



Anglican Church Diocese of Sydney

22 January 2024

Submission to the Productivity Commission Inquiry into Philanthropy

1. This submission is made on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 267 parishes and 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 include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.
2. We welcome the opportunity to make a submission to the Productivity Commission Inquiry into Philanthropy. Our contact details are
Bishop Michael Stead
Chair, Religious Freedom Reference Group
Anglican Church Offices
PO Box Q190,
QVB Post Office, NSW 1230
Phone: (02) 9265 1598
mstead@sydney.anglican.asn.au
3. Our submission is ordered according to the following headings:

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Executive Summary

4. The purpose of this Inquiry, as defined by the Terms of Reference, is to understand philanthropic giving and its drivers, with a view to identifying opportunities and obstacles to increasing such giving. The Government hopes to double philanthropic giving by 2030. The Draft Report’s recommendations are unlikely to achieve this aim, because they miss significant opportunities to address barriers to giving and harness opportunities to grow giving further in relation to faith-based philanthropy. There is a strong positive correlation between faith and philanthropy, but the recommendations fail to tap into this, and instead will have a negative impact on those charities closely aligned to the segment of society that is one of the most philanthropic. Rather than increasing philanthropy, these recommendations will, with one noted exception, hinder giving and increase compliance burdens for communities of faith. [See paragraphs 16-28].
5. We support the recommendation to significantly expand DGR categories, but we do not support the targeted exclusion of ‘advancing religion’, ‘advancing education’ and ‘advancing aged care’ charities from DGR status. These exclusions disproportionately impact people of faith. We argue that the Productivity Commission should revert to its position as articulated in 2010, that “gift deductibility should be widened to include

all tax endorsed charities in the interests of equity and simplicity.” This would bring Australia into line with 75% of OECD countries, which allow tax deductions for ‘advancing religion’ charities [See paragraphs 29-39].

6. We do not support the recommendation to revoke DGR status for school building funds. Governments provide all the capital funding for students in government schools, but only a fraction of the capital needs for the one-third of students in faith-based schools. DGR status has been how the Government has provided indirect support for the capital needs of students in faith-based schools, and this should continue. [See paragraphs 40-44].
7. We do not support the recommendation to revoke DGR Status for Religious Education in Government Schools (RIGS) funds, on the apparent basis that Special Religious Education (SRE) has little ‘community-wide benefit’. This overlooks the high levels of benefit conferred on the public through the provision of religious instruction. SRE delivers key psychological benefits in students, promotes a thick multiculturalism within local communities and reduces the risk of student radicalisation. The wider benefits of SRE are also affirmed by the fact that many non-religious parents choose to place their children in SRE. [See paragraphs 45-47].
8. We do not support the abolition of the Basic Religious Charity (BRC) category. The abolition of the BRC category will impose significant reporting and compliance requirements on larger churches/synagogues/mosques etc. It will also enable the ACNC Commissioner to remove and appoint leaders of religious institutions, which raises Constitutional concerns. Given the local nature of BRCs, existing financial disclosures and governance standards are appropriate. [See paragraphs 48-57].
9. We do not support a legislated redefinition of a Public Benevolent Institution (PBI) to ‘delineate its scope more clearly’. This recommendation, read together with Draft Recommendation 6.1 (that ‘all activities in the subtype of advancing religion’ lose DGR status) suggest that the intention of the redefinition is to revoke DGR status for institutions registered both as ‘advancing religion’ and as a PBI. This recommendation does not align with the ACNC’s CIS on this topic, nor does it acknowledge the public benevolence that faith-based organisations can provide as dual-registered PBIs. [See paragraphs 58-65].
10. We are concerned that the Draft Report has not addressed the potential for anti-discrimination law to limit faith-based philanthropy. In overseas jurisdictions, changes in anti-discrimination law have forced faith-based institutions providing (for example) adoption services to cease to provide this service. This stifles philanthropy both by reducing the number and range of institutions providing this service and by cutting off access to individuals willing to adopt. [See paragraphs 66-68].
11. In the final section, we provide shorter comments on other recommendations: the ‘in Australia’ requirement; changes to the ACNC’s powers of direction and disclosure; dormant charities; fundraising; winding up; registration with all applicable subtypes; and reducing red tape and duplication. [See paragraphs 69-76].

Introduction

12. People of faith are the one group who will be significantly worse off under the proposals in the Productivity Commission's Draft Report. The proposed withdrawing of deductible gift recipient (DGR) status for school building funds will impact both private schools (96% of which are faith based) and community learning facilities constructed by religious communities. The Draft Report also recommends withdrawal of DGR status for funds established to support religious instruction in government schools (RIGS).
13. However, people of faith are also the 'losers' more broadly. The Draft Report recommends a significant expansion to DGR categories to include 'advocacy in furtherance of another charitable purpose, public interest journalism, smaller social welfare charities that do not meet the criteria to be a public benevolent institution, and a more diverse range of animal welfare and health promotion charities.'¹ However, 'advancing religion', 'advancing education' and 'advancing aged care' are the key areas excluded from the recommendation to expand deductibility. While we support the proposal to expand DGR status to most charitable categories and particularly the proposal concerning 'smaller social welfare charities that do not meet the criteria to be a public benevolent institution', we argue that this should go further, and include all charitable subtypes. The decision to exclude 'advancing religion' and 'advancing education', and to revoke DGR status for school building funds and RIGS funds is not justified. At points the Commission's Draft Report has the appearance of anti-religious ideology dressed up as tax policy.
14. This is affirmed by the Commission's candid admission that 'making assessments about which purposes or classes of charitable activities ... should be within the scope of the DGR system is **challenging, subjective and contestable**.'² The Commission claims that its proposals will result in a 'more diverse range of charities with DGR status' and thus 'a wider range of causes and beneficiaries could benefit from philanthropy and co-investment from Australian taxpayers, providing donors with more choice.'³ However, this does not appear to be the case. The Commission's recommendations decrease choice and diversity within Australian philanthropy.
15. The Commission seeks to address what it terms is the lack of a 'coherent policy rationale for why certain entities are eligible for DGR status and others miss out.'⁴ If there is a rationale underpinning the Draft Report's recommendations it is a preferencing of secularism and a holistic recalibration away from faith-based philanthropy. Ominously, among the 'three main factors' on which '[th]e preferred design of a tax incentive for giving depends' the Commission first lists: 'the type of behaviour the government wants to encourage'.⁵

¹ Commonwealth of Australia Productivity Commission, *Future Foundation for Giving*, (November 2023) 185 ('Draft Report').

² *Ibid* 184 (emphasis added).

³ *Ibid* 179.

⁴ *Ibid* 39.

⁵ *Ibid* 142.

