



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

THE PRESIDENT

9 February 2024

Philanthropy Inquiry
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioners

Submission to the Productivity Commission Inquiry into Philanthropy

The Australian Catholic Bishops Conference (the Conference) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Conference seeks to participate in public debate by making reasoned arguments that can be considered by all people of goodwill.

The Catholic community is the largest religious group in Australia, with one in five Australians, i.e. 5.076 million people, identifying as being Catholic in the 2021 Census¹. The Catholic Church and its agencies contribute in various ways across the spectrum of Australian society. Worship, pastoral and other religious activities take place in more than 1,384 Catholic parishes². The Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of hospital and aged care services in Australia. It provides social services and support to more than 450,000 people across more than 650 communities Australia-wide each year. It has more than 1,769 schools enrolling more than 795,000 Australian students³. Catholic Church agencies and organisations employ approximately 220,000 people in more than 3,500 Catholic organisations who serve millions of Australians, both Catholic and non-Catholic.⁴

The Conference welcomes the Treasurer's referral of the Terms of Reference for the Review of Philanthropy to the Productivity Commission (the Review).⁵ The Conference was encouraged by the Treasurer's scope to the Productivity Commission, particularly the references to:

- identify opportunities to increase philanthropic giving; and

¹ Page 3, *"Social Profile of the Catholic Community in Australia, Based on the 2021 Census"*, "Religion, Christianity and Social Capital" April 2023, National Centre for Pastoral Research, Australian Catholic Bishops Conference.

² Summary of Statistics of the Catholic Church, *The Official Directory of the Catholic Church in Australia 2023-2024*, Australian Catholic Bishops Conference.

³ Summary of Statistics of the Catholic Church, op cit.

⁴ The Catholic Contribution to the Common Good: Providing hope, a sense of belonging, spiritual comfort and consolation. Australian Catholic Bishops Conference, 2022.

⁵ Extracted at pages iv-v of the Draft Report.

- the burden imposed on donors, volunteers and not-for-profits by the current regulatory framework for giving and how this affects their philanthropic decision.

The Conference has contributed to the development of policy in the area of charitable and not-for-profit reforms over many years, including through consultation and submissions to the various reviews and enquiries listed in the Draft Report.⁶ In the most recent review which was listed in the Draft Report,⁷ the Conference made two submissions which included matters relating to the 'Basic Religious Charity' (BRC) rules in the *Australian Charities and Not-for-Profits Commission Act 2012* (ACNC Act), which is further addressed in this submission. In the context of the current Review and past reviews, the Conference has some concerns about certain recommendations made in the Draft Report, which are addressed specifically in this submission. The Conference also takes the opportunity to make some more general comments which we believe will assist to inform the work of the Productivity Commission as it continues its valuable work on the Review into Philanthropy.

This submission makes several introductory comments and is then set out in three parts:

- Part One - Response to draft recommendation 7.1 on Basic Religious Charities;
- Part Two - Response to draft recommendation 6.1 on Deductable Gift Recipient; and
- Part Three - Other comments on the Draft Report.

⁶ Draft Report, page 56.

⁷ Treasury, 'Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018' (August 2018) (**2018 ACNC Act Review**).

Contents

Introduction	4
Part One – Response to draft recommendation 7.1 on Basic Religious Charities.....	7
BRC statistical summary data.....	8
The BRC classification.....	8
Constitutional concerns	9
ACNC Governance Standards.....	11
Unjustified cost of audit review of medium and large size BRC entities.....	14
Financial reporting	15
Areas in which the BRC classification could be reformed	17
Part Two – Response to draft recommendation 6.1 on Deductible Gift Recipient status	19
Religion is for the public benefit, not for private benefit or private donors.....	20
School building funds.....	22
Exclusion of Special Religious Education in government schools	24
Refusal to Extend Deductible Gift Recipient Status to Religious Institutions.....	26
Refusal to extend Deductible Gift Recipient status to primary and secondary education	27
Refusal to extend Deductible Gift Recipient status to childcare and aged care	27
Commendable support for local faith-based philanthropy.....	28
Transitional arrangements	30
Part Three – Other matters	31
Draft recommendation 6.2 – Statutory Definition of Public Benevolent Institution	31
Draft recommendation 7.3 – test case funding and binding rulings system.....	32
Draft recommendations 7.2, 9.1 and 9.4 – ACNC requiring and publishing information	32
Draft recommendation 10.1 – Establishing an Aboriginal and Torres Strait Islander philanthropic foundation.....	32
Supporting faith-based service provision	32
Reducing red-tape.....	33
Fundraising.....	34
Competitive neutrality	34
Advocacy by charities.....	34
In Australia Requirement for DGRs	35
TR 2015/1 Special Conditions for charities	35
‘Dormant’ charities	35
Winding up and revocation requirements	36
Charities to be registered with all applicable subtypes	36

Introduction

The Conference commends the Treasurer for requesting an inquiry by the Productivity Commission into philanthropy. The Conference recognises the huge contributions that Australians generously make to establish and improve the structures that underpin our Australian community including churches, schools, community services, aged care and hospitals. People of faith have given generously with their money, time, skills, assets and voices to their churches and more widely to Australian society. There is a great deal that threatens this generous philanthropic giving in Australia. A decline in giving in recent years can be mapped to a decline in church attendance and participation in other civil society structures like service clubs, unions and sporting associations. For this reason, the Conference has serious concerns with the approach adopted by the Commission in its Draft Report. The Australian Government cannot increase philanthropic giving by abolishing the BRC category and consequently adding red tape and administrative burden to 17 per cent of all charities. BRCs are by definition constrained in accepting any government grants or having Deductible Gift Recipient (DGR) status. Equally, the Australian Government cannot increase philanthropic giving by removing DGR status from existing funds for religious instruction and school building funds. The Conference is concerned that proposals in the Draft Report will impede, rather than encourage, philanthropy in the religious sector and consequently broader Australian society.

The Commission proposes a recalibration of the settings for philanthropy in this country in a manner that eschews the contribution of persons of faith. The Commission proposes removal of existing structures that successfully promote philanthropic giving to established building funds that enable the education of Australians and relieve the Australian Government from having to invest in capital grant programs. The Commission proposes to abolish deductible funds for religious instruction in schools and school building funds which are primarily used by faith-based schools. It proposes to extend deductibility status to all existing charities apart from religious institutions and primary and secondary private schools, which are again primarily comprised of faith-based schools.

Deductible status is the primary means by which government may encourage philanthropy. As the Commission acknowledges, 'charities with DGR status already receive about 80% of total giving to charities even though they only account for about 40% of all charities.'⁸

The Commission claims that it offers a 'more diverse range of charities with DGR status' with the result that 'a wider range of causes and beneficiaries could benefit from philanthropy and co-investment from Australian taxpayers, providing donors with more choice.'⁹ In effect, the Commission's conclusion that 'donors would have greater choice ... [i]f the Commission's proposed approach ... is adopted'¹⁰ is a statement applying almost exclusively to donors whose philanthropy is not guided by religious faith. The choice for donors with a religious motivation will vastly decrease.

The Commission candidly admits 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.'¹¹ Among the 'three main factors' on which '[t]he preferred design of a tax incentive for giving depends', the Commission first lists: 'the type of behaviour the government wants to

⁸ Ibid 206.

⁹ Ibid 179.

¹⁰ Ibid 20.

¹¹ Ibid 184.

encourage'.¹² The draft report recommendations tend to exclude the contribution of persons of faith to philanthropy in this nation.

As the Commission recognises, religious communities like the Catholic Church have traditions and practices of giving embedded in their belief systems¹³. The Draft Report fails to apply any considered focus to the religious motivations for giving within Australia. Research suggests that individuals who identify strongly with a religious affiliation tend to be more inclined to engage in philanthropic giving. For example, McGregor-Lowndes et al found that those who identified with a religion had a greater rate of participation in volunteering for any organisation than those who did not identify with a religion (48.1% compared to 40.7%). They found that those who identified with religion gave on average nearly double that of non-religious givers.¹⁴ Religion is a strong motivating factor in giving both to the religious purpose and other charitable purposes. People who give to their church are also more likely to give to other charitable subtypes. People with a religious affiliation give for a motivation that is based in faith, devotion and religious community, rather than as some act of discretionary allocation of financial resources. Members of the Catholic Church give freely and cheerfully as an act of worship. In the Catholic community, people give to support the Church, its leaders and its ministry.

In the United States it has also been shown that '[t]he benefits of church membership appear to redound not only to attendees but to the larger community. For example, one study found a "halo effect" by which historic sacred places on average generate roughly \$1.7 million for their local economies and estimated that 87 percent of the beneficiaries of such places' community programs were not themselves parishioners.'¹⁵ The contribution of religion to philanthropic endeavour is well documented.¹⁶

Notwithstanding that the Commission recognises that '[r]eligion is one of the largest recipients of donations',¹⁷ and that '[m]any people are motivated by religious or cultural factors',¹⁸ it makes little endeavour to explore the unique imperatives that arise in the case of religious philanthropy. This failure takes no stock of the distinction between philanthropy that is directed to institutions with a purpose of 'advancing religion' and faith-based institutions with other charitable purposes. That such an analysis is not anywhere present in a report charged with the responsibility of discovering means to increase philanthropy is, again, nothing short of astounding. This is a serious omission, especially to the extent that religious motivation may inspire philanthropy towards faith-based benevolence in the wider community. Correspondingly, while the Commission acknowledges that religious groups represent the second-highest avenue for formal volunteering,¹⁹ the Commission's overview of the

¹² Ibid 142.

¹³ Ibid 4.

