established is to carry out charitable work consistent with being a Christian, humanitarian organisation and, in particular, consistent with the Mission Statement, Core Values, Statement of Faith and Covenant of Partnership.</p>			
ACNC Registration	✓PBI	✓Advancing social or public welfare	✓ Advancing Religion

It is anomalous that World Vision is a religious-purpose charity, but Mission Australia is not. It is anomalous that a new entity with an objects statement like World Vision cannot be registered with the charitable purpose of advancing religion.

Implications

29. The establishment of the ACNC in 2012 has led to a significant change in approach to the definition of a “religious institution” in federal legislation. In 2012, section 136(1) of the Fringe Benefits Tax Assessment Act 1986 (FBTAA) was amended to define a “registered religious institution” as an institution that is a charity “registered under the ACNC Act as the subtype of entity mentioned in column 2 of item 4 of the table in subsection 25-5(5) of that Act.” The FBTAA definition is referenced in the Financial Transaction Reports Act 1988 and Insurance Act 1973. There is an identical definition in the Social Security Act 1991. A New Tax System (Goods and Services Tax) Act 1999 defines an “ACNC registered religious institution” in identical terms to the FBTAA and the Social Security Act.
30. This means, for example, that it is critical for Anglicare Sydney to continue to be able to hold dual registration as a PBI and as an “advancing religion” charity, in order for it to be able to qualify for FBT exemptions for “religious practitioners” for the more than 70 chaplains it employs.
31. The term “religious institution” is also used, but not defined, in other legislation that pre-dates the ACNC Act. It is likely that newer legislation will use ACNC registration with the charitable purpose of advancing religion as a determinant of whether a body is a religious institution, or otherwise make use of ACNC categories.
32. For example, Clause 11(b) of the Second Exposure Draft of the Religious Discrimination Bill 2019 creates a special category for “faith-based PBIs” – that is, an ACNC registered PBI that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. We note the fundamental tension, not to say inconsistency, between this definition and the practice of the ACNC – the first creates a special regime for faith-based PBIs, and the second does not permit such entities to exist.

33. A second, problematic example is in clause 22K of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*, where the definition of a “religious ethos organisation” includes “a charity registered with the Australian Charities and Not-for-profits Commission under the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”.
34. Based on this definition, St John's Anglican Benevolent Society (see paragraph 12) and St John's Community Services Limited (see paragraph 13) would both fail to qualify as a religious ethos organisation. The implication would be that their Constitutions, which require members of the board to be members of the church, would be unlawful according to the proposed anti-discrimination provisions in the Bill.
35. As the ACNC approach to an “advancing religion” charity becomes used widely in other legislation, it is increasingly important that all religious-purpose charities be permitted to register as such. Faith-based charities should not be forced to obscure their Christian benevolent purposes in order to qualify for recognition as a PBI, as is currently the case. So doing will inevitably lead to “mission drift”, because Christian PBIs will not be able to preference the employment of Christian staff who support the religious ethos of the entity.
36. We urge the Commissioner to issue a revised CIS that gives full effect to the stated intention of subsection 25-5(4) of the ACNC Act; and clarifies that it is permissible for a religious purpose which is benevolent to be registered concurrently with PBI status.



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