

8 February 2024

Productivity Commission
GPO Box 1428
Canberra City
ACT 2601

Via email to philanthropy@pc.gov.au, and uploaded to portal at:

[Make a submission - Philanthropy - Productivity Commission \(pc.gov.au\)](#)

Dear Inquiry Secretary,

Philanthropy Inquiry: 'Productivity Commission 2023, Future foundations for giving, Draft report'

I refer to the invitation by the Commission for submissions on the above draft report. HRLA welcomes the opportunity to provide this submission.

HRLA is Australia's only human rights law firm specialising exclusively in the areas of religious liberty and freedom of thought, speech and conscience. We regularly represent clients and litigate religious freedom matters in all States and Territories and regularly make submissions on the human rights implications of legislative and policy proposals that have implications for religious freedom.

I enclose HRLA's submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,

John Steenhof
Principal Lawyer

Human Rights Law Alliance Submission

‘Productivity Commission 2023, Future foundations for giving’

1. HRLA limits its submissions to those recommendations of the *Productivity Commission 2023, Future foundations for giving, Draft report (Report)* that will adversely impact on religious freedom rights and which will discriminate unjustly against religious Australians and their institutions.
2. HRLA is strongly opposed to:
 - 2.1. Draft recommendation 6.1, to amend the *Income Tax Assessment Act 1997* (Cth) by expanding the deductible gift recipient (DGR) system but expressly excluding from this: primary, secondary, religious and other informal education activities; all activities in the subtype of advancing religion; and the activities of childcare and aged care in the social welfare subtype.
 - 2.2. Draft recommendation 7.1, to amend the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) to remove the concept of ‘basic religious charity’ and associated exemptions.
3. HRLA considers that these recommendations would disadvantage charities of faith in Australia, relative to other charities, and would be detrimental to the wider Australian community which obtains significant benefits from activities and services provided by affected religious charities. These recommendations are inconsistent with the Terms of Reference, have no compelling rationale, are inconsistent with basic charity law principles, and should be abandoned.

Draft Recommendation 6.1

4. HRLA opposes Draft Recommendation 6.1 because it will deny religious public benefit organisations obtaining DGR status. The Report shows a fundamental lack of understanding about religious philanthropy, and contains no real assessment or acknowledgement of the significant benefits that religious organisations provide to Australian society, and how their activities should qualify, rather than be excluded, under the proposed framework. This has produced a deeply flawed recommendation.
5. The DGR system operates to encourage taxpayer support for activity that is expected to generate net community-wide benefits and would otherwise likely be undersupplied by the market.
6. It is accepted that under the *Charities Act 2013* (Cth) these benefits must be available to the general public, or a sufficient section of the general public, and that the notion of public benefit has regard to possible detriment on the general public (or a section of the general public) from achieving the charitable purpose. It is also accepted that whether an entity is a charity and whether it should be eligible for DGR status are separate questions.

7. The report explains that to address the lack of any coherent policy in the current DGR system, at a time of increase in activities by registered charities, the decision has been taken to prioritise eligibility under the DGR system to activities likely to have the greatest net benefits to the community as a whole.
8. To that end, the Commission has developed a ‘principles-based’ framework to determine which classes of charitable activities are within the scope of the DGR system. Under that framework, among the excluded classes would be all activities for the purpose of advancing religion; primary, secondary, religious and informal education; and the activities of childcare and aged care in the social welfare subtype.
9. The three steps in the principles-based assessment for determining whether a class of charitable activity should receive DGR status are that:
 - 9.1. the activity must have a rationale for government support;
 - 9.2. there should be net benefits from providing government support of philanthropy through a tax deduction for giving (as opposed to other government funding mechanisms, like grants); and
 - 9.3. the activities must be unlikely to create a material risk of converting a tax-deductible donation into private benefits for the donor.
10. In reference to the first step, the Report offers the disquieting assurance that ‘meeting this first step does not require an activity to be *explicitly* aligned with the policies and priorities of the government of the day’. This statement is alarming. Charities with religious activities are entitled to the reassurance which is not provided in the Report (in fact the Report does quite the opposite), that they will not be unjustifiably adversely treated as a result of these charities law reforms.
11. The Report is discriminatory towards religious activities in the asymmetrical way that it applies these “principles”. It proposes to expand DGR status generally, but apply exceptions that will specifically adversely affect charities engaged in the excluded activities, which are predominantly religious charities. The Report does not specify in what respects the religious activities within the excluded classes fail to pass the three essential steps. The partisan ideological motivations of this recommendation are disappointing.
12. The impact of the loss of the DGR system benefits will be far-reaching to charities whose religious activities are proposed to be excluded. This should at least be explained by the Commission, and justified, according to its own criteria, before further steps are taken. In view of the fact that religion is well acknowledged by creditable sources¹ to promote moral and community values, and confer broad social and economic benefits, in terms of social capital, social cohesion, and community health and well-being, extending even to economic benefits, this proposal appears to be motivated by political considerations rather than sound principle.