¹⁴ Myles McGregor-Lowndes et al, Giving Australia 2016 report series commissioned by the Australian Government Department of Social Services, *Individual Giving and Volunteering* The Australian Centre for Philanthropy and Non-profit Studies, Queensland University of Technology, Centre for Social Impact Swinburne, Swinburne University of Technology and the Centre for Corporate Public Affairs, (Report, September 2017) 111. See also Showers, Vince E et al, 'Charitable Giving Expenditures and the Faith Factor' (2011) 70(1) *The American Journal of Economics and Sociology* 152.

¹⁵ Joint Economic Committee – Republicans (United States), Senate, *The Space Between* (SCP Report 8-19, 2019) 13.

¹⁶ 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; Andrew Leigh, *Disconnected* (UNSW Press, 2010); Andrew Leigh and Nick Terrell, *Reconnected* (La Trobe University Press, 2020).

¹⁷ Draft Report 224.

¹⁸ Ibid 127.

¹⁹ Ibid 109.

factors incentivising volunteering fails to acknowledge this reality.²⁰ This deficient methodology undermines the Commission's own goal to provide 'insights' into 'motivations for giving that 'could inform how government agencies design and administer measures to support giving'.²¹

The Catholic Church has a lot to offer any inquiry on philanthropic giving, but the Draft Report appears to put forward a position that will diminish persons of faith from philanthropic giving and instead proposes to place additional red tape on religious entities with the removal of the BRC classification. The Commission's draft recommendations would have a disruptive and negative effect on giving by people of faith and other generous donors.

²⁰ Draft Report, see particularly at 107.

²¹ Ibid 118.

Part One – Response to draft recommendation 7.1 on Basic Religious Charities

The draft recommendation is in the following terms:

A more transparent and consistent approach to regulating basic religious charities

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, so all charities registered with the Australian Charities and Not-for-profits Commission have the same governance obligations and reporting requirements proportionate to their size.

This recommendation is stated as the Productivity Commission's 'preliminary view'.²² It is surprising that the Productivity Commission has chosen to address this aspect of the ACNC Act within the scope of the Review for the following reasons:

1. Despite the apparent rationale for making this recommendation in the context of the regulatory framework for charities (in Chapter 7 of the Draft Report), it is not apparent how the scrutiny of the BRC rules in the ACNC Act falls materially within the scope of the Terms of Reference for the Review.
2. By definition, a BRC (as an entity) is not a DGR.
3. As noted by the Productivity Commission, 'the majority of basic religious charities are small'.²³
4. There is no evidence-based analysis in the Draft Report of either existing problems in the context of philanthropy which arise because of the BRC rules, or how removing the concept of a BRC would materially advance the objectives of the Review.
5. The subject of the BRC rules was extensively reviewed and evaluated recently in the 2018 ACNC Act Review by the Treasury. There were numerous submissions, in detail, regarding these rules in that review. The result of that review in 2020 was emphatic: 'The Government has no plans to review the exemptions for basic religious charity'.²⁴
6. The Australian Government has been consulting broadly with the philanthropic, not-for-profit and business sectors to double philanthropic giving by 2030, but in earlier conversations has never raised the unrelated idea of removing the BRC classification.

Considering these points, it is disappointing that the Productivity Commission has chosen to focus one of its draft recommendations on the BRC rules and that the Conference must (again) explain the well-founded basis for the BRC rules in this submission. In doing so, this submission does not seek to address or repeat all prior submissions on this topic.²⁵

²² Draft Report, page 224.

²³ Draft Report, page 23.

²⁴ Australian Government, 'Government Response To The Australian Charities And Not-For-Profits Commission Legislation Review 2018' (6 March 2020), page 14.

²⁵ Any omission of prior submissions herein should not detract from the force of those prior submissions. For example, the Conference previously has argued for the extension of equivalent exceptions for other similar unincorporated charities.

BRC statistical summary data

Table 1- BRC Summary Data ²⁶ Charity Size (Pre-2022 AIS Thresholds)	No of BRCs	% of BRCs	% change over 1 year	% change over 5 years
Small i.e. revenue <\$250,000 pa	8,435	82.7%	+0.1%	-0.8%
Medium i.e. revenue \$250,000 or more but less than \$1 million pa	1,397	13.7%	-0.1%	+0.7%
Subtotal Small & Medium BRCs	9,833	96.4%		
Large i.e. revenue \$1 million or more pa	367	3.6%	0.0%	+0.1%
Total Number of BRCs	10,200	100.0%	+0.1%	-0.6%
Notes:				
1. Total Registered Charities per 9 th Edition Australian Charities Report	60,000			
2. BRCs Proportion per 9 th Edition Australian Charities Report	17%			
Total Number of BRCs (1 X 2)	10,200			

The total number of registered charities in Australia is circa 60,000 with BRCs representing 17 per cent, i.e. circa 10,200 registered charities (see Table 1 above). The aggregate number of BRCs has fallen by 0.6 per cent over the past five years. There is no evidence that charities are rushing to establish BRCs to avoid proportionate Australian Charities and Not-for-profits Commission (**ACNC**) regulation and oversight.

It is important to note that 96.4 per cent of BRCs or circa 9,833 BRC entities are small or medium size charities using pre-2022 ACNC thresholds. Whilst new statistics based on size arising from the ACNC's changed Annual Information Statement (**AIS**) thresholds have not yet been released, it is estimated that even more BRCs will now be rated as being small or medium. These entities are, for the most part, simple unincorporated entities. By way of example, the majority of the 1,384²⁷ Catholic Parishes in Australia would be small. It would be largely in the capital city dioceses that any parishes might be a medium size entity using the current ACNC thresholds, i.e. annual revenue of \$0.5 million to \$3 million. In the Archdiocese of Sydney there are 21 out of 129 parishes (16 per cent) and in the Archdiocese of Brisbane there are 19 out of 94 Parishes (20 per cent) that would be a medium size entity, with no parishes that would be large charities.

The BRC classification

The BRC classification has been part of the ACNC Act since its enactment. The Parliament considered it appropriate to provide for a classification of BRCs. Under the ACNC Act, a BRC qualifies for three concessions:

1. an exception from the removal and suspension powers of the ACNC for breach of certain provisions of the ACNC Act or Governance Standards;²⁸
2. an exception from compliance with the Governance Standards;²⁹ and
3. an exception from certain reporting requirements.³⁰

²⁶ Extrapolated from Table 2- BRC by ACNC Charity Size, page 12, Australian Charities Report, 9th Edition, ACNC.

²⁷ Summary of Statistics of the Catholic Church, op cit.

²⁸ ACNC Act, s100-5(3).

²⁹ ACNC Act, s45-10(5).

³⁰ ACNC Act, s60-60.

As the Australian Centre for Philanthropy and Non-profit Studies summarised:

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.³¹

It is noteworthy that in 2018 the ACNC Advisory Board informed the 2018 Statutory Review of the Australian Charities and Not-for-profits Commission legislation (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.’³²

The Commission offers several rationales for its recommendation. It emphasises the role of regulation in underpinning public confidence in the charity sector, noting that ‘well-designed regulation can give the community confidence that funds are being used for charitable purposes.’³³ In itself, this is a non-contentious statement. However, its application to religious charities is not proven by the Commission. In fact, once again, the Commission offers no analysis of the unique circumstances that arise within the context of religious institutions. The following discussion discloses that on close consideration the rationales the Commission develops from studies concerning secular charities are inapplicable to religious bodies.

The Conference repeats its support for retention of BRCs, for the following reasons:

1. Constitutional concerns;
2. ACNC Governance Standards;
3. Unjustified cost of audit review of medium and large size BRC entities; and
4. Financial reporting.

Constitutional concerns

Regarding the removal and suspension powers, the Productivity Commission has overlooked a fundamental consideration. The abolition of the Basic Religious Charity (BRC) category would mean that the ACNC Commissioner would be able to suspend, appoint and remove the leaders of non-compliant 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.’³⁴ This is demonstrably not the case. In its submission to the 2018 ACNC Review the Conference observed that the Conference understands that the redrafting of the first Bill proposing the establishment of the ACNC was necessary to avoid constitutional difficulties exposed. Specifically, the exercise of any powers of the ACNC to replace and

³¹ Australian Centre for Philanthropy and Non-profit Studies, Queensland University of Technology Business School, *ACPNS Current Issues Information Sheet 2015/2 (April 2015)* 2.

³² Cited in Statutory Review of the Australian Charities and Not-for-profits Commission, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* 66 (Commonwealth of Australia, 2018) (‘ACNC Review’).

³³ Draft Report 20.

³⁴ Draft Report 224 Draft Report.

appoint responsible persons³⁵ in religious entities or to direct religious bodies to alter governance rules and structures could have been subject to constitutional challenge.

The Conference notes the observation in the Draft Report that removing the BRC concept from the ACNC Act would 'also mean if basic religious charities breach governance standards, the ACNC would be able to act'³⁶ and 'would also enable the Commissioner of the ACNC to exercise their existing power to suspend or remove a responsible person in relation to any charity that is a federally regulated entity.'³⁷

As the Conference explained in its further submission to the 2018 ACNC Act Review, there is a restriction on the legislative power of the Commonwealth to legislate for the ACNC to suspend, appoint and remove the leaders of religious bodies, in the context of section 116 of the Australian Constitution.

Section 116 of Commonwealth of Australia Constitution

Commonwealth not to legislate in respect of religion.

