

**Submission to the Australian Government, Productivity Commission**  
**Review of Philanthropy Discussion Paper**

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## Introduction and Overview of Argument

1. This submission is directed to various of the questions posed by the Productivity Commission Discussion Paper (the ‘Discussion Paper’). The central concerns of this submission are directed towards the following matters:
  - a. The means by which local faith-based charities may contribute to Assistant Minister for Charities Andrew Leigh’s desire to inspire ‘a civic renaissance’ through charitable associations;<sup>1</sup>
  - b. The public benefit of religion, as applies to tax exemption and deductibility of gifts;
  - c. The Productivity Commission’s prior recommendation that Deductible Gift Recipient status should be given to all charities, and the effect of this on basic religious charities;
  - d. The maintenance of the existing fringe benefit tax exemption for religious institutions; and
  - e. Competitive neutrality concerns as applied to the tax exemption of charities.
  
2. Part 1 argues that, in light of the strong historical and contemporary presence of faith-based charities within the benevolent charitable sector, in order to acquit its terms of reference the Productivity Commission should give specific consideration to how that contribution may be not only maintained, but enhanced. This is critical to ensure that the Commission accurately engages with the character of the Australian charitable sector and to ensure the maximum impact of its recommendations. Part 1 poses this argument from the perspective of the common law’s recognition that benevolent institutions may have regard to the spiritual needs of those they seek to serve. Part 2 argues that against the trend of declining civic engagement, the evidence suggests that religious entities are foremost amongst those charities that promote community engagement. Noting the statistically significant correlation between geographic location and philanthropic concern, the Productivity Commission should seek to identify initiatives that will enhance civic engagement through local associations. The remainder of Part 2 of this submission considers specific policy initiatives encouraging civic engagement that seek to build upon this relationship or address constraints limiting it. Faith-based charities are a critical component of any such effort.

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<sup>1</sup> Danielle Kutchel, ‘Leigh Hits the Ground Running as Charities Minister’, *Pro Bono Australia*, 15 June 2022 <<https://probonoaustralia.com.au/news/2022/06/leigh-hits-the-ground-running-as-charities-minister/>>.

3. Parts 3 to 5 respond to question 5 of the Discussion Paper. Part 3 addresses the tax treatment of religious institutions. The discussion takes note of the Productivity Commission's 2010 recommendation that '[t]he Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds', inclusive of religious institutions. Noting that the Productivity Commission places heavy reliance upon subsidy theory, I argue that tax expenditure theory is an inappropriate measure by which to weigh the contribution of religious institutions to the public benefit. The traditional economic rationales for charitable tax favour are either inapplicable to religious institutions, or do not offer a complete account for their distinct purposes or activities.
4. Part 4 argues that the existing criteria for the provision of fringe benefits to religious practitioners by religious institutions should be maintained. Part 5 addresses the concerns with competitive neutrality raised in the Discussion Paper; being that tax 'concessions can increase the ability of charities to compete with other organisations and businesses that are unable to access them and can raise competitive neutrality concerns.' However, it is noted that, in respect of tax exemption, this statement is inconsistent with the Productivity Commission's 2010 conclusion that '[o]n balance, income tax exemptions are not significantly distortionary as not-for-profits (NFPs) have an incentive to maximise the returns on their commercial activities that they then put towards achieving their community purpose.' The submission concludes with a summary statement of the principal recommendations made herein.

## Commission's Terms of Reference

### 5. The Commission's Terms of Reference are as follows:

The purpose of the inquiry is to understand trends in philanthropic giving in Australia, the underlying drivers of these trends, and to identify opportunities and obstacles to increasing such giving. The inquiry should make recommendations to Government to address barriers to giving and harness opportunities to grow it further.

In undertaking the inquiry/study, the Commission should:

1. Consider the tendencies and motivations for Australians' charitable giving, including through different donation channels such as workplace giving, bequests, private foundations, in-kind donations, and volunteering.
2. Identify opportunities to increase philanthropic giving and the extent of their potential impact, including:
  - i. The role of, and effectiveness of, foundations in encouraging philanthropic giving and supporting the charitable sector.
  - ii. Successful public strategies in other jurisdictions – across business, not-for-profits and philanthropic sectors – that have enhanced the status of giving or the level of philanthropic activity.
  - iii. The potential to increase philanthropy by enhancing the effectiveness and efficiency of the use of donations.
3. Examine current barriers to philanthropic giving, including:
  - i. The burden imposed on donors, volunteers and not-for-profits by the current regulatory framework for giving and how this affects their philanthropic decisions.
  - ii. The ability of donors to assess and compare charities based on evidence of effectiveness, including through impact evaluations and making

comparisons across charities. In doing so, the Commission should consider the work of overseas impact evaluation comparison sites.