A Skewed Analysis

16. The central request posed to the Commission is summarised in its terms of reference: 'The purpose of the inquiry is to understand trends in philanthropic giving in Australia, the underlying drivers of these trends, and to identify opportunities and obstacles to increasing such giving.'⁶ As Dr Leigh noted in his book *Disconnected*, religious people are more than twice as likely to be involved in community service or civil associations, and regular attenders are 22% more likely to have helped the needy.⁷ International studies have found that religious practice is linked to greater generosity in charitable giving and volunteering.⁸ There is a wide body of scholarly evidence demonstrating that people of faith 'report giving more charity and volunteering more time than their secular counterparts do [and that] there appears to be a persistently positive correlation between faith and philanthropy'.⁹
17. In the Australian context, research has generally found that religion has a positive impact on volunteering and building social capital in the community. A person's religious identity and their frequency of attendance at religious services are both related positively to volunteering.¹⁰ Churches build social capital in many ways, including by fostering volunteering both within the local church and beyond it in the broader community.
18. Details of voluntary activities of church attendees involving all the major Christian denominations in Australia are collected as part of the National Church Life Survey, conducted nationally every five years. An analysis of 15 years of volunteering data showed that church attendance is associated with higher levels of volunteering than in the general community, a finding consistent with widely known Christian messages about helping others in need.¹¹ Church attendees are regularly reminded of this message and many churches also provide structured opportunities for volunteering such as church-based activities in welfare and social justice.¹²
19. Not only are church attendees more likely to volunteer than the general community, but the analysis found that volunteering within the local church was strongly related

⁶ Ibid iv.

⁷ Andrew Leigh, *Disconnected* (UNSW Press, 2010) 32. See also Andrew Leigh and Nick Terrell, *Reconnected* (La Trobe University Press, 2020).

⁸ For example, Arthur Brooks of the American Enterprise Institute found that religious people were 25 percent more likely than their secular counterparts to donate money and 23 percent more likely to volunteer time. See "Religious Faith and Charitable Giving," Policy Review 121 (2003): 39. Available at <http://www.hoover.org/research/religious-faith-and-charitable-giving>. See also Jesse Graham and Jonathan Haidt, 'Beyond Beliefs: Religions Bind Individuals into Moral Communities' *Personality and Social Psychology Review* (2010) 14(1) 140-150; Robert Putnam, *Bowling Alone* (Simon & Schuster, 2020), ch 4.

⁹ See, for example, Israel, Salomon and Brown, Maoz, "Faith, Fellowship, and Philanthropy: Giving Rates as a Function of Religiosity among Israeli Jewish Women", *McGill Sociological Review*, Volume 3, February 2013, pp. 36-54, <https://www.mcgill.ca/msr/volume3/article3>;

¹⁰ Lyons, M & Nivison-Smith, I (2006), 'The relationship between religion and volunteering in Australia', *Australian Journal of Volunteering*, 11 (2), 25-37.

¹¹ Leonard R, Bellamy J & Ollerton R, 'Volunteering among Christian church attendees 1991-2006', *Australian Journal on Volunteering*, Volume 14, 2009, pages 1-9.

¹² Ibid.

to volunteering beyond the local church, with many people volunteering in both the church and the community.¹³ Church members who are highly involved in their local church are not doing so at the expense of volunteering in other community organisations. Rather, church involvement can motivate members to also volunteer elsewhere.

20. A survey deployed on a subset of the national respondents to the National Church Life Survey in 2006 provided detailed insights on social capital and volunteering, with the following findings:¹⁴
- a. 82% respondents had undertaken volunteer work in the community apart from volunteer roles in their local church in the past couple of years.
 - b. 96% respondents had participated in the activities of at least one wider community organisation outside of their local church in the past couple of years.
 - c. The strongest predictor of a church member volunteering in the broader community was their level of involvement in their local church.
 - d. The most frequently stated reasons for volunteering were altruistic and religious reasons, with 'meeting the needs of others' the most commonly stated reason.
 - e. The least frequently reported reasons to volunteer were to do with the meeting of personal needs through volunteering, such as career enhancement and addressing one's own personal problems or needs.
21. There is passing acknowledgment in the Draft Report of the role of religion in encouraging philanthropy, when it states '[s]ome cultural or religious communities also have philanthropic traditions or practices of giving embedded in their belief systems or ways of life.'¹⁵ However, the Commission does not attempt any analysis of the unique factors giving rise to faith-based philanthropy, despite extensive literature available which analysing the factors that underpin faith-based philanthropy toward both institutions with a purpose of 'advancing religion' and other types of faith-based charities.
22. In respect of the latter form of philanthropy, our submission to the 2018 ACNC Legislation Review provided an analysis of ACNC data which estimated that 50% of all charities within Australia are faith-based.¹⁶ This conclusion aligns with the much more developed data in America where Robert Putnam, on whom Dr Leigh's work draws in significant part, argues that:

[f]aith communities in which people worship together are arguably the single most important repository of social capital ... nearly half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context.¹⁷

¹³ Ibid.

¹⁴ Bellamy J & Leonard R, 'Volunteering among church attendees in Australia', Chapter 7 in *Religion and Volunteering* (Hustinx L, von Essen J, Haers J & Mels S) (2015), Springer International, pages 121-146.

¹⁵ Draft Report 4.

¹⁶ Available at <https://treasury.gov.au/consultation/c2017-t246103>

¹⁷ Robert Putnam, *Bowling Alone* (Simon & Schuster, 2020) 66.

The Commission's failure to consider philanthropy toward faith-based charities is made the more extraordinary given the Commission's acknowledgment that '[u]nderstanding the diverse ways people give, their reasons for giving (or not giving) and how giving has changed over time, is a prerequisite for assessing whether existing policies are effective. It is also a prerequisite for assessing whether policies that aim to support giving will likely be effective.'¹⁸

23. Given the correlation between religion and philanthropy, it is both surprising and alarming that the proposed reforms will only have a negative impact on those charities closely aligned to the very segment of society that is one of the most philanthropic. With the sole exception of the commendable recommendation to encourage local faith-based benevolent activity (discussed below under the heading 'Incentivising Local Benevolent Relief'), rather than genuinely considering how faith-based networks may contribute to Dr Leigh's commendable desire to inspire a 'civic renaissance'¹⁹, the Draft Report discloses a persistent and calculated exclusion of that contribution. Faith-based charities are committed to the success of the Australian nation. We consider the direction taken by this Draft Report to be a significant lost opportunity.

Incentivising Local Benevolent Relief

24. Notwithstanding the many concerns we hold with the recommendations made in the Draft Report, the Commission's recommendation that local parishes be able to establish deductible funds in support of their local benevolent work is a reform that we unreservedly commend. The Commission states:

Under the Commission's proposed approach, gift funds would continue to facilitate DGR status for those charities that undertake a mix of charitable activities that qualify for DGR status and activities that do not. Gift funds provide a simpler approach for charities than having to set up separate charitable entities to split off charitable activities that would be in scope for DGR status. For example, a charity that primarily focuses on religious worship, but also undertakes some social or public welfare activities to support people in need in the local community could establish a gift fund and be endorsed as a DGR, with tax-deductible donations it receives only permitted to be directed toward eligible social or public welfare activities. A clear benefit of the Commission's proposed approach is that such a charity would not need to establish a PBI or necessitous circumstances fund in such a situation, as is the case now.²⁰

The recommendation is further outlined at pages 172, 185 and 198 of the Draft Report.