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

As explained in more detail in the submission on the Draft Report of Dr Alex Deagon and Dr Mark Fowler, and in summary in the extract below:³⁸

...international human rights bodies have strongly contended that government interference in the leadership of religious organisations will breach human rights norms. Commonwealth legislation enabling such interference may be beyond the powers granted to the Parliament under the Constitution. Even if the legislation is within power, it is likely to be invalid on the basis of breaching the freedom of religion provision of the Constitution which imposes limits on Commonwealth legislative power.

For this fundamental reason, the Conference repeats its submission to the 2018 ACNC Act Review that the fundamental constitutional issue remains with any powers the ACNC might be given to suspend, remove or appoint responsible persons in religious organisations or use statutory backing or to recommend such action to the Courts. The ACNC believes unreservedly that powers of the ACNC to suspend, remove or appoint responsible persons in registered charities should not extend to Basic Religious Charities.

This concern was affirmed by the ACNC Review. It recognised that section 116 '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 relation to other registered entities'.³⁹ It also 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.'⁴⁰ As Professor Nicholas Aroney and Associate Professor Mark Fowler have pointed out: 'The limited scope of the BRC exemption under the

³⁵ The term used in the ACNC Act is 'responsible entity'. For greater clarity in this submission we adopt the term 'responsible person'.

³⁶ Draft Report, page 23.

³⁷ Ibid, page 224.

³⁸ Dr Alex Deagon and Dr Mark Fowler, 'Submission to the Productivity Commission on Draft Report on Philanthropy', received by the Productivity Commission on 4 January 2024 as Submission no. 276.

³⁹ ACNC Review 63.

⁴⁰ Ibid 69.

ACNC Act and the resulting power of the Commissioners to replace the leaders of religious institutions illustrate the importance of constitutional protections of freedom of religious association.⁴¹

Indeed, as the ACNC Review confirmed, this limitation on the power of the ACNC Commissioner is supported by the relevant international law. The *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory, imposes limitations on the ability of a State Party to appoint the leaders of religious institutions. The United Nations Human Rights Committee has affirmed this principle in *William Eduardo Delgado Páez v. Colombia*,⁴² where it stated its view that the selection of teachers who conform to the teachings of the Catholic Church does not amount to discrimination, nor disclosing a ‘violation of article 26’, and is thus not within the discretion of the State to regulate. The same applies under the jurisprudence arising under the European Convention on Human Rights (ECHR). For example, in *Hasan and Chaush v. Bulgaria*⁴³ the European Court of Human Rights recognised that the protection to freedom of religion under Article 9 of the ECHR was violated because of ‘an interference with the internal organization of the Muslim community’.

As the Conference noted in its submission to the ACNC Review, the Law Institute of Victoria has acknowledged that ‘the ability for the Commissioner to remove and replace responsible entities raises potential freedom of association issues for all charities, not just religious entities.’ In light of these various serious concerns the Conference reaffirms its position before the ACNC Review that it believes unreservedly that powers of the ACNC to suspend, remove or appoint responsible persons in registered charities should not extend to Basic Religious Charities. There is no evidence that the existing governance standards within Catholic institutions are insufficient, a matter to which we now turn.

ACNC Governance Standards

Regarding the exception from compliance with the ACNC Governance Standards, logically, it follows that compliance with obligations might not be mandated, if non-compliance is incapable of enforcement through making suspension, removal or appointment orders as above. That said, there are broader reasons for the appropriateness of this exception for a BRC, which the Conference has explained previously:⁴⁴

The exemption for BRCs from the application of governance standards regulated by the ACNC recognises that churches of many faiths have unique governance structures consistent with the beliefs, attitudes and behaviours fostered by the philosophy and theology of their particular faith. Within religions, governance is often integrated with the nature of worship and manifestation of religious belief.

In the case of the Catholic Church in Australia, the roles of physical entities (e.g. diocese and parishes), religious communities (e.g. religious orders of nuns and priests) and clergy (e.g. bishops, priests and deacons) are all set down in Canon Law. Some examples of governance arrangements that apply within the Catholic Church that would not usually apply in other registered charities are:

- A parish priest is the person solely responsible for stewardship of resources at the

⁴¹ Nicholas Aroney and Mark Fowler ‘Freedom of Association in Australia’ (2023) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4587217

⁴² *William Eduardo Delgado Páez v. Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990).

⁴³ (2002) 34 Eur Court HR (ser A) 55.

⁴⁴ The following extracts are taken from the Conference’s further submission to the 2018 ACNC Act Review.

disposal of a parish with the aim of supporting worship and religious activity within the parish community. Parish priests are identified as the sole “responsible person” in most Catholic parishes. However, the parish priest is not an employee of the Church and is not entitled to receive a wage for the conduct of religious services. Living expenses and accommodation are funded by stipends and donations from within the membership of the parish.

- A parish priest is required by Canon Law to appoint a finance committee. However, these finance committees are advisory in nature and respond to requests for advice from the parish priest. A parish finance committee is not equivalent to a Board of Directors appointed by a company or incorporated charity and a parish priest is not a chief executive officer with responsibility to take direction from the finance committee. Members of parish finance committees serve in a voluntary capacity, but often have skills and experience similar to members of governing boards in commerce and the charitable sector.
- Legal ownership of parish land and buildings is vested in diocesan trusts although the parish priest is responsible for their maintenance.

Different churches will have different arrangements.

Continuation of an exemption from governance standards as applied by the ACNC is appropriate.

The following comments are made on the ACNC Governance Standards - Charity Self-Evaluation Checklist and conflicts with Canon Law:

1. The ACNC expects each charity to have several Responsible Persons whereas Canon Law requires the Parish Priest to be solely responsible for his Parish.
2. Governance Standard 1, Q1 examples- The governing document (i.e. Code of Canon Law) is to be reviewed to ensure it remains relevant. The governing document is reviewed to consider if changes are required. These requirements are not consistent with Canon Law.
3. Governance Standard 2- Accountability to members (i.e. baptised Catholics)-
 - a. Q3 Does your charity allow its members to ask questions, vote on resolutions and raise concerns? e.g. does it hold AGMs and include Q&A sessions? This is not fully compatible with Canon Law, as the parish priest is solely responsible for the pastoral care and administration of the parish.
 - b. Q4 Does your charity make clear to members how they can participate in its governance? For example, does the governing document (Code of Canon Law) set out how Responsible People are nominated and elected? This is not fully compatible with the Code of Canon Law.
4. Governance Standard 4- Suitability of Responsible Persons
 - a. Q2 Does your charity take steps to ensure its Responsible People are suitable prior to appointment? Does the charity have processes in place for recruiting, screening and appointing Responsible Persons? This is not fully compatible with the Code of Canon Law and the role of the diocesan bishop in appointing parish priests and the Pope appointing diocesan bishops.

5. Governance Standard 5- Duties of Responsible People-

- a. Q3 Do your charity's Responsible People have the right skills and knowledge for their role? This is not fully compatible with the Code of Canon Law.
- b. Q6 Does your charity take steps to ensure responsible decision-making? For example, does the charity has enough Responsible People that are independent from each other to allow for independent decision-making? This is not fully compatible with the Code of Canon Law.

Regarding the exception from certain reporting requirements, the Draft Report notes the exception in this regard for a BRC as an example of an 'unjustified reporting exemption'⁴⁵ and that there is 'no stated policy rationale for treating basic religious charities differently to other religious and non-religious charities'.⁴⁶ These statements require correction.

It must always be remembered that one of the primary objects of the ACNC Act is 'to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector'.⁴⁷ In that context, it should be wholly understandable that the various rules will be adapted to be fit for purpose for entities with different features. A BRC is such an entity for which such adapted treatment is appropriate.

Bearing in mind that the definition of a BRC is limited to those entities which are not DGRs and do not receive grant payments above the specified threshold from Australian government agencies, it should be recognised immediately that the type of entity concerned is a relatively small entity which does not receive substantial amounts of funding involving 'opportunity costs' of the kind discussed in the Draft Report. Incidentally, this makes the Productivity Commission's decision to focus on BRCs all the more surprising.

In this regard, it is apt to focus on the kind of entity that benefits from the BRC exemption. The archetype in the Catholic Church is a 'parish'. A parish comprises a community of faith in a geographical area. Each parish, administered by a parish priest, advances the faith of the community through religious services and engagement with the community.⁴⁸ The parish typically draws on financial and volunteer resources contributed by parishioners, including through collections at masses, and undertakes work in the community to advance religion for the public benefit.

Although it is not stated as such in the ACNC Act, the Conference considers it almost self-evident that the rationale for excepting a BRC from certain reporting requirements is explicable by reference to the lower risk and impacts of such risk which are associated with a BRC. As explained above, a BRC is not a DGR and does not receive significant grant funding, and hence its funding does not represent any cost to the Australian public in that regard.

In terms of accountability to the public, that just leaves the exemption from income tax as the item most relevant to the scope of its reporting obligations for transparency purposes. However, by reference to the composition of 'membership' and source of funding, it is likely that at least some, and probably a large, part of a BRC's 'income' would not be within the income tax regime in the first place

⁴⁵ Draft Report, Figure 10, page 30.

⁴⁶ Draft Report, page 224.

⁴⁷ ACNC Act, s15-5(1)(c).

⁴⁸ 'A parish is a certain community of the Christian faithful stably constituted in a particular church, whose pastoral care is entrusted to a pastor (parochus) as its proper pastor (pastor) under the authority of the diocesan bishop.' Code of Canon Law, 515.

under the principle of mutuality in tax law. As stated by the Australian Taxation Office, 'the mutuality principle is a legal principle established by case law. It is based on the proposition that an organisation cannot derive income from itself'.⁴⁹ Under this principle, the 'income' sheltered by the exemption from income tax is likely to be minimal for an archetypal parish of the Catholic Church, for which members of the parish (i.e. parishioners) contribute to a common fund to advance the purposes of the community (i.e. the parish). To that extent, the 'subsidy' to the BRC by way of exemption from income tax is likely to be relatively small and, in that context, it would be appropriate for the reporting to be reduced commensurately, which is achieved by the current BRC rules.