Consider the appropriateness of current sources of data related to philanthropic giving, and how databases could be enhanced in a cost-effective manner.

5. Examine the tax expenditure framework that applies to charities. In particular, assess the effectiveness and fairness of the deductible gift recipient framework and how it aligns with public policy objectives and the priorities of the broader community.

6. Identify reforms to address barriers or harness opportunities to increase philanthropy, and assess benefits, costs, risks, practicalities and implementation considerations. In doing so, the Commission should advise on priority areas for reform, having regard to:

i. The integrity of the taxation system and the current fiscal environment.

ii. The benefits that flow to not-for-profits from existing programs.

iii. The benefits that would flow from increased philanthropic giving.

6. The Discussion Paper poses a number of questions. This submission engages with questions 1, 3 and 5.

## Part 1 – Information Request 1 – Defining Philanthropy

3. The Discussion Paper seeks views on the following question:



### Information request 1

#### Defining philanthropy and the inquiry's scope

The Commission is seeking views and information on the following.

- Philanthropic activities that should fall within the scope of this inquiry.
- Ways of recognising different definitions, perspectives and norms relating to philanthropy among different cultures and communities, including but not limited to:
  - Aboriginal and Torres Strait Islander people
  - culturally and linguistically diverse communities
  - faith-based groups
  - younger and older Australians.

4. The Discussion Paper notes that:

There is no single definition of philanthropy, and participants will have views about what is and is not covered by the term, but it commonly refers to charitable acts motivated by the desire to improve the welfare of others (Australian Institute of Health and Welfare 2021, pp. 1–2; McCully 2008; OECD 2020). For example, Philanthropy Australia (2022, p. 1) define philanthropy to include ‘the giving of money, time, information, goods and services, influence and voice to improve the wellbeing of humanity and the community’.

5. The common law has long recognised that charities seeking to relieve the ‘welfare’ of others may have regard to their spiritual needs. This recognition is important for the current inquiry, as it allows the Productivity Commission to consider how faith-based charities may be placed at the centre of reforms seeking to enhance philanthropy within Australia. In its 2018 submission to the Review of Australian Charities and Not-for-profits Commission (ACNC) legislation the Anglican Diocese of Sydney analysed ACNC data to conclude: ‘the combination of “religious purpose” and faith-based charities accounts for just over half (51.1%) of all registered charities. By recognising Faith-Based Charities, the number of “religious charities” jumps from 30% to 50%.’<sup>2</sup> In light of the strong historical and contemporary presence of faith-based charities within the benevolent charitable sector the

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<sup>2</sup> Available at <https://treasury.gov.au/sites/default/files/2019-03/ACDS-310865.pdf>

Productivity Commission should give specific consideration to how that contribution may be not only maintained, but enhanced. Incorporating the notion that philanthropic benevolence may include regard to a person's spiritual welfare within the definitional boundaries of the 'philanthropy' that the Commission seeks to enhance is therefore critical to ensure that the Commission accurately engages with the character of the Australian charitable sector and to maximise the impact of its recommendations. To assist the Commission, in the following discussion I outline how the common law of charities places the relief of the spiritual needs of persons at the core of its understanding of benevolent relief.

6. The common law recognises that a purpose of relieving 'any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief'<sup>3</sup> attends not just to the material need of the person, but to their holistic self, which can include regard to their spiritual health. Practically speaking, that such a notion remains uncontentious within contemporary Australia is demonstrated by the presence of chaplains across a diverse range of fields in which benevolent need is sought be addressed, including for those suffering ill-health, those incarcerated for criminal acts, those suffering the misfortune of disaster, of substance abuse or of grief. We readily accept that a focus on spiritual health can inspire those in need of assistance to draw upon reserves in a time of crisis or infirmity. For many religious PBIs chaplains form an integral component of an holistic approach to addressing the benevolent needs of their clients; evidenced within fields as diverse as aged care, hospital and health services, police services, rural fire services, prison and juvenile detention facilities and social or community housing.
7. The law concerning public benevolent institutions (PBIs) has long recognised that such a body may relieve 'spiritual needs' or 'spiritual destitution'. This recognition was initially found in its very genesis as an attempt to enshrine the 'popular conception'<sup>4</sup> of charity. In the first High Court decision to consider the interpretation of the notion of 'public benevolent institution' both Dixon J<sup>5</sup> and Starke J<sup>6</sup> held that the history of the concept as a response to Privy Council's overturning of the High Court's judgement in *Chesterman* directly shapes its definition. This

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<sup>3</sup> *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 ('*Pemsel*') 571-572 (Lord Herschell).

<sup>4</sup> *Ibid* 572 (Lord Herschell).

<sup>5</sup> *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1931) 45 CLR 224 ('*Perpetual Trustee*') 233-4 (Dixon J).