¹⁸ Draft Report 91

¹⁹ Danielle Kutchel, 'Leigh Hits the Ground Running as Charities Minister', *Pro Bono Australia*, 15 June 2022 <<https://probonoaustralia.com.au/news/2022/06/leigh-hits-the-ground-running-as-charities-minister/>>.

²⁰ Draft Report 198.

25. As the Commission recognises in its description of the ‘key points’ opening the Draft Report: ‘Philanthropy, particularly volunteering, can help build social capital by contributing to social networks, building trust within communities, and diffusing knowledge and innovations through communities.’²¹ The Commission correctly posits that the means that ‘Government can encourage giving using more than tax incentives’ include ‘encourag[ing] giving among certain groups’, ‘encourag[ing] certain types of giving ... time’ and ‘encourag[ing] giving by appealing to people’s sense of community and social responsibility’.²² The Commission’s recommendation that gifts funds can be established to fund the benevolent works of local charities fulfils all of these inestimable goals.

26. The reform is an important step forward for small-scale local benevolent effort. The Commission recognises that ‘[d]onations are particularly important for smaller charities. For example, charities with revenue under \$250,000 receive 40% of total revenue from donations on average, whereas larger charities are less reliant on donations.’²³ The reform will greatly assist local parishes in their efforts to provide benevolent relief to their communities. It will provide a driving force for civic re-engagement in this nation, enabling local agency to respond to local need with localised solutions.

27. As the Commission states

[t]he reform would also increase access to DGR status for smaller charities, for example, because they have not had the resources to establish a PBI or another eligible charity. This would include charities that are dependent on volunteers and have few or no paid staff. To illustrate, only a third of charities wholly dependent on volunteers had DGR status.²⁴

We agree that this particular recommendation ‘would refocus the system toward generating community-wide benefits and would provide greater simplicity, certainty and consistency for charities, donors and the community over what the DGR system covers.’²⁵ To that end, we support the Commission’s recommendation that such funds need not be subject to the additional public fund requirements.

28. However, as we will argue below, this reform does not go far enough, because it still leaves charities with a mix of charitable activities that qualify for DGR status and activities that do not. Instead, we argue that Australia should align itself with almost every other country in the OECD, and allow tax deductibility for all charitable giving, without arbitrary exclusions that have the appearance of targeting people of faith.

DGR Expanded ... Except Religion, Education & Aged Care

29. We commend the proposal to significantly expand DGR categories so that up to 20,000 more charities could gain DGR status. However, ‘advancing religion’, ‘advancing education’ and ‘advancing aged care’ are the key areas excluded from the

²¹ Draft Report 6.

²² Ibid 32.

²³ Ibid 163.

²⁴ Ibid 18.

²⁵ Ibid 205.

recommendation to expand deductibility, which will disproportionately impact people of faith. The Draft Report's argument for excluding these three charitable subtypes is weak.

Advancing Religion

30. The Draft Report states that '[r]eligious organisations play an important role in many people's lives and communities across Australia'. However, the Commission does not see a case for additional government support for the practice of religion through the DGR system, based on the first principle [i.e., *expectation of community-wide benefits*] above.²⁶ Deductible gift recipient status is highly sought after. It is the chief means by which government may incentivise philanthropy. As the Commission records 'charities with DGR status already receive about 80% of total giving to charities even though they only account for about 40% of all charities.'²⁷

31. The Draft Report posits three key criteria for determining whether an entity is eligible for DGR status:

- a. First, there is a rationale for taxpayer support because the activity is expected to generate net community-wide benefits and would otherwise likely be undersupplied by the market.
- b. Second, there are net benefits from providing government support for the activity through subsidising philanthropy using a tax deduction for giving (as opposed to other government funding mechanisms, like grants). The government should take into account the alternative uses of the taxpayer funds that are supporting philanthropy, which could be more (or less) valuable to the community as a whole; there are opportunity costs to subsidising philanthropy.
- c. Third, the activity is unlikely to be a material risk of converting tax-deductible donations to private benefits for donors. One indication of this can be charging fees – where fees are charged there should not be significant scope for substitution between donations and fees. However, if a charitable activity is funded partly by user fees this should not necessarily prevent DGR-endorsement nor the use of tax-deductible donations for that activity.²⁸

32. Applying these principles to religious institutions the Commission concludes:

the Commission does not believe there is a strong rationale for expanding the scope of the DGR system to include charitable activities that are specifically for the purpose of advancing religion. As emphasised above, this is not based on a view that religious practice does not provide a benefit to the community, but rather that the additional net community benefits from extending the DGR system to include the purposes of purely advancing religion are not apparent.

There is also a material risk of a nexus between donors to religious organisations and beneficiaries. Donations to a religious institution for purely religious activities (as opposed to other services that religious institutions may

²⁶ Ibid 18.

²⁷ Ibid 206.

²⁸ Ibid 17.

provide, such as relief from hardship) primarily benefit the people who regularly participate in the activities of the institution.²⁹

33. The entire reasoning contained in the Commission's assertion in respect of the first and second criteria is that 'the additional net community benefit' of religion is 'not apparent'. This disregards the long-running common law recognition of the public benefit arising from the charitable purpose of 'advancing religion'. For example, in *Walz v Tax Commission of City of New York* ('Walz') the U.S. Supreme Court held that charity law favours institutions that foster 'moral or mental improvement' in the community.³⁰ In *Neville Estates Ltd v Madden* Cross J made a finding of public benefit on the basis that, notwithstanding the synagogue concerned was closed to the public, 'some benefit accrues to the public from the attendance at places of worship of persons who ... mix with their fellow citizens'.³¹ Similarly in *Joyce v Ashfield Municipal Council* the New South Wales Court of Appeal held that worship services, although conducted in private, nonetheless had 'public value in improving the standards of the believer in the world'.³² Such consequentialist reasoning is also present in arguments that neutrally applied tax favour contributes to pluralism within society.³³
34. The research referred to at paragraphs [6]-[7] above also affirms the well-recognised benefits of religion to the wider community. The Productivity Commission evidently believes, contrary to that evidence, that religious charities produce little community-wide benefit. The Draft Report proposes that all activities within the charity subtype 'Advancing Religion' are to be excluded from DGR status. It is not clear what this would mean for charities that are dual-registered as "Advancing Religion" and a PBI.
35. The Commission recognises the key principle that 'financial incentives ... should be effective, efficient and equitable.'³⁴ It is not equitable to exclude religion and faith-based primary and secondary education from a recommendation that all remaining charitable purposes be eligible for deductibility. This was the precise rationale offered by the Commission in 2010 in support of its recommendation that religion be **included** in the expansion of deductibility to all charitable purposes: 'The Commission believes

²⁹ Ibid 192.

³⁰ *Walz v Tax Commission of City of New York*, 397 US 664, 672 (Burger CJ) (1970) ('Walz').