In the context of the ACNC Act's object to reduce unnecessary obligations and the Productivity Commission's scope in the Review to consider the burden imposed on not-for-profits by the current regulatory framework, it would be a retrograde step to increase the cost and burden on a BRC to make it subject to the greater reporting requirements in the ACNC Act. Instead, it would undo the very benefits that the BRC rules are intended to, and actually do, deliver. In this regard, the Conference noted in its original submission to the 2018 ACNC Act Review:

BRC status has been very effective in keeping to a minimum the time and resources involved in regulatory compliance for unincorporated Church entities. For many of these entities, attention to accounting and regulatory compliance is handled by volunteers. In this regard, BRC status is consistent with the ACNC's Object to cut red tape as enunciated in Section 15-5(1)(c): "to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector".

Losing BRC status would result in many parishes which are currently able to rely on volunteers being required to seek professional advice, which could come at a cost disproportionate to the size of their annual revenue.

Unjustified cost of audit review of medium and large size BRC entities

In our experience there is no significant difference in the cost of external audit review of a medium size entity and a full audit of the same medium size entity. By way of example, in the Catholic Archdiocese of Sydney there are currently circa 21 out of 129 (16 per cent) unincorporated parishes with a turnover of more than \$500,000 that will be required to have an audit review each year, if the BRC exemption is abolished. Pitcher Partners estimated in 2012 this cost would be \$5,000 per parish. We conservatively estimate this audit cost today will be \$7,500 per annum with a further \$5,000 needing to be spent in preparing general-purpose financial statements compliant with Australian Accounting and International Financial Reporting Standards. In the Archdiocese of Sydney this cost is estimated at equating to \$262,500 per annum.

This proposed incremental audit and accounting cost would represent up to 2.5% of a medium size entity's revenue for little benefit. The proposed audit and reporting obligations are unwarranted when it is considered that local Australian subsidiaries of multi-national corporations and Australian private companies with a turnover exceeding hundreds of millions of dollars are not required to undertake the same external audit and public financial reporting obligations as those which are being proposed for medium and large BRCs. It is also noted that under Accounting Standards, unincorporated BRCs would not be ordinarily defined as 'Reporting Entities' and required to prepare financial statements as they do not have shareholders, employees, creditors and other stakeholders who rely on entities' financial statements to assess their financial performance and make investment decisions. In the case

⁴⁹ Australian Taxation Office, 'Taxable income and mutuality': [Taxable income and mutuality | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/Taxable-income-and-mutuality).

of parishes, it is in fact a matter for the parish priest to assess and manage the financial affairs of the parish. Understanding this point, requiring such reports to be prepared and audited is unnecessary and out of step with Accounting Standards.

Financial reporting

The Commission's recommendation that the BRC status be abolished would withdraw the current success of the existing arrangements in reducing red tape for small unincorporated charities. As the Commission acknowledges, the vast majority of BRCs are 'small'.⁵⁰ It will mean that churches/synagogues/mosques etc. will be required to disclose their financials on the publicly searchable Australian Charities and Not-for-profits Commission register. The rationales offered by the Commission for this recommendation are inapplicable to religious institutions.

In its submission to the ACNC Review, the Conference affirmed that the important values of transparency and accountability need to be understood and promoted in a way that is proportionate to the size of charities and any assessment of relevant risk factors. We considered that removal of this element of the BRC exemptions is the area in which the costs for parishes in terms of volunteer time and/or additional professional services are likely to be disproportionate to the benefits envisioned from greater transparency.

The Conference informed the ACNC Review that the current regulatory regime has meant additional reporting and red tape, especially in view of the duplication with state and territory legislation. Unincorporated entities have new reporting obligations as a result of the ACNC, which are particularly burdensome for organisations heavily dependent on volunteers.

The Conference also submitted that the information which might be required to be produced (including its type and detail) if the BRC status is abolished is a substantial issue. If basic religious charities are to lose their exemption from reporting, then the appropriateness of applying all accounting standards must be critically examined. There are some accounting standards which cause significant reporting costs and the information serves no purpose other than being able to comply with accounting standards. The value added needs to be critiqued, particularly given recent media attention to the value of Church assets which cannot be put to an alternate use. The asset revaluation standard is one in particular and it appears that the leasing standard may become another. Not all charities are the same and not all charities are the same size. If the BRC status is lost, then a classification of charities is required. As an example, the ASX classifies by size and by industry. The same is true of charities and especially so when National Standard Chart of Accounts is discussed. Amongst many challenges, an example would be the coding of the costs of living for religious.

It needs to be appreciated that this change would not just involve an increase in reporting thresholds. Many organisations have chosen their current governance structures, often across multiple entities, based on these classifications. These would require detailed review to ensure that any future structures, asset holdings and related arrangements are both fit for purpose and meet legislative standards.

The Conference encountered no argument in submissions to the Legislation Review to indicate that the benefits for either the regulator or society in general would justify the removal of the reporting exemption for Basic Religious Charities. The same is true of the arguments put by the Productivity Commission in its Draft Report.

⁵⁰ Ibid 223-4.

The following statements offered by the Commission demonstrate the inapplicability of the rationales it offers for public disclosure of financial information to the specific context of religious charities:

- ‘It can be difficult for donors to navigate which charities align with their preferences and motivations to give.’⁵¹ Donors to the Catholic Church give to the Church because their values already align with the Church. There is no evidence that donors giving to the Church are shopping amongst varying charities to ensure value alignment before deciding to give to the Church.
- ‘misconduct by one charity may negatively affect trust and confidence in other parts of the sector, including charities that are meeting their obligations. The possibility of such negative spillover effects may deter people from donating to worthy causes, for fear their donation may be misused for private or other non-charitable purposes.’⁵² This is not applicable to religious charities. There is no evidence that misconduct within a particular religious movement has any implication for other religious movements. As noted above, governance mechanisms within the Catholic Church are sufficient to assure the trust and confidence of its members.
- ‘the main benefit from adding this information to the website of a government body such as the ACNC might be that it increases the likelihood a donor will come across the information or it increases the likelihood the donor will use the information because they consider information on a government site as more trustworthy.’⁵³ Donors to the Catholic Church do not ‘come across’ their local parish and decide to give. They are in relationship with that parish and have adequate information to inform their decisions as to giving to the needs of the parish.
- ‘if information provided by influencers, celebrities or professional advisors is ill-informed or misleading it has the potential to negatively impact charities, recipients of services and donor trust and confidence to give.’⁵⁴ These rationales for public disclosure are inapplicable to the Catholic Church.

The Catholic Church has sufficient reporting requirements to assure its parishioners that any misuse of funds will be identified and dealt with accordingly. The ‘public’ to whom the Church is accountable in terms of the financial contributions made by its members is its membership and the relevant ecclesiastical authorities.

The Commission also acknowledges that studies are ‘mixed’ as to whether financial disclosure actually increases philanthropy in respect of secular charities, with many concluding that there is negligible benefit. For example, ‘[i]n an experiment examining impediments to effective altruism, Berman et al. found providing information on charity effectiveness had a limited influence on subjects’ decision about which charity to give to.’⁵⁵

Having regard to these factors, 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

⁵¹ Ibid 29.

⁵² Ibid 212.

⁵³ Ibid 297.

⁵⁴ Ibid 118.

⁵⁵ Ibid 294.

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.⁵⁶

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.'⁵⁷ Evidence supporting the Commission's recommendations in respect of BRCs and which satisfies these standards has not been produced by the Commission.

No Australian State or Territory currently requires churches to disclose the private donations of members of parishes to a regulator, let alone to make those amounts available to the wider public. A cogent rationale for the recommendation that religious charities must disclose their financial statements to government and also have those statements publicly disclosed has not been made out. The proposition does not acquit the terms of reference provided to the Commission. The Commission has not made the case that its recommendation that the BRC exception be abolished will further philanthropy within Australia.

Areas in which the BRC classification could be reformed

In our submission to the ACNC Review we further noted that we would have no difficulty with removal of section 205-35 (2) of the ACNC Act as several commentators have noted that some religions are incorporated and that legal structure should not of itself rule out eligibility for Basic Religious Charity status. Furthermore, we noted that we would have no difficulty with removal of section 205-35 (5) relating to receipt of government grants. In practice, there is a negligible number of Basic Religious Charities in receipt of government grants. Where government grants are directed to Catholic charities, the organisations deliver health, education and other social services and are therefore not currently classified as BRCs.

The Conference submitted to the ACNC Review that one option for extending BRC-like status for reporting is to extend the BRC-like status to all unincorporated charities not in receipt of DGR status. In the first instance the extension could apply to all unincorporated non-DGR charities classified as "small". Currently, small charities are defined as having revenue under \$500,000.

Arguably any charity with revenue less than \$1 million might be regarded as "small". In the Catholic Church's experience, such a threshold would lead to almost all unincorporated non-DGR charities (including almost all parishes) to be defined as "small". Following the logic of raising the thresholds for other categories, the Productivity Commission might consider the following adjustments to thresholds:

- small registered charity – no more than \$1 million in revenue per annum;
- medium registered charity - annual revenue more than \$1,000,000 and no more than \$5,000,000; and
- large registered charity - annual revenue of more than \$5,000,000.

⁵⁶ Ibid 285 (emphasis added).

⁵⁷ Ibid 295.