¹ E.g. Justice Derrington, 2019 CLAAZ Annual Lecture “Faith, Hope, and Charity - Religion as a Public Benefit in Modern Australia”: [https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20191129#:~:text=The%20public%20benefit%20requirement%20also,Charities%20Act%202013%20\(Cth\).](https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20191129#:~:text=The%20public%20benefit%20requirement%20also,Charities%20Act%202013%20(Cth).)

13. HRLA opposes the removal of DGR concessions for school building funds. Faith-based schools, of which Christian schools make up the majority, have benefited from DGR concessions for school building funds, because of the obvious benefits that such schools offer in alleviating the burden and expense of public education. Schools for minority faiths serve an even greater social purpose. The Government, through the proposals that it has advanced over the last 12 months is leaving very little rationale for the existence of certain faith-based schools. If even a small number of such private schools were to close, the education sector would be in crisis.
14. HRLA also opposes the removal of DGR concessions for Religious Education in Government. It is more ideologically motivated than rational, since it overlooks the widely reported 'community-wide benefits' over the years it has been available.

Draft Recommendation 7.1

15. HRLA opposes Draft Recommendation 7.1 of the Report to remove the concept of 'basic religious charity' and associated exemptions. This is an ill-conceived recommendation which again suggests ignorance of the impact on the religious entities affected. It will have adverse consequences for fundamental human rights of religious freedom that Australia purports to uphold.
16. The Report states (at page 224) that '[t]here is no stated policy rationale for treating "basic religious charities" differently to other religious and non-religious charities', as if the Commission is unable to recall or find the reasons for the concessionary treatment of religious charities. The policy rationale is explained in the Australian Centre for Philanthropy and Non-profit Studies, Queensland University of Technology Business School, April 2015 in the following terms:

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.

17. One compelling reason for retaining the concessions for 'basic religious charities', especially where such charities are not receiving large amounts of public or DGR money (as must be the case by virtue of s.205-35 of the *Australian Charities and Not-for-profits Commission Act 2012*), concerns the human rights consequences of enabling the power to suspend or remove a 'responsible person'.
18. It represents a serious and unjustifiable threat to:
 - 18.1. the right to "manifest religion or belief in worship, observance, practice and teaching" within the freedom of thought, conscience and religion protected by article 18 of the International Covenant on Civil and Political Rights (to which Australia is bound). It is well established that this right extends to the organisational aspects of religious practice, specifically acts integral to the conduct by religious groups of their basic affairs, such as the freedom of choice in their religious leaders, priests and teachers. Similar protection is expressed in article 6(g) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.

- 18.2. the self-autonomy of religious groups which is secured by protecting them against interference with leadership. This has been underscored repeatedly by the UN special rapporteur on religion or belief, and by the European Court under the European Convention.
19. We are grateful for the opportunity to make this submission and welcome any opportunity to appear in support of it.

Yours sincerely,

John Steenhof
Principal Lawyer