³¹ See, eg, *Neville Estates Ltd v Madden* [1962] 1 Ch 832, 853 (Cross LJ) ('*Neville Estates*'). A general link between private religious purposes and public goods was also alluded to by Chitty J in *Re Joy* (1889) 60 LTR 175.

³² *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744, 751-752 (Hutley JA), holding that private worship services are for the public benefit, equipping adherents to apply religious principles in their respective roles in society. In *Crowther v Brophy* [1992] VR 97 Gobbo J referred to private goods in the form of 'the enhancement in the life, both religious and otherwise, of those who found comfort and peace of mind in their resort to intercessory prayer' and the 'edification' entailed in the celebration of the Roman Catholic mass as grounds for charitable recognition. See also Pauline Ridge, 'Religious Charitable Status and Public Benefit in Australia' (2011) 35 *Melb University Law Review* 1071, 1084.

³³ On the benefits arising from the neutral recognition of plural religions see, eg, *Walz v Tax Commission of City of New York*, 397 US 664, 672 (Burger CJ) (1970); Matthew Harding 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559; David Brennan, 'A Diversity Theory of Charitable Tax Exemption' (2006) 4(1) *Pittsburg Tax Review* 1. See also *Neville Estates* where Cross J states '[a]s between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none': at 853.

³⁴ Draft Report 69.

that gift deductibility should be widened to include all tax endorsed charities in the interests of equity and simplicity.³⁵ There is no explanation in the Draft Report as to what has changed in the past 13 years that has led the Productivity Commission to reverse its position.

36. It is important to note that 75% of OECD countries allow tax deductions for ‘advancing religion’ charities.³⁶ The Commission acknowledges that Australia is more restrictive than New Zealand, the United Kingdom, Canada and the United States, when it states:

Another indicator that the scope of the DGR system in Australia may be too narrow is that the range of activities that qualify for personal income tax concessions for giving in other countries is often broader (box 5.2). In New Zealand [in the form of a tax credit], the United Kingdom [in the form of Gift Aid], Canada and the United States the eligible activities and organisations that qualify for deductions tend to include all charitable activities (subject to varying exclusions and constraints).³⁷

As noted by the Commission, extending the deductible status to include religion was a ‘common proposal’ amongst submitters, including the Community Council for Australia.³⁸ If submissions to the Commission on this point are to be taken into account, this proposal should not be contentious.

37. In respect of the Commission’s third criterion (i.e., converting tax deductible donations to private benefits), it is not apparent why this should disqualify religious organisations from receiving DGR status. Typically, the support for religious organisations is not from fees charged. Religious organisations overwhelmingly receive gifts given freely rather than “fee for service”. The Commission does not provide any evidence to support the claim that there could be substantial private benefit arising to individuals through such a means within religious institutions. Moreover, if any such private benefit would arise, the exchange would fail the conditions for the making of deductible gifts. As the Australian Taxation Office clarifies: ‘It must truly be a gift or donation – that is, you are voluntarily transferring money or property without receiving, or expecting to receive, any material benefit or advantage in return. A material benefit is something that has a monetary value.’³⁹ If any such mischief arises into the future, existing policy settings are sufficient to address it.

Primary and Secondary Education

38. The recommendation to exclude primary and secondary education from DGR status has a disproportionate impact on faith-based schooling (government schools are excluded from the legal definition of ‘charity’, and thus DGR status). Independent

³⁵ Commonwealth of Australia Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010) 179.

³⁶ <https://www.oecd.org/tax/tax-policy/oecd-taxation-and-philanthropy.pdf>, page 45.

³⁷ Draft Report 168.

³⁸ Ibid 171.

³⁹ <https://www.ato.gov.au/individuals-and-families/income-deductions-offsets-and-records/deductions-you-can-claim/gifts-and-donations>

Schools Australia (ISA) has compiled the following data on 2022 student enrolment in non-government schools.⁴⁰

| | Students | % | Schools | % |
|-----------------------------|-----------------|--------------|----------------|--------------|
| Catholic (Systemic) | 747,415 | 52.05% | 1,759 | 56.98% |
| Independent – religious | 669,737 | 46.64% | 1,209 | 39.16% |
| Independent - non-religious | <u>18,901</u> | <u>1.31%</u> | <u>119</u> | <u>3.85%</u> |
| | 1,436,053 | 100.00% | 3,087 | 100.00% |

That is, almost 99% (98.69%) of students in non-government schools were in faith-based institutions, and 96.15% of non-government schools were faith-based. The failure to extend DGR status to primary and secondary educational institutions overwhelming impacts faith-based schooling.

Child Care and Aged Care

39. The Commission proposes that '[t]he activities of childcare and aged care that fall within the charity subtype of advancing social and public welfare should continue to be excluded [from deductible status] ... However, PBIs [public benevolent institutions] undertaking childcare and aged care activities would continue to be eligible for DGR status.'⁴¹ The rationale given is that, '[a]s with school building funds [discussed below], this exclusion is based on a concern that where the main activities of a subtype of charities is charging fees to provide services to beneficiaries, there are material risks that donors would convert a tax-deductible donation into a substantial private benefit.'⁴² This proposition runs counter to long-settled charity law that holds that the levying of contributions from beneficiaries is not determinative of the presence of private benefit.⁴³ If the full implications of the Commission's reasoning were to be accepted, it would represent a wholesale reconsideration of the financial viability of various elements of the charity sector, including aged care, child care, counselling services and private schooling. As noted above, the prospect that mischief might arise where a beneficiary of a service obtains a private benefit through a deductible gift is already suitably regulated by the gift conditions for deductible gifts. In order to qualify as a gift a donor must not receive a private benefit. Again, the Commission has not provided any evidence of mischief to support its claim.

The Removal of DGR Status for School Building Funds

40. This proposal will have a profound impact on low-fee faith-based schools whose students cost the government far less to educate than if those same students were in a local public school. The ISA Report states: 'Over the next 10 years, ISA projects that Independent schools could enrol an additional 195,000 students. Based on an average school size of 570, around 342 additional Independent schools would be required to

⁴⁰ <https://isa.edu.au/wp-content/uploads/2023/09/Enrolment-Trends-and-Projections-2023-Edition.pdf>, page 10 and <https://isa.edu.au/our-sector/about-independent-schools/characteristics-of-independent-schools>. Catholic System School numbers from <https://ncec.catholic.edu.au/wp-content/uploads/2023/08/2022-NCEC-Annual-Report.pdf>, page 16.

⁴¹ Draft Report 191.

⁴² Ibid.

⁴³ See, eg, *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 Ch 159; [1983] 1 All ER 288.

accommodate the increase in students.’⁴⁴ In recent years, Australia’s growing multiculturalism has driven demand for Muslim, Hindu, Buddhist, Ba’hai, and Jewish education. Withdrawing DGR status for school building funds would disproportionately harm adherents of minority faiths.