The above recommendations accord with the resulting conclusions of the ACNC Review:

The Panel recommends that the revenue thresholds be increased to less than \$1 million for a small registered entity, from \$1 million to less than \$5 million for a medium registered entity and \$5 million or more for a large registered entity, and determined on rolling three-year revenue.⁵⁸

⁵⁸ ACNC Review 9.

Part Two – Response to draft recommendation 6.1 on Deductible Gift Recipient status

Draft recommendation 6.1 is lengthy. The Conference wishes to focus on the following elements:

A simpler, refocused deductible gift recipient (DGR) system that creates fairer and more consistent outcomes for donors, charities and the community

The Australian Government should expressly exclude the following classes of charitable activities or subtypes:

- primary, secondary, religious and other informal education activities, with an exception for activities that have a specific equity objective (such as activities undertaken by a public benevolent institution)
- all activities in the subtype of advancing religion.

The criteria proposed by the Productivity Commission in the Draft Report to guide the eligibility for DGR inclusion are as follows:⁵⁹

- There is a rationale for Australian Government support because the activity has net community-wide benefits and would otherwise be undersupplied.
- There are net benefits from providing Australian Government support for the activity through subsidising philanthropy.
- There is unlikely to be a close nexus between donors and beneficiaries, such as the material risk of substitution between fees and donations.

The application of these principles would seem to result in an outcome, compared to the current DGR rules, whereby:

- Most classes of entity with charitable activities would be in scope for DGR status, including activities that have been largely excluded from the DGR system to date, such as 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.⁶⁰
- Entities whose purpose is advancing religion would be excluded.⁶¹
- School building funds would be excluded.⁶²

In resolving the above outcomes to exclude the latter two categories (as draft recommendations), the Conference submits that the Productivity Commission has misapplied the criteria identified above, principally in respect of not giving due recognition to the public benefit of religion and education, and the perceived nexus between donors and beneficiaries, in ways that misconstrue long-standing principles of charitable law.

⁵⁹ Draft Report, draft recommendation 6.1, page 196.

⁶⁰ Draft Report, page 185.

⁶¹ Draft Report, page 196.

⁶² Draft Report, pages 188-191.

The Productivity Commission also seeks to exclude religion and school building funds by explaining (incorrectly, in the view of the Conference) why they do not satisfy the specified criteria, but does not seek to explain positively why other entities do satisfy the specific criteria, let alone seeking at all to explain how any of the entities that are DGRs because of being specifically listed by name (so-called specific listing) would satisfy such criteria,⁶³ despite the concerns expressed in the Draft Report about specific listing.

Religion is for the public benefit, not for private benefit or private donors⁶⁴

Page 18 of the Draft Report provides some explanation for the Productivity Commission's draft recommendation:

Religious 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 above.

The 'first principle above' is that religion does not have net community-wide benefits and would otherwise be undersupplied.

The rationale for these statements seems to lack understanding of the public benefit of religion.

The advancement of religion is a recognised head of charity. As noted in the Charities Definition Inquiry:⁶⁵

The 'advancement of religion', in one form or another, has been part of charity throughout the history of charity law.

The Committee affirms that 'the advancement of religion' should continue as a head of charity. It is clear that a large proportion of the population have a need for spiritual sustenance. Organisations that have as their dominant purpose the advancement of religion are for the public benefit because they aim to satisfy the spiritual needs of the community. Religious organisations satisfy these needs by providing systems of beliefs and the means for learning about these beliefs and for putting them into practice.

Other inquiries have consistently supported the advancement of religion as a charitable purpose.⁶⁶

The case law also has consistently supported the advancement of religion as a charitable purpose. Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor* [1934] HCA 14 stated:

A trust for the purpose of religion is prima facie a trust for a charitable purpose. ... A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover, a disposition is valid which in general terms devotes property to religious purposes or objects. ... The law has found a public benefit in the promotion of religion as an influence upon human conduct;

⁶³ Other than taking on notice that Paul Ramsay Foundation and Minderoo Foundation would be such entities: Draft Report, page 173.

⁶⁴ For attribution, this information is sourced from the content of the submission by the Catholic Archdiocese of Sydney to the review by The Treasury, A definition of charity Consultation Paper, October 2011.

⁶⁵ The Treasury, 'Charities Definition Inquiry' (2001) (**Charities Definition Inquiry**), pages 175 and 178.

⁶⁶ The Conference welcomes the Productivity Commission's support for the maintenance of this position in the Draft Report (at page 192), though again it seems to be a matter which was unnecessary to deal with, given that it falls outside the scope of the Review.

More recently, the High Court (including the minority judgment) in *Commissioner of Taxation v Word Investments* [2008] HCA 55 recognised the same position:

...its true construction states a charitable purpose – a purpose of advancing religion in a charitable sense.

It is implicit in the inclusion of the advancement of religion as a charitable purpose that it is for the public benefit and hence beneficial to the community. Indeed, the 2001 Charities Definition Inquiry made this very point:⁶⁷

...once a purpose has been established to fall under the advancement of health, education, social and community welfare, religion, culture or the environment, it would be presumed to be for the benefit of the community unless evidence to the contrary were presented.

Various writers have explained the position about how religion is for the public benefit in different ways. For example:⁶⁸

Having religious organisations is good for society as a whole – social inclusion is inclusion into a group of people, not a concept. We would argue that the Australian community accepts that there is inherent value for society as a whole in having religious organisations which facilitate connectedness of people into religious groups. ... Provided the religious groups do not engage in anti-social or illegal behaviour, most Australians would consider them to have a broader social good

In various ways, studies have demonstrated that Australian believers who worship regularly are more likely to volunteer and to give more to charity and in the process to display a willingness to reach out beyond their own worshipping community⁶⁹ and, in respect of young people, 'to have positive civic attitudes, to demonstrate high levels of social concern and to be actively involved in service to the community.'⁷⁰

To the same end, we repeat the explanation provided by the Conference in its submission to the 2001 Charities Definition Inquiry:

Religion provides a basic motivation for acting virtuously and in the interests of the common good. The religious underpinning for the life of virtue can be either conscious and direct or it can be indirect and mediated through historical developments in law and culture ... the promotion of religious faith through word and deed is a vitally important educative function in society by positing a basis for moral action.

The historical link between religion and benevolent works/social services and its current context is discussed in an article by a respected clergyman and a prominent advocate for community and not for profit sectors:⁷¹

The first thing to note is that the way in which social service is delivered in Australia is quite distinctive. Prior to the Second World War, social services were almost entirely delivered by

⁶⁷ Charities Definition Inquiry Report, page 190.

⁶⁸ Fr Brian Lucas and Anne Robinson, 'Religion as a head of charity', *Modernising charity law*, 2008, 186.

⁶⁹ Mark Lyons & Ian Nivison-Smith, "The relationship between religion and volunteering in Australia", *Australian Journal on Volunteering*, volume 11 (2), 2006, page 25 and Leonard, Rosemary et al, "Volunteering among Christian church attendees 1991-2006", *Australian Journal on Volunteering*, volume 14 (7), 2009.

⁷⁰ Fr Brian Lucas and Anne Robinson AM quoted by Mason, Michael et al, *The Spirit of Generation Y: Young People's Spirituality in a Changing Australia*, John Garratt, 2007, page 304.

⁷¹ *Ibid*, pages 188 to 191.

charities and most of them were religious-based (Christian). ... Christian charities dominate in Australia in a way that they do not elsewhere. ... Twenty-three of the 25 largest Australian charities by income are Christian. ... The charitable activities are not undertaken in isolation: institutions may be separate entities for various legal reasons, but they are inherently part of, and come out of, communities of faith.

By proposing to exclude entities whose purpose is the advancement of religion from other charities which operate for the public benefit, the Productivity Commission would be falling into error. It would also itself be seeking to define the meaning of 'public benefit' in a way that is contrary to the long-standing position at law and without a principled basis of distinction for religion. The Courts have advised against anyone trying to define public benefit in this way. Rather, 'such judgments are often required of the courts in a variety of jurisdictions'.⁷²

Returning to the point in question in respect of the Draft Report, if the foundation for DGR eligibility is to be charitable, subject only to exclusion for entities whose benefits are not 'community-wide' or where there is a material risk of private benefit, the Conference submits that there is no basis on which to exclude an entity whose purpose is to advance religion.

It follows that, if the Productivity Commission proposes to recommend the expansion of DGR eligibility to include charities in general, entities for the advancement of religion must be included along with the other charities for which the Productivity Commission would propose for such expansion.⁷³

School building funds

At the outset, in the absence of the Draft Report extending to any other matters of education funding, there is a threshold question about the merits or appropriateness of the Productivity Commission delving into any matters to do with education funding. The Conference advises against the Productivity Commission making recommendations about matters which impact more broadly on education funding, of which school building funds are one component, in the current circumstances.

Subject to the above, the Conference makes the following comments.

Page 18 of the Draft Report sets the scene for the Productivity Commission's views:

The Commission's view is that converting a tax-deductible donation into a private benefit is, in principle, a substantial risk for primary and secondary education, religious education, and other forms of informal education, including school building funds. The potential for a donor to be able to convert a tax-deductible donation into a private benefit is especially apparent for primary and secondary education, particularly where students are charged fees. Potential donors are most likely to be people directly involved with the school and benefit directly from donations, such as students, their parents or alumni. Most other classes of activities in the education charitable subtype, including formal higher education and research activities would remain within the scope of the DGR system.

⁷² *Victorian Women Lawyers' Association Inc v FC of T* [2008] FCA 983, [117].