<sup>6</sup> *Ibid* 231 (Starke J).



understanding was subsequently affirmed on multiple occasions.<sup>7</sup> During Parliamentary debate Earle Page stated that the proposed statutory concept of ‘public benevolent institution’ was an attempt to ‘restate’ the ‘popular meaning’ of the notion ‘charity’<sup>8</sup> as articulated by the High Court in *Chesterman*, and thus unwind the technical legal meaning applied by the Privy Council.

8. Attention must then turn to the High Court’s understanding in *Chesterman*. In that case the Court made clear that that ‘popular meaning’ encompasses the relief of ‘spiritual needs’ or ‘spiritual destitution’. Justice Isaacs provided the following description of that ‘popular meaning’:

‘Charitable’ must therefore, in the sub-section referred to, be understood in its ‘popular’ sense. That does not admit of any rigid or undeviating connotation. It is flexible to an immeasurable degree, as can be seen by reference to the judgments of such eminent masters of law and language as the Judges who sat in *Pemsel’s Case*. I am disposed to think Lord Herschell (with whom Lord Watson concurred) stated the central truth when he said that ‘the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.’ He carefully explains that he intends that in no narrow sense, because he states that *within his statement come spiritual needs quite as much as physical needs*, and he says as to charitable purposes, the proper course would be to prefer the broadest sense in which they are employed.’ I take ‘charitable’ to cover all that Lord Herschell includes, and to comprise benevolent assistance in aid of physical, mental, and *even spiritual*, progress for the benefit of those whose means are otherwise insufficient for the purpose.<sup>9</sup>

Justice Rich adopted the ‘very flexible test’ posited by ‘the brother *Isaacs*’.<sup>10</sup> Justice Starke also concurred with Isaacs J’s formulation, clarifying that ‘[n]or, am I prepared to say that

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<sup>7</sup> *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 (*‘Lawlor’*) 233-4 (Dixon J), 231 (Starke J); *The Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75, 100 (Starke J). See also *Acts Interpretation Act 1901* (Cth), section 15AB.

<sup>8</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 1928, 6568 (Earle Page, Treasurer). The very nearly verbatim comments were made in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 19 September 1928, 6848–9 (Sir George Pearce).

<sup>9</sup> *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362, 384-5, (Isaacs J) (emphasis added).

<sup>10</sup> *Ibid* 398, (Rich J) (emphasis in original).

the relief of what is often termed spiritual destitution or need is excluded from this conception of charity.’<sup>11</sup> Consistent with his judgement in *Chesterman*, in *Young Men's Christian Association v Federal Commissioner of Taxation* Isaacs J had also considered that the ‘usual modern sense’ of the word charitable included ‘in the broad and literal sense of assistance, physical, mental or *spiritual*, for the benefit of those whose means or opportunities are otherwise insufficient for the purpose.’<sup>12</sup>

9. Lord Herschell’s 1891 judgement in *Pemsel* was decisive for the majority judges in *Chesterman*. Therein, Lord Herschell overturned the prior 1888 authority of *Baird's Trustees v Lord Advocate*<sup>13</sup> which held that

‘charities’ and ‘charitable purpose’ [as] popularly used ... are limited to the relief of wants occasioned by lack of pecuniary means ... I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. On the contrary, no insignificant portion of the community consider what are termed spiritual necessities as not less imperatively calling for relief, and regard the relief of them not less as a charitable purpose than the ministering to physical needs ...<sup>14</sup>

10. *Baird's Trustees v Lord Advocate* concerned a gift held to be for the promotion of religion.<sup>15</sup>

Grasping the reasoning of the Court in that matter is critical to an accurate understanding of Lord Herschell’s conception of the relief of ‘spiritual destitution’ within the ‘popular conception’<sup>16</sup> and thus Page’s endeavour to ‘restate’ *Chesterman* within the statutory concept of ‘PBI’. The terms of the bequest in that case stated:

I, James Baird of Auchmedden, ... feeling deeply impressed with the extent to which *spiritual destitution* prevails among the poor and working population of

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<sup>11</sup> Ibid 399-400 (Starke J).

<sup>12</sup> *Young Men's Christian Association v Federal Commissioner of Taxation* (1926) 37 CLR 351, 358 (emphasis added).

<sup>13</sup> *Baird's Trustees v Lord Advocate* (1888) 15 R (Court of Session Cases) (4<sup>th</sup> series) 682.

<sup>14</sup> *Pemsel* (n 3) 571-572 (Lord Herschell).

<sup>15</sup> *Baird's Trustees v Lord Advocate* (n 13) 688.

<sup>16</sup> *Pemsel* (n 3) 572 (Lord Herschell).