41. The Commission’s recommendation flies in the face of the demonstrable need for the construction of additional buildings in the private schooling sector. The ISA Report states that the ‘[i]ndependent sector grew by 3.2% from 2021, the sector’s strongest growth in more than a decade, despite student population growth of only 0.3% and declining enrolments in government schools (-0.7%).’ This is not an aberration due to the COVID pandemic but represents a long-running trend: ‘The Independent sector has increased its enrolment share every year for the past nine consecutive years, climbing steadily to a high of 17.1% in 2022. Over the past 20 years, Independent sector growth has consistently exceeded student population growth.’ The ISA Report concludes: ‘growth in Independent schools is across all fee levels, with the strongest growth in low fee (below \$5,000 per annum) Independent schools’. The Productivity Commission appears to be unaware of these trends. Coupled with the fact that the Catholic sector and the Independent sector care for 18% and 17% of Australia’s students respectively, the Productivity Commission’s recommendation is unsupportable.
42. Governments provide all the capital funding (e.g., buildings and facilities) for government schools, but only 14% of the capital needs of faith-based schools.⁴⁵ DGR status is one means by which the government provides indirect support for the capital needs of faith-based schools. If the Federal government were to revoke DGR status and thereby remove this support, then it will have to address the capital funding gap in other ways.
43. The Commission’s recommendation to abolish the School Building Fund (SBF) DGR category rests upon its assertion that SBFs might fail to satisfy the third of its criterion for assessing DGR eligibility.⁴⁶ The report states that “Potential donors are most likely to be those directly involved with the organisation, such as students, their parents **or alumni**” (emphasis added). Anecdotally, alumni (rather than current students or their parents) are the major contributors to school building funds. Alumni receive no private benefit from their donation, and so it is not appropriate for them to be included to bolster the argument for the third criterion. Moreover, the prospect that a parent at a school might give a donation in the hope that this would reduce their children’s fees at some point in time into the future is not supported by logic or experience. There is no evidence that schools are offering any reduction in private fees to parents who make donations. If there is evidence of non-compliance with this rule by private schools this can be addressed through increased guidance or through use of the existing powers exercisable by the Australian Taxation Office. The potential for minor infraction is no basis from which to assert the entire revocation of the SBF regime supporting private schools.

⁴⁴ ISA Report (n 34).

⁴⁵ <https://isa.edu.au/our-sector/funding/capital-funding/>

⁴⁶ Draft Report 188.

44. The Commission also asserts that the spread of donations to SBFs ‘suggests that many schools servicing communities with greater socio-economic disadvantage are less likely to benefit from DGR endorsement for school building funds.’⁴⁷ Contrary to this assertion, many of the SBFs operated within the Anglican Church structure are administered for the benefit of schools in lower income areas.

The Removal of DGR Status for Religious Education in Government Schools (RIGS) Funds

45. RIGS programs support Special Religious Education (SRE). The Draft Report provides no justification for the abolition of the religious instruction fund DGR category, apart from the unsupported claim that ‘[t]he Commission’s view is that converting a tax-deductible donation into a private benefit is, in principle, a substantial risk for ... religious education’.⁴⁸ There is no evidence cited for this extraordinary claim. The Productivity Commission evidently believes that Special Religious Education has little ‘community-wide benefit’. This contention overlooks the high levels of benefit conferred on the public through the provision of religious instruction. SRE delivers key psychological benefits in students, promotes a thick multiculturalism within local communities and reduces the risk of student radicalisation. It represents Australia’s largest year-round volunteer labour force, providing in NSW alone well over ten thousand hours of classroom teaching in public schools every week. Were this to reduce or cease, the resultant teaching gap will need to be addressed in other ways.
46. Religious instruction networks provide a leading example of successful multi-faith cooperation across this nation. The wider benefits of SRE are also affirmed by the fact that many non-religious parents choose to place their children in SRE. We find it extraordinary that the Productivity Commission would seek to weigh into the contentious debate over religious instruction in schools by recommending, in effect, that severe limitations be placed upon resources that enable that instruction. It is all the more extraordinary in light of the fact, as the Commission acknowledges, that a separate DGR category titled the “public fund for ethics education in government schools” endorsement category was introduced in 2013 as a secular alternative to the religious education in government schools category.⁴⁹ As a result there can be no assertion that the current settings confer an inordinate preference on persons of religious faith. It is also noted that the removal of the DGR category for religious instruction will have the consequence that public and private ancillary funds will no longer be able to give to these funds. It is another example of the anti-religious bias in the recommendations that an “Ethics in Government Schools” fund will retain DGR status, but a “Religion in Government Schools” fund will not.

Transitional Arrangements

47. The Draft Report states that:

The Commission does not see a compelling case for grandfathering existing DGR endorsements as it would entrench complexity and inequitable

⁴⁷ Ibid 190.

⁴⁸ Ibid 18.

⁴⁹ Ibid 167.

treatment within the DGR system. However, there would be merit in having a transition period (for example, three to five years) for charities that would no longer have DGR status to adjust their fundraising activities.⁵⁰

As we have noted, we do not support the abolition of SBFs or deductible funds for SRE. However, the Commission's proposal for transitional arrangements lacks clarity. It is not clear whether monies within an existing deductible fund must be expended by the completion of the transitional arrangement, or whether the funds can continue to accept donations until that time but continue to expend funds into the future. Given the long lead time necessary to construct school buildings, no transitional limit should apply to the expenditure of monies within an SBF. For reasons of equity the same principle should apply to SRE funds.

The Abolition of the Basic Religious Charity Exception

48. Draft Recommendation 7.1 states: 'The Australian Government should amend the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) to remove the concept of "basic religious charity" and associated exemptions'. The abolition of the Basic Religious Charity (BRC) category will impose significant reporting and compliance requirements on larger churches/synagogues/mosques etc., and that the ACNC Commissioner will be able to suspend, appoint and remove the leaders of religious institutions. The Commission states '[t]here is no stated policy rationale for treating basic religious charities differently to other religious and non-religious charities.'⁵¹ However this is not the case.

49. As the Australian Centre for Philanthropy and Non-profit Studies explains:

The BRC was intended as a classification for faith-based congregations to be granted a lower reporting burden and be exempt from certain mandatory governance arrangements for charities, because it was regarded as inappropriate for the ACNC to interfere in the governance of small religious bodies which were not incorporated and received little direct funds from government.⁵²

The Commission's recommendations are inconsistent with the recommendation of the ACNC Advisory Board to the 2018 Legislative Review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Review) that 'the operation of section 205-35 has not been controversial, and the review panel should affirm the continued operation of the provision.'⁵³

Constitutional Concerns

50. The Draft Report makes no mention of the fact that in 2018 the ACNC Review recognised in its consideration of the BRC exception that section 116 of the Australian Constitution 'imposes some limits on the power of the Commonwealth to make laws in relation to religious registered entities which do not apply to the making of laws in

⁵⁰ Ibid 20.

⁵¹ Ibid 224.

⁵² Australian Centre for Philanthropy and Non-profit Studies, Queensland University of Technology Business School, *ACPNS Current Issues Information Sheet 2015/2 (April 2015)* 2.