⁷³ For completeness, if DGR is expanded to include an entity whose purpose is to advance religion, and such entity otherwise would be a BRC, there would need to be some reconciliation between these sets of rules, such as, for example, permitting the entity to elect either for BRC or DGR, but not both.

Along with the advancement of religion, the advancement of education is one of the foundational and traditional heads of charity.⁷⁴ The advancement of education is for the public benefit *per se*. The advancement of education should be accepted as being for the public benefit simply because education is a social good which improves society as a whole. The public benefit presumption exists because it is self-evident that educating people from all parts of society is a common and universal good for society as a whole.

There is no relevant distinction between schools which educate people with different backgrounds or with different needs. Simply, all education is for the public benefit and the community as a whole. To suggest otherwise is wrong.

In that context, the maintenance of a school building fund supports the needs of schools to provide education and hence assists to advance the purposes of the school. The Parliament has seen fit for a long time to grant DGR status to such a fund subject to strict conditions about the use of those funds for the 'acquisition, construction or maintenance of a building used, or to be used, by the school'.⁷⁵ The restriction on that use of funds is the protection, as considered appropriate by the Parliament, to guard the well-known risk identified by the Productivity Commission in the extract above that there not be a tax deduction available for the payment of school fees.

The Commission argues that 'the rationale for school building funds accessing DGR status is weak',⁷⁶ citing arguments for this proposition by reference to a narrow range of submissions to this effect (and giving less weight to submissions from better-positioned education bodies to the contrary). The Commission seems to dismiss the basis for this DGR category because of the inference drawn from a limited range of data as follows:⁷⁷

This suggests that many schools servicing communities with greater socio-economic disadvantage are less likely to benefit from DGR endorsement for school building funds.

The above is hardly a cogent reason to withdraw DGR endorsement from those schools which benefit from donations. Instead, the Conference would submit that the material reviewed and analysed by the Productivity Commission ought to be factored into devising strategies for:

- governments to fund those schools which have greater needs that have not been able to benefit from donations to date; and/or
- encouraging donors, such as ancillary funds, community and corporate foundations to re-direct donations to those schools most in need and thereby advance the objective of the Review to increase philanthropic giving.

The draft recommendation of the Productivity Commission should be reconsidered and recalibrated to finding more positive solutions to the needs of schools which could benefit more from donations into school building funds. In this regard, the consequences of the draft recommendation of the Productivity Commission needs much more careful consideration, given that school building funds represent the second-highest number of DGRs by category⁷⁸ and that there are currently about 5,000

⁷⁴ The speech of Lord Macnaghten in *Pemsel* is the source of the modern classification of charitable trusts in four principal divisions: trusts for the relief of poverty, for the advancement of education, for the advancement of religion and for other purposes beneficial to the community.

⁷⁵ *Income Tax Assessment Act 1997* (Cth), s30-25(1) Item 2.1.10.

⁷⁶ Draft Report, page 189.

⁷⁷ Draft Report, page 190.

⁷⁸ Draft Report, Figure 5, page 15; Figure 5.1, page 159.

DGR endorsements for school building funds.⁷⁹ The withdrawal of DGR eligibility will obviously require substitution of substantial funding from other sources and risks upsetting the current government funding settings.

Returning to the start of this section, the Conference submits that education funding is not something to be reformed through the myopic lens in the current Review, but instead it requires holistic assessment and analysis of the kind that is more appropriately addressed through the existing channels for education funding review and decisions. For that reason, the Productivity Commission should refrain from including school building funds within the scope of its further work in the Review.

Exclusion of Special Religious Education in government schools

The Commission appears to have formed a view that, as a class, deductible funds for religious instruction in schools (Special Religious Education (SRE) funds) should be excluded from DGR status eligibility because they do not meet the Commission's proposed eligibility criteria.⁸⁰ The Commission makes the unsupportable 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'.⁸¹ The Commission also asserts that '[t]he likelihood of a close nexus between fees and donations means that there is a case for expressly excluding education activities related to ... religious education'.⁸² No evidence is offered for these extraordinary claims. It is not at all clear how a parent contributing to a fund for SRE in a school in which their child is enrolled would take a private benefit, other than the intended religious education of their child. Moreover, these claims completely overlook the wider public benefit of religious instruction, further considered below. They also overlook the common occurrence that many non-religious parents by their own volition choose to place their children in religious instruction.

Apart from the foregoing, nowhere in its report are the eligibility criteria expressly applied to SRE funds in a manner that supports the conclusion that SRE funds should lose deductibility status. The available research instead supports the opposite conclusion; SRE funds meet the very criteria proposed by the Commission because:

- i. SRE funds provide community-wide benefits that are unlikely to be supported by other sources of government funding; and
- ii. SRE funds improve access to educational services, including for families on lower incomes, making a valuable contribution to a more equitable society.

In their *Study of SRE and its value to contemporary society*, Professor Zehavit Gross and Professor Emerita Suzanne D. Rutland OAM identified four clear benefits of SRE in the contemporary context:⁸³

- i. an effective values education that empowers student decision making fosters student action and assigns real student responsibility;
- ii. important psychological benefits to students' mental health and wellbeing;
- iii. strengthening the multicultural fabric of Australian schools; and

⁷⁹ Draft Report, page 18.

⁸⁰ Draft Report 'Figure 6.1 – Assessment criteria for determining the scope of the DGR system' 182.

⁸¹ Ibid 18.

⁸² Ibid 188.

⁸³ Zehavit Gross and Suzanne D. Rutland, *Study of Special Religious Education and its Value to Contemporary Society*, 5.

- iv. creating safe places for students to explore deeper questions of identity.

As Gross and Rutland observe,⁸⁴ religion is a key component of cultural heritage and providing avenues for the study of religion strengthens multiculturalism by providing an opportunity for students to learn about, appreciate and understand the diversity of contemporary Australia. It has been observed that increased religious literacy contributes to greater tolerance and understanding.⁸⁵ Greater tolerance and understanding across differences is of great benefit to a contemporary Australia which has been growing in religious diversity over the past several decades.⁸⁶

In NSW alone, there are presently 98 approved providers of SRE from a variety of mainstream religious faiths that provide SRE across 969 schools. While we cannot provide conclusive data for all those providers, we can speak authoritatively to the scope of the operations of the 11 Catholic SRE providers in NSW; they provide over 4,000 volunteers to teach SRE to some 66,000 students. It is highly unlikely that any government would ever provide sufficient funding to maintain this scale of religious education if SRE funds are excluded from DGR status eligibility.

There is therefore a great risk that the exclusion of SRE funds from DGR status eligibility will generate inequity, as the benefits of SRE would no longer be accessible to Catholic students in government schools; whereas they would be available to students in private schools. This prospect is particularly problematic given that the cultural and religious diversity of government schools implies a greater need for the promotion of understanding and tolerance of religious diversity that SRE provides. In Australian government schools, students who have a religious affiliation account for 43.1 per cent of primary and 45.5 per cent of secondary students.⁸⁷ Of these, 13.3 per cent of primary and 11.7 per cent of secondary students have a religious affiliation other than Christianity.⁸⁸ Religious students in public schools (who are a substantial minority) therefore risk having the benefit of being understood, appreciated, and tolerated for their difference removed from them. Parents of children who attend government schools, many of whom are on lower incomes, risk having removed from them the choice to confer an educational benefit to their children, a choice that will continue to be available to parents of children who attend religious or private schools. The blanket exclusion of SRE funds from DGR eligibility is therefore at cross-purposes with the stated aim of the Commission's report, that DGR status be extended to charities which have an equity objective.⁸⁹ The exclusion of SRE funds would instead result in greater inequity in the Australian education system.

Importantly, as the Commission itself observes, the DGR condition for religious instruction does not preference persons of a religious faith: "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 (Bradbury 2013).⁹⁰ The DGR status of SRE funds does not violate principles of neutrality.

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 well over ten thousand hours of classroom teaching in public schools

⁸⁴ Ibid, 10.

⁸⁵ See, e.g., Diane Moore, *Overcoming Religious Illiteracy: A Cultural Studies Approach to the Study of Religion in Secondary Education* (2007).

⁸⁶ Gross and Rutland (n 55) 7.

⁸⁷ *ABS Census of Population & Housing 2021* (data obtained using Census TableBuilder).

⁸⁸ Ibid.

⁸⁹ Draft Report 39.

⁹⁰ Ibid 167.

every week. 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. The Conference does not support the Commission's recommendation that DGR funds for SRE be abolished.

Refusal to Extend Deductible Gift Recipient Status to Religious Institutions

The Commission recognises the key principle that 'financial incentives ... should be effective, efficient and equitable.'⁹¹ It is not equitable to exclude religion from the Commission's recommendation to extend the scope of deductible purposes. Indeed, the lack of such equity is the precise rationale underpinning the Commission's recommendation in 2010 that religion be included in the expansion of deductibility to all charitable purposes: 'The Commission believes that gift deductibility should be widened to include all tax-endorsed charities in the interests of equity and simplicity.'⁹²

The Draft Report posits three touchstone criteria by which it determines whether an entity is eligible for DGR status. In respect of the first and second criteria the only rationale the Commission offers for the refusal to extend deductible status to religion is that 'the additional net community benefits from extending the DGR system to include the purposes of purely advancing religion are not apparent.'⁹³ This extraordinarily scant treatment disregards the long-running common law recognition of the public benefit of religion,⁹⁴ the Commission's 2010 analysis and the widely recognized benefits of religion, further outlined below under the heading 'A Deficient Methodology'. The Commission's recommendation fails to provide sufficient regard to the fact that religion qualifies for deductions alongside the other charitable purposes in all major Anglophone democracies. The Commission recognises this fact 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).⁹⁵

⁹¹ Ibid 69.