⁵³ Cited in Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* 66 ('ACNC Review').

relation to other registered entities'.⁵⁴ The Panel acknowledged 'the risk that the current powers of the Commissioner could be found to be prohibiting the free exercise of religion in breach of section 116 of the Australian Constitution, and recommended that a legislative amendment to require the Commissioner of the ACNC to 'respect the independence of the sector in carrying out duties under the ACNC Act. This would include respecting the fundamental rights and freedoms protected by section 116 of the Australian Constitution or set out in the ICCPR, the UDHR and other international treaties and covenants ... (including the freedoms of religion, peaceful assembly and association)..'⁵⁵ As Professor Nicholas Aroney and Associate Professor Mark Fowler have pointed out: 'The limited scope of the BRC exemption under the ACNC Act and the resulting power of the Commissioner's to replace the leaders of religious institutions illustrates the importance of constitutional protections of freedom of religious association.'⁵⁶ All of the foregoing defy the Commission's conclusion that '[t]here is no stated policy rationale for treating basic religious charities differently to other religious and non-religious charities.'⁵⁷

Governance Standards

51. The Commission also makes no mention of the fact that the 2018 Legislative Review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) accepted that equivalent forms of governance regulation may be sufficient for certain industry entities. The Panel made the following conclusions:

It is the Panel's view that the ACNC governance standards should operate to the extent there is not already another comparable governance framework with which a registered entity is bound to comply.

While the governance standards are considered 'minimum requirements', they are effectively an overlay that needs to be complied with in addition to other requirements. The Panel is not persuaded that the governance standards should 'override' specific tailored governance requirements ...

To avoid duplication and reduce red tape, a registered entity should be deemed to be in compliance with the governance standards if it already applies a separate set of governance standards which meet minimum requirements.⁵⁸

52. The Panel acknowledged that '[m]any BRCs may already be obliged to comply with a comparable denominational or other religious governance requirement and therefore there would be no further requirement to comply with the ACNC governance

⁵⁴ ACNC Review 64. See also Nicholas Aroney and Matthew Turnour, 'Charities and the New Constitutional Law Frontier' (2018) 41(2) *Melbourne University Law Review* 446.

⁵⁵ ACNC Review 69.

⁵⁶ Nicholas Aroney and Mark Fowler 'Freedom of Association in Australia' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4587217

⁵⁷ Draft Report 224.

⁵⁸ ACNC Review 48, 49.

standards.⁵⁹ The Commission itself specifically recognises the benefits of self-regulation in the following statements:

Self-regulation can help provide tailored standards that are specific to the risks relevant to the sector in which a charity operates. In some instances, charities can voluntarily opt to become a member of a sector organisation. Once a member, they are obliged to comply with the organisation's code of conduct. Self-regulation in this manner can signal to donors a charity's intention to act with integrity.⁶⁰

For example, some donors may value having access to 'proxies' of effectiveness or other information to help them make giving decisions such as whether charities ... adopt other good governance practices, including compliance with voluntary codes which promote transparency and accountability of outcomes⁶¹

53. There is no evidence that mischief exists within BRCs or that existing self-regulation regimes that apply to BRCs warrant imposition of the governance standards on those entities. The Commission offers no evidence to support that imposition. We confirm that regulation of BRCs within the Anglican Church of Diocese of Sydney is according to standards commensurate with the ACNC Governance Standards, consistent with the regime envisaged by the ACNC Review, and that there is appropriate governance accountability.

Financial Disclosure

54. Anglican BRCs are already sufficiently accountable to their members in respect of financial governance. Each local parish is supported by donations from that local congregation, and members of that congregation receive audited financial accounts at an annual general meeting. Those who have no connection with the parish do not need access to its financial records. Each congregation also elects representatives to the Diocesan Synod, in which copies of the audited financial statements of all the Diocese entities are made available and deliberated upon. There has been no suggestion from any credible body that the Anglican Church in the Diocese of Sydney lacks financial accountability to the membership of the Church.
55. The Commission repeatedly asserts the need for accountability and the desire to inspire confidence as the motivations for its recommendation that the BRC exception should be abolished. For example, the Commission asserts that '[m]ore information may help donors make choices that are more aligned with their preferences'.⁶² There is no basis in logic for asserting that as a justification applicable to religious institutions. Members of the Anglican Diocese of Sydney are those who donate to the Diocese. These members obtain financial information on the operation of their Parish and Diocese through the means detailed in the preceding paragraph. Members of the Diocese do not need to seek information on the Diocese through a public register so to ascertain whether the Diocese 'aligns with their preferences'. They have determined that the Diocese aligns with their values consequent upon their

⁵⁹ Ibid 69,

⁶⁰ Draft Report 219.

⁶¹ Ibid 296.

⁶² Ibid 29.

attendance. These rationales for abolishing the BRC exception are simply inapplicable to religious institutions such as the Diocese.

56. Having regard to the foregoing, the following statement from the Commission ably summarises the reasons why the BRC exception should not be abolished:

Governments need to ensure that the information on charities they collect and publish provides benefits to the public that outweigh the costs. **Requiring charities to make information publicly available is likely to have little benefit if people do not use the information because it is not relevant to their giving decisions**, or if they are unaware the information exists. **Onerous public reporting requirements on charities may worsen outcomes for recipients of goods and services and the wider community because the cost of gathering and supplying information reduces the pool of funds that can be used to provide goods and services to beneficiaries.** At worst, publishing poorly designed performance measures for charities could result in perverse outcomes, including for beneficiaries.⁶³

57. As the Commission acknowledges, '[t]he purpose of government agencies publishing information about charities is to improve accountability and help inform decisions, and the collection and publication of additional data should only be undertaken where there is clear evidence of a market failure and that it would generate net benefits to the community.'⁶⁴ Evidence supporting the Commission's recommendations in respect of BRCs and which satisfies these standards has not been produced by the Commission. For the foregoing reasons we do not support the Commission's recommendation that the BRC exception should be abolished.

Redefining Public Benevolent Institutions (PBIs)

58. The Draft Report recommends that the Government should 'develop a legislated definition of what constitutes a public benevolent institution to delineate its scope more clearly.'⁶⁵ The report makes passing reference to the ACNC Commissioner's Interpretation Statement⁶⁶ (CIS) issued in August 2023, without acknowledging that it was a partial reversal in the ACNC's position, by now clearly permitting a charity to be dual registered both as a PBI and with the charitable subtype "Advancing Religion". The CIS resulted from a long-running consultation process in which many religious institutions expressed their concern with the ACNC's prior approach. The ACNC's resultant position has provided a principled answer to the long running question as to how a faith-based PBI may maintain fidelity to its religious character. The ACNC's position welcomes the unique holistic approach that faith-based PBIs adopt when assisting persons in need of benevolent relief.

⁶³ Draft Report 285 (emphasis added).

⁶⁴ Ibid 295.

⁶⁵ Ibid 41.

⁶⁶ <https://www.acnc.gov.au/tools/guidance/Commissioners-interpretation-statements/Commissioners-interpretation-statement-public-benevolent-institutions>.

59. The law underpinning that position has been set out by Dr Mark Fowler in ‘Can a Faith-Based Public Benevolent Institution Have a Purpose of “Advancing Religion”?’,⁶⁷ demonstrating that the ACNC’s position is consistent with long-standing common law. We are concerned that the proposal to “delineate” the scope of the PBI is directed at reversing the ACNC’s settled consensus, by preventing religious institutions qualifying as a PBI.
60. It is not clear that any such restatement is warranted. The law concerning PBIs is a complex interaction of statute and common law, which the ACNC took several years to summarise in its revised CIS. That CIS ably sets out the multifarious elements of that which comprises a ‘PBI’ in a manner that is intentionally accessible to non-lawyers (and thus small PBIs). This has provided sufficient certainty such that there is no need to redefine the concept. Furthermore, in support of its recommendation for a statutory definition of PBI the Commission states that the definition ‘may distort behaviour by charities in order to obtain classification as a PBI’.⁶⁸ It is not at all logically evident how a statutory enshrinement would address this purported risk.
61. As noted above, the August 2023 CIS provided essential guidance on how an organisation can provide both public benevolence and at the same time pursue a charitable purpose of advancing religion. A clear example of how a PBI can provide benevolent relief and also maintain its religious character is evidenced in Anglicare Sydney’s provision of chaplaincy services. Anglicare is registered with the ACNC as having five charity purpose subtypes: PBI; advancing social or public welfare; advancing religion; advancing health; and purposes beneficial to the general public that may be reasonably be regarded as analogous to, or within the spirit of, any of the other charitable purposes.
62. Anglicare employs 150 chaplains and pastoral carers to provide emotional, spiritual, social and physical support in 75 facilities across the Sydney and Illawarra Shoalhaven regions – hospitals, prisons, youth detention centres, mental health facilities, residential aged care and retirement villages. In 2022-23, Anglicare chaplains and pastoral carers supported 5,740 people in these facilities and also in peoples’ homes. Four chaplains are dedicated to working with Police and Emergency Service workers.
63. The CIS provides a list of community groups who may be accepted as beneficiaries of a PBI, which includes people who are in prison, people in poverty, people with disability, and elderly people who need support with completing daily tasks.⁶⁹ These groups are supported by Anglicare chaplains and pastoral carers. The CIS provides examples about how an entity could be registered as a PBI along with other charity subtypes (such as ‘advancing religion’) to provide benevolent relief.⁷⁰ Notably, the following chaplaincy example is included in the list:⁷¹

⁶⁷ (2023) 1 *Third Sector Review* 65.

⁶⁸ *Ibid* 170. See also 171-72.

⁶⁹ Commissioner’s Interpretation Statement, pp 5-6, [20].

⁷⁰ Commissioner’s Interpretation Statement, pp 20-21 [86].

⁷¹ Commissioner’s Interpretation Statement, pp 20-21 [86].

a PBI's governing document states that its aims are to advance religion and to relieve the distress of people who are in prison by providing chaplaincy services for inmates who wish to maintain a connection with their faith. The PBI regularly sends chaplains into prisons to provide emotional and spiritual support to prisoners of faith or prisoners interested in exploring faith. The PBI is organised for benevolent relief of people who are in prison. The prisoners have been excluded from participation in organised religion in the general public, due to their imprisonment, leading to distress. The PBI relieves the prisoners' distress and advances religion simultaneously through its chaplaincy services. The PBI would be entitled to registration as the 'advancing social or public welfare' subtype and the 'advancing religion' subtype.

64. The CIS upholds Anglicare's dual registration as a PBI with the charitable subtype 'advancing religion'. The Draft Report appears to recognise the presence and benefit of these types of entities:⁷²

... many charities with DGR status do have a religious connection, including where a charity has multiple purposes or where charities are established as separate entities by a religious organisation to do charitable work. In these cases, DGR status has been granted with respect to those activities (for example, homelessness, health and disaster response services) rather than activities specifically for the purpose of advancing religion – this should continue.

65. However, as noted above in paragraph 21 of this submission, the Commission proposes Draft Recommendation 6.1, which states the Australian Government should expressly exclude from DGR status 'all activities in the subtype of advancing religion'.⁷³ This exclusion does not appear to align with the ACNC's CIS, nor does it acknowledge the public benevolence that faith-based organisations can provide as dual-registered PBIs.

Anti-discrimination Law Limiting Faith-Based Philanthropy

66. One important factor not addressed in the Draft Report is the adverse impact of Anti-discrimination law on faith-based philanthropy. Recent reforms to Australian anti-discrimination law mean that faith-based charities will no longer be able act in accordance with religious belief if this leads to discrimination on any other ground except religion.⁷⁴ This adversely impacts the provision of adoption or fostering services, the provision of counselling services and the provision of education or health services. Where the law prevents a faith-based charity from acting in accordance with the religious convictions of the movement it is associated with, this impacts the religious manifestation of those persons associated with the charity and decreases the level of donor support that the charity would otherwise elicit. Such law stymies the philanthropic efforts of the members, employees and volunteers of faith-based charities who are not able to express their faith in that particular instantiation. In

⁷² Draft Report, p 192.

⁷³ Productivity Commission Draft report, p 196, Draft recommendation 6.1.

⁷⁴ See, e.g., *Equal Opportunity Act 2010* (Vic) s 82B.

addition, beneficiaries who seek a faith-based supply will be detrimentally impacted by the withdrawal of the service. As a result the community is denied an important service and the autonomous exercise of preference within the wider community is diminished.

67. The potential of anti-discrimination law to stifle the philanthropic endeavours of persons of faith in this way is directly relevant to the Commission's terms of reference. The Commission recognises that 'outcomes generated by markets do not always meet individual or community preferences or expectations.'⁷⁵ It emphasises the importance of mitigating the prospect of market failure in the provision of charitable services. The Commission also acknowledges the detrimental consequences of decreasing consumer choice:

A lack of effective competition between firms can give rise to one provider (or a small number of providers) having market power. A firm merely possessing market power is not necessarily a concern; rather, it is if the firm *uses* their market power to the detriment of the community that there may be a case for government intervention. A firm using their market power could charge unduly high prices and/or undersupply the good or service. For example, a single dental service in a sparsely populated area could have market power, raise prices and/or reduce the quantity of services it supplies to below efficient levels.⁷⁶

68. It also emphasises the negative consequences of government 'crowd out'.⁷⁷ Anti-discrimination law that precludes the operations of faith-based providers amounts to a government intervention in the market of charitable services to exclude faith-based options. Significantly, the Commission recognises that:

Government can and does intervene in markets, but it cannot, or sometimes fails to, fill all the gaps that emerge in markets. It is subject to information asymmetries and may not have the knowledge or expertise to provide services in certain locations or to meet the needs of people receiving services. It is often the case that government is not best placed to provide a particular service – it can be higher cost, more risk averse and without the incentives to innovate compared to the private or NFP sectors.⁷⁸

Anti-discrimination law can lead to the forced withdrawal of faith-based services from the market. The Commission should recommend that governments do not stifle the philanthropy of persons of faith by limiting the operations of faith-based service providers through anti-discrimination law.