⁹² Commonwealth of Australia Productivity Commission, *Contribution of the Not-for-Profit Sector*, (January 2010) 179.

⁹³ Draft Report 192.

⁹⁴ See, e.g., *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. See *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 *Melbourne University Law Review* 1071, 1084. On the benefits arising from the neutral recognition of plural religions see, e.g., *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.

⁹⁵ Draft Report 168.

In respect of the third criterion there are three clear objections to the application of this disqualifying condition as a basis for withholding DGR status from religious institutions:

1. The Commission does not claim that there is evidence of substantial mischief.
2. The prospect that a member of a religious institution might give a donation in the hope that this would reduce fees they incur from the religious institution is so remote as to make the proposition illogical.
3. If any such reduction were to be offered, the gift 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.'⁹⁶ If there is any such mischief, existing policy settings are sufficient to deal with it.

Consequently the Commission has failed to offer a reasoned basis for refusing to extend deductibility status to religious institutions alongside the other charities it recommends receive that status.

Refusal to extend Deductible Gift Recipient status to primary and secondary education

In respect of the recommendation to exclude primary and secondary education from DGR status it is self-evident that this recommendation has a disproportionate impact upon faith-based schooling in this nation. The Independent Schools Australia (ISA) 2023 edition of the 'School Enrolment Trends and Projections Research Report' (the ISA Report) states: 'There are currently 4 million full time equivalent students enrolled in Australian schools across all sectors. The government sector has the most enrolments (2.6 million or 64 per cent of total enrolments), followed by the Catholic sector (0.75 million or 18 per cent) and the Independent sector (0.69 million or 17 per cent).'97 The latter category is overwhelmingly comprised of faith-based schools, including independent Catholic schools. The failure to extend DGR status to Catholic and Independent schools provides another illustration of the Draft Report's exclusion of the contribution of religion from the Australian project.

Refusal to extend Deductible Gift Recipient status to childcare and aged care

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.'⁹⁸ 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.'⁹⁹ This proposition runs against long-settled charity law which holds that the levying of contributions from beneficiaries is not determinative of the presence of private benefit.¹⁰⁰ 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, childcare, counselling services and private schooling. As noted above, the prospect that mischief might arise where a beneficiary of

⁹⁶ <https://www.ato.gov.au/individuals-and-families/income-deductions-offsets-and-records/deductions-you-can-claim/gifts-and-donations>

⁹⁷ <https://isa.edu.au/wp-content/uploads/2023/09/Enrolment-Trends-and-Projections-2023-Edition.pdf>

⁹⁸ Draft Report 191.

⁹⁹ Ibid.

¹⁰⁰ See, eg, *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] 1 Ch 159; [1983] 1 All ER 288.

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.

Commendable support for local faith-based philanthropy

The Conference commends the following recommendation:

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.¹⁰¹

This recommendation is further articulated at pages 172, 185 and 198. As demonstrated by recent interest in ‘place-based initiatives’, the effectiveness of local knowledge and initiative in meeting local benevolent need cannot be understated.¹⁰² The Commission is to be commended for having regard to the contribution that small-scale local relief may play in encouraging philanthropy and social cohesion. As the Commission states:

Donors and charities can bring specific skills, relationships or experience working with communities receiving services or networks that the government cannot access. These skills and networks may allow donors and charities to achieve better and more valued outcomes, like higher quality, more accessible, or more timely service delivery at lower cost compared with direct government provision or grants.¹⁰³

As the Commission notes, the proposed

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.¹⁰⁴

To this end we support the Commission’s recommendation and agree that it ‘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.’¹⁰⁵ For the

¹⁰¹ Draft Report 198.

¹⁰² See, e.g., Jess Dart, ‘Place-based Evaluation Framework’ (Queensland Government Department of Communities, Disability Services and Seniors (DCDSS), Australian Government Department of Social Services (DSS), and Logan Together, 2018); S Wilks, J Lahausse and B Edwards, ‘Commonwealth Place-Based Service Delivery Initiatives’, Australian Institute of Family Studies, Department of the Prime Minister and Cabinet, (Report No 32, April 2015); I Marsh et al, ‘Delivering Public Services’ (2017) 76(4) *Australian Journal of Public Administration* 443; T Moore and R Fry, ‘Place-based Approaches to Child and Family Services’, Murdoch Childrens Research Institute, The Royal Children’s Hospital Centre for Community Child Health (Literature Review, July 2011).

¹⁰³ Draft Report 6.

¹⁰⁴ Ibid 205.

¹⁰⁵ Ibid 186.

same reason and in light of the fact that the reform is targeted at small entities, we support the Commission's recommendations that these funds do not need to be subject to the additional public fund requirements.¹⁰⁶

We also affirm the Commission's concern that:

[i]ncreased reporting obligations would impose additional costs on charities and there would need to be a clear case that further reporting obligations are necessary. ... Making reporting obligations more detailed about the receipt of donations for DGR-eligible activities could impose a disproportionate change from the status quo on small charities that currently have fewer reporting obligations.¹⁰⁷

Small charities that establish deductible funds should be subject only to proportional levels of reporting. Consistent with the existing conditions for BRCs, the grant of deductible status to such a fund should not prejudice a parish's BRC status, unless total revenue derived from that operation for the financial year exceeds \$500,000. If the below proposal for reform of the financial reporting thresholds to the Australian Charities and Not-for-profits Commission (ACNC) is implemented, the reform should align with those thresholds.

The Conference commends the Commission for proposing this important reform. As the Commission recognises in its opening summary to 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.'¹⁰⁸ This recommendation will play a significant role in strengthening social capital within Australia because it specifically seeks to encourage local relationship:

Philanthropy can also contribute to the building of social capital where relationships form between donors, between donors and not for profit organisations, or between donors and beneficiaries. These relationships can become networks of connected people that facilitate trust and co-operation within or between groups that can be drawn on, including in times of crisis or to disseminate knowledge.¹⁰⁹

The Commission's recommendation accords with the important Catholic principle of subsidiarity. Pope John Paul II provided the following description of that concept: 'a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.'¹¹⁰ In its endeavour to incentivise the meeting of local benevolent need with local initiative, of all the recommendations made by the Commission, this sole recommendation holds the greatest potential to create social capital through government policy.

¹⁰⁶ Ibid 198.

¹⁰⁷ Ibid 200.

¹⁰⁸ Ibid 2.

¹⁰⁹ Ibid 67.

¹¹⁰ Pope John Paul II, 'Centesimus Annus', *Vatican* (Web Page, 1 May 1991) [48] <https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html>.

Transitional arrangements

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 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.¹¹¹

The Conference does not support the abolition of school building funds or deductible funds for SRE. However, the Commission's proposal for transitional arrangements lacks clarity. It is not clear whether the Commission intends that 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 expend their funds thereafter. 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 must also apply to SRE funds.

¹¹¹ Draft Report 20.

Part Three – Other matters

In the time available to review the Draft Report, the Conference has prioritised responses on the above matters and makes the following brief comments and submissions on other selected aspects of the Draft Report.

Draft recommendation 6.2 – Statutory Definition of Public Benevolent Institution

The Conference counsels against seeking to define in a prescriptive way the meaning of a concept like 'public benevolent institution'. The Conference believes it would be unwise to engage in this exercise, rather than leave it to the Courts, which are best placed to make these judgments in a way that is flexible enough to adapt to developments over time.

The report recommends that the Australian Government should 'develop a legislated definition of what constitutes a public benevolent institution to delineate its scope more clearly.'¹¹² The Commission provides the following rationale:

Some participants have noted that this creates complexity and uncertainty about whether or a not certain charities are PBIs. For example, Justice Connect (sub. 269, p. 4) commented that PBI requirements 'can only be fully understood by reference to 90 years' worth of case law and a lengthy ACNC Commissioner's Interpretation Statement'.¹¹³

In releasing the August 2023 version of its Commissioner's Interpretation Statement (CIS) on PBIs, the ACNC was at pains to point out that no existing PBI would lose its eligibility. To avoid the prospect that any statutory statement of the meaning of PBI would exclude an existing PBI and thus make it no longer eligible for its associated tax endorsements and concessions, the statutory enshrinement could only restate the current common law. This would only then replicate the current position stated in the ACNC CIS.

In the interests of assisting compliance, the ACNC drafts Commissioner's Interpretation Statements with the intention that they be accessible to the non-lawyer and thus be of particular benefit to responsible persons associated with smaller charities. The CIS on PBI provides sufficient guidance and we do not accept the submissions that an ongoing lack of clarity does indeed remain after the extensive consultation conducted by the ACNC on the most recent version of its CIS on PBIs.

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'.¹¹⁴ It is not at all logically evident how a statutory enshrinement would address this risk.

It is also to be noted that the recently released CIS on PBIs satisfactorily settles the long-running question of whether a PBI may have an additional purpose of 'advancing religion'. The ACNC consultation process on its recently released CIS on PBIs was undertaken over a period of several years and involved significant contributions from faith-based PBIs. These were made in response to the concern that the ACNC would no longer register a PBI with a purpose of 'advancing religion'. The ACNC's CIS on PBIs now clarifies that a PBI may be registered with such a purpose. The law underpinning the ACNC's position has been set out by Dr Mark Fowler in 'Can a Faith-Based Public Benevolent Institution Have a Purpose of "Advancing Religion"?' (2023) 1 *Third Sector Review* 65. The ACNC CIS provides an important clarification that supports the ongoing maintenance of the religious ethos of faith-based PBIs within Australia. For these

¹¹² Ibid 41.

¹¹³ Ibid 169.