'In Australia' Requirements

69. The Commission proposes the abolition of the 'in Australia' requirements in the *Income Tax Assessment Act 1997* (Cth):

⁷⁵ Draft Report 70.

⁷⁶ Ibid 70.

⁷⁷ Ibid 71.

⁷⁸ Ibid 71.

Given the suite of regulatory requirements that apply to ACNC registered charities, including the external conduct requirements, the additional ‘in Australia’ requirements in the ITAA97 are unnecessary and should not be retained under the proposed reforms. This would simplify the DGR system while presenting minimal integrity risks, given existing charity regulations and the inherent lower risks posed by Australian government entities given the oversight associated with government control.⁷⁹

We commend the Commission for this recommendation for the reasons that it provides.

Changes to the ACNC’s Powers of Direction and Disclosure

70. Recommendation 7.2 includes the following:

The Australian Government should:

- amend the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (the Act) to enable the Commissioner of the Australian Charities and Not-for-profits Commission (ACNC) to require a registered charity to provide the information necessary to assess whether the charity is likely to be a ‘federally regulated entity’ ...

To improve transparency for donors, the Australian Government should amend the Act to enable the Commissioner of the ACNC to:

- publish details of recommendations given to a charity to address actual or potential non-compliance with the Act or the *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth)
- publish circumstances and reasons for referrals made to other Australian government agencies (including state and territory regulators) under section 150-40 of the Act, in instances where harm caused by the disclosure does not outweigh the public benefit of that disclosure.⁸⁰

Allegations recorded on the public register may seriously prejudice the operations of a charity and the reputations of its responsible persons. They may also detrimentally impact on the ability of a charity to fulfill its charitable purposes. Any such proposals for public disclosure or to provide directions should be subject to accessible, proportionate and economical avenues of appeal.

‘Dormant’ Charities

71. The Commission seeks ‘further information about options for ensuring that the assets of dormant charities are directed toward benefiting the public, including what test may be appropriate for determining whether a charity is ‘dormant’ and what steps could be taken in response.’⁸¹ It is critical that the Commission recognise that in the context of the use of real property for charitable purposes, the ultimate

⁷⁹ Ibid 199.

⁸⁰ ACNC Review 23.

⁸¹ Draft Report 43.

intended purpose of an asset may not be attained for considerable periods of time. We also affirm the Commission's recognition that:

Accumulating assets can support the financial sustainability and independence of charities, as well as enable long-term planning. Managing reserves is an important aspect of the financial management of a charity, which is a crucial element of good charity governance. Charities cannot access equity markets and may face difficulties accessing debt markets, and so creating reserves can be an efficient way for a charity to manage their balance sheet.⁸²

Fundraising

72. We support the Commission's recommendations for reform to the fundraising regime in Australia 'so charities can benefit from a simplified set of conduct requirements across all jurisdictions, with reporting directed through the ACNC. Once harmonisation has been achieved, it will also be important for state and territory governments to ensure consistency is maintained.'⁸³

Winding Up and Revocation Requirements

73. The Commission recommends that '[w]ind-up requirements to ensure that surplus DGR-related funds are transferred to another entity with DGR status on revocation of DGR status should be maintained under the Commission's proposed reforms.'⁸⁴ Uncertainty can arise where distributions are proposed between entities where there is not a complete alignment between purposes. For example, a PBI may have a benevolent purpose and a separate religious purpose. Can the entity transfer surplus to an entity with only a benevolent purpose? Similarly, an entity may have a purpose of providing housing to those in need of benevolent relief. Is that entity able to transfer surplus to a PBI that provides housing and other supports associated with care of the aged? Greater clarity is required.

Charities to be Registered with all Applicable Subtypes

74. The Commission recommends that 'the Australian Government should ... amend the *Australian Charities and Not for profits Commission Act 2012* (Cth) to require the ACNC to register all new and existing charities with all applicable charitable subtypes.'⁸⁵ We note that a charity may currently register simply as a charity with no designated subtype. This allows registration for a general charitable entity not focussed on a particular subtype but on all types of charity – for example, a trust for general charitable purposes. If the recommendation were to be accepted, such a charity would have to register under all subtypes.
75. This recommendation has the potential to impose significant and immediate administrative burden on charities. It is the practice of the ACNC to, upon initial registration or review, request that an entity consider whether it may have other additional purposes. The Commission has not provided any evidence that mischief

⁸² Ibid 264.

⁸³ Ibid 236.

⁸⁴ Ibid 199.

⁸⁵ Ibid 41.

arises from the existing framework. The Diocese does not support this recommendation.

Measures to Reduce Red Tape and Duplication

76. We commend the Commission for its recommendations that seek to improve coordination and information sharing among regulators (in particular see recommendation 7.4). We also note that after its own extensive consultation process the ACNC Review made the following recommendations:

To reduce red tape for the sector, the Commonwealth Government should mandate that departments and agencies are required to use the Charity Passport and must not seek information from registered entities that is already available through the Charity Passport. The Panel recommends that all responsibility for the incorporation and regulation of companies which are registered entities, be transferred from ASIC to the ACNC, except for criminal offences. This will significantly reduce the level of red tape that is currently imposed on entities that are on both registers.⁸⁶

We support these recommendations.

Conclusion

77. Given the overwhelming contribution of religious belief to both (what Putnam famously coined) bridging and bonding capital, people of faith must be intentionally included in the Commission's recommendations if Australia is going to achieve the desired target of a doubling of philanthropic giving by 2030. The ACNC's recently released CIS welcomes the distinct contribution that faith-based PBIs make to the meeting of benevolent need in our community. Approaching seemingly intractable social problems from the perspective of faith can afford unique insights. As American social scientists Berger and Neuhaus contend: 'Government bureaucracies—indeed by definition, all bureaucracies—demonstrate little talent for helping the truly marginal who defy generalized categories. The Salvation Army needs no lessons from the state on how to be nonsectarian in its compassion for people.'⁸⁷ The final report should give detailed consideration to the overwhelming contribution of faith-based benevolent charities within the history of Australian civil society and their resulting ongoing contribution. Failure to consider this within an effort to increase philanthropy is a failure to acquit the terms of reference. The fact that Draft Report does not even engage with these matters underpins our concern that the unspoken assumption motivating the Inquiry is that faith-based charity is not a welcome contributor to the ongoing project of philanthropy in this nation. We urge the Productivity Commission to revert to its position as articulated in 2010, that "gift deductibility should be widened to include all tax endorsed charities in the interests of equity and simplicity." This is far more likely to achieve the stated aim of doubling philanthropy by 2030.

Bishop Michael Stead
Chair, Religious Freedom Reference Group

⁸⁶ ACNC Review 11.

⁸⁷ Peter Berger and Richard Neuhaus, 'To Empower People' in Virginia Hodgkinson and Michael Foley (eds), *The Civil Society Reader* (Tufts University Press, 2003) 227.