¹¹⁴ Ibid 170. See also 171-72.

reasons we do not consider that a statutory statement of the definition of a 'public benevolent institution' is necessary.

Draft recommendation 7.3 – test case funding and binding rulings system

The Conference supports these proposals for test case funding for the ACNC and for amending the ACNC Act to provide for a binding ruling scheme, as a way of providing clarity and certainty to entities subject to the ACNC's jurisdiction. This would be similar to the way that the Australian Taxation Office was able to operate when it was the primary regulator of charities via its independent assessment of eligibility for tax concessions.

Draft recommendations 7.2, 9.1 and 9.4 – ACNC requiring and publishing information

To varying degrees, draft recommendations 7.2, 9.1 and 9.4 expand or change the basis for the ACNC to require additional information, publish details and report data, including to separately report information on bequests. The Conference submits that any changes in line with these draft recommendations must not unreasonably increase the cost to registered charities, consistent with the long-standing views of the Conference to give effect to the original intention of the ACNC to reduce 'red tape'.

Public disclosure of the matters contemplated in Recommendation 7.2 could have serious impacts upon a charity's reputation and prejudice the pursuit of its charitable purposes. It may also have impacts on the reputation of responsible persons associated with the charity. Charities should have the right to challenge the ACNC's decisions and their public disclosure. The right to challenge public disclosure of a decision should be exercisable prior to the effectuation of that disclosure.

Draft recommendation 10.1 – Establishing an Aboriginal and Torres Strait Islander philanthropic foundation

There is a long history of the Church working to alleviate disadvantage within Aboriginal and Torres Strait Islander communities. The Conference supports any measures that would make a meaningful difference in this regard, including a foundation that can be led by Aboriginal and Torres Strait Islander people and partner with other networks (including Church entities).¹¹⁵

Supporting faith-based service provision

The Conference is concerned that anti-discrimination law is increasingly imposing restrictions on the supply of faith-based community services. This concern can arise, for example, in the provision of adoption or fostering services, in the provision of counselling services, in the provision of education or health services.¹¹⁶ Where anti-discrimination law limits the ability of a Catholic service provider to offer a distinctly Catholic approach at the request of its beneficiaries, the community is denied an important service and the autonomous exercise of preference within the wider community is diminished.

This concern is directly relevant to the Commission's work. The Commission emphasises the importance of mitigating the prospect of market failure on the provision of charitable services. It recognises that 'outcomes generated by markets do not always meet individual or community preferences or expectations.'¹¹⁷ 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

¹¹⁵ Draft Report, page 336.

¹¹⁶ See, eg, *Equal Opportunity Act 2010* (Vic) s 82B.

¹¹⁷ Draft Report 70.

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.¹¹⁸

It also emphasises the negative consequences of government ‘crowd out’.¹¹⁹ 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.¹²⁰

Where a faith-based charity is precluded from offering a faith-based service, this impacts upon the religious manifestation of those persons associated with the charity and decreases the level of donor support that it would otherwise elicit. This 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.

The Commission lauds the role of advocacy by charities in the formation of government policy:

Philanthropy can also support advocacy that conveys the perspectives of communities, facilitating their input into democratic processes and policy outcomes. This can include expressing views on policy issues which are different from the government or the wider public.¹²¹

Anti-discrimination law that enforces the withdrawal of faith-based providers leads to the loss to future policy debates of the knowledge and expertise that arises from the application of religious beliefs to particular charitable need. Detrimental impact arises as a result of the loss of the public voice of that specific charity. The Commission should recommend that governments do not stifle philanthropy by limiting the operations of faith-based service providers through anti-discrimination law.

Reducing red-tape

As we informed the Tax White Paper Task Force in 2015, instead of unhelpful and irrelevant arguments about “revenue foregone” and justifications for exemptions and concessions for charities such as the Church, the more important issue is the reduction of red tape to make it easier for charities to pursue their objectives for the public benefit. The cost of compliance for charities is growing and compromising the capacity of charities to achieve their full potential in contributing to society and relieving the burden from government.

The Commission’s desire to reduce red tape is commendable. The Conference notes that the recent

¹¹⁸ Ibid 70.

¹¹⁹ Ibid 71.

¹²⁰ Ibid 71.

¹²¹ Ibid 7.

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.¹²²

The Commission should affirm these recommendations.

Fundraising

The Commission recommends 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.'¹²³

The Conference's position on fundraising reform remains unchanged from its submission to the ACNC Review. Accordingly, it supports the proposal to bring all charity fundraising activity under one national banner. Currently there is a fragmented approach to fundraising compliance due to each state and territory having its own rules. This imposes a severe compliance burden on charities that engage in large-scale mass-market fundraising.

Competitive neutrality

As we submitted to the Tax White Paper Task Force, the question of whether there is a 'competitive advantage' for charities has been considered and dismissed in past reviews. Any suggestion of reform to tax concessions based on 'competitive neutrality' is based on a flawed premise, as reviewed and concluded in past reviews, particularly by the Productivity Commission and the Henry Review.

The 2010 Productivity Commission Report addressed these issues comprehensively and concluded that '[o]n balance, income tax exemptions are not significantly distortionary as [NFPs] have an incentive to maximise the returns on their commercial activities that they then put towards achieving their community purpose.'¹²⁴ The 2008 Henry Review Report stated the same view: "The NFP income tax concessions do not generally violate the principle of competitive neutrality where NFP organisations operate in commercial markets."¹²⁵ The Commission should not assert reliance on principles of competitive neutrality in making recommendations for the reform of the Australian NFP sector.

Advocacy by charities

As the Conference noted before the ACNC Review, systemic issues and failures in the social welfare system are often addressed and changed by concerted advocacy efforts on behalf of civil society. Advocacy is important as an educative and pastoral means to raising public awareness and gathering support in order to influence public policy for the betterment of the Australian community.

¹²² ACNC Review 11.

¹²³ Draft Report 236.

¹²⁴ Productivity Commission 2010 (n 8) 197.

¹²⁵ Australia's Future Tax System Review Panel *Australia's Future Tax System*, (Final Report, December 2009) ('Henry Review') pt 2, 209.

In Australia Requirement for DGRs

The Commission recommends the abolition of the ‘in Australia’ requirements in the *Income Tax Assessment Act 1997* (Cth):

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.¹²⁶

We support this recommendation for the reasons stated by the Commission.

TR 2015/1 Special Conditions for charities

The Commission makes references to TR 2015/1 Special Conditions for Charities. It states:

To maintain eligibility for an income tax exemption under section 50-50(2)(b) of the *Income Tax Assessment Act 1997* (Cth), charities are required to apply income and assets solely for the purposes for which the entity was established. Taxation Ruling TR 2015/1 ‘Income Tax: special conditions for various entities whose ordinary and statutory income is exempt’ sets out the Commissioner of Taxation’s view of this requirement, stating that an ‘entity that accumulates most of its income over a number of years will need to show on a year by year basis that the accumulation is consistent with the purpose for which the entity is established’. Although this condition does not impose a minimum distribution requirement on charitable trusts or other charities, it has generally been interpreted to require a relatively direct and active use of funds (Murray 2021, p. 164).¹²⁷

In 2015 the Conference submitted that it considers tax ruling TR2015/1 ‘Income tax: special conditions for various entities whose ordinary and statutory income is exempt’ to be unworkable and recommended that the legislation behind it be repealed. We indicated that one area which concerns the Conference is the increasing escalation of compliance costs and special conditions attaching to long-standing and uncontroversial categories of tax-exempt entities. As an example, the introduction of ‘special conditions’ by the former government via the *Tax Laws Amendment (2013 Measures No.2) Act 2013* both adds red tape and has no practical effect. The conditions generate uncertainty for both charities and professional advisers. The Conference considers that the ATO’s views in tax ruling, TR2015/1 “Income tax: special conditions for various entities whose ordinary statutory income is exempt”, adds to the confusion. The reforms add cost for no discernible benefit and should be repealed. Our position remains unchanged, and the Commission should make recommendations accordingly.

‘Dormant’ charities

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.’¹²⁸ In determining whether an entity is ‘dormant’ it is critical that regard be had to the purposes and

¹²⁶ Draft Report 199.

¹²⁷ Ibid 264.

¹²⁸ Ibid 43.

operations of that entity. For example, in the context of charitable housing, or the development of property, particular proposals may take years to eventuate. Such assets should not be regarded as 'dormant'. 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.¹²⁹

Winding up and revocation requirements

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.'¹³⁰ We noted before the ACNC Review that the process for an entity to revoke ACNC registration is overly cumbersome and time-consuming. Uncertainty can arise where a deductible entity has multiple purposes. For example, an entity that operates an aged care facility may give consideration to the provision of surplus to an entity that undertakes aged care and housing for the relief of poverty. Both entities are PBIs, but the question arises as to whether their purposes are sufficiently similar for the purposes of the DGR winding up condition? A similar example arises in the context of a coordinated group of housing charities or within a coordinated group of faith-based benevolent charities. If the charities each indicate in their objects that they will operate within a given State jurisdiction, are the entities prohibited from transferring assets on winding up? Additional certainty is required.

Charities to be registered with all applicable subtypes

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.'¹³¹ 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 arises from the existing frameworks. The Conference does not support this recommendation.

¹²⁹ Ibid 264.

¹³⁰ Ibid 199.

¹³¹ Ibid 201.

If you require any further information on this submission please contact Mr Jeremy Stuparich, Deputy General Secretary at the Conference, on (02) 6201 9863 or at policy@catholic.org.au

Yours sincerely,

✘ Timothy Costelloe SDB

Archbishop of Perth

President