Scotland ... have resolved ... to provide a fund of £500,000 sterling, &c., ... my grand object being to assist in providing the means of meeting, or at least as far as possible promoting the mitigation of, *spiritual destitution* among the population of Scotland, through efforts for securing the godly upbringing of the young, the establishing of parochial pastoral work, and the stimulating of ministers and all agencies of the said Church of Scotland, to sustained devotedness in the work of carrying the gospel to the homes and hearts of all.<sup>17</sup>

11. Lord Fraser held that the bequest's purpose of 'advancing religion' does not fall within the 'popular' sense of charity deployed under the taxing enactment in question, as distinct from that developed by the Court of Chancery.<sup>18</sup> It is this view against which Lord Herschell reacts when in *Pemsel* he declares that 'the popular conception of a charitable purpose' *does* include 'spiritual destitution'. Although *Baird's Trustees v Lord Advocate* is the only judgement to which Lord Herschell refers, other prior judgements also agree that relief of 'spiritual destitution' connotes a religious purpose.<sup>19</sup> In the 1752 judgement of the Court of Session *Hamilton v the Minister and Kirk-Session of Cambuslang*<sup>20</sup> it was similarly found that funds devoted to the poor of a parish were not necessarily applied to physical destitution, and were lawfully applied to the 'purchase and after-repairs' of 'a new tent for the field-preachings' to the poor.<sup>21</sup>
12. To conclude, within the formative early Australian authorities, read in light of the antecedent precedents to which they respond, there is found clear recognition that a PBI may relieve spiritual destitution through the provision of benevolent relief. Lord Herschell's concept that benevolent acts may include the relief of 'spiritual destitution' was affirmed in the leading judgements in *Chesterman* and was thus encompassed within the 'popular' sense of charity that the Commonwealth Parliament sought to 'restate' in legislating the new statutory construct of 'public benevolent institution'. The following section considers what may be entailed in the concept of 'spiritual destitution' and observes how the subsequent development of the law on PBIs has retained this element of the definition.

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<sup>17</sup> *Baird's Trustees v Lord Advocate* (n 13) 682-3 (emphasis added).

<sup>18</sup> *Ibid* 688.

<sup>19</sup> See, for eg, *Kinnoll v Presbytery of Auchterarder* (1838) 16 S (Court of Session Cases) (1<sup>st</sup> Division) 661, 727 (Lord Fullerton); *Denton v Lord John Manners* (1858) 25 Beavan 38 53 ER 550, 552 (Romilly MR).

<sup>20</sup> *Hamilton v the Minister and Kirk-Session of Cambuslang* (1752) Mor. 10570.

<sup>21</sup> *Ibid* 10570, 10571.

13. The notion that benevolent relief may entail regard to the spiritual health of beneficiaries underpins what might be termed the ‘indigenous PBI cases’. In *Tangentyere Council Inc v Commissioner of Taxation* (‘*Tangentyere*’) Angel J held:

Helping those who cannot help themselves to retain and observe their customary values, traditions and culture, western or not, is benevolent, *at least in the sense that it is for their social and spiritual welfare* and the welfare of society as a whole ... Benevolence in the relevant sense is not confined to practical and material interests and needs.<sup>22</sup>

Subsequently in *Northern Land Council v Commissioner of Taxes*, Mildren J with whom Martin CJ and Thomas J agreed, stated that a statutory body established to protect the ‘culture, spirituality, traditions and freedom of choice’ of indigenous Australians meets ‘needs [that] are recognisably beneficial in relieving distress and helplessness’.<sup>23</sup> Citing *Toomelah Co-op v Moree Plains Shire Council*,<sup>24</sup> Thomas J also recognised that ‘[t]he restoration of land, and with it the promotion of cultural and spiritual integrity, have been recognised as benevolent purposes.’<sup>25</sup>

14. In the jurisprudence following the early authorities, the recognition that the provision of relief may have regard to matters beyond material concerns and include the ‘spiritual’ needs of beneficiaries is not limited to the relief of indigenous Australians. In 1942 the High Court recognised that a body who sought to contribute to the ‘physical, mental and moral well-being and improvement’ of boys in a ‘slum area’ was a PBI.<sup>26</sup> (Justice Angel cited this as authority for the proposition that a PBI may target ‘social and spiritual welfare’ in *Tangentyere*.<sup>27</sup>) In the 1945 *Hobart City Mission Case* the Commonwealth Taxation Review Board (CTRB) recognised that

that the religious aspect cannot reasonably be divorced from the material ... even where a man’s physical needs are urgent and paramount, it may be found necessary to awake spiritual forces within him if he is not to become a permanent subject of

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<sup>22</sup> *Tangentyere Council v Commissioner of Taxes* (1990) 99 FLR 363, [20]-[21] (Angel J) (emphasis added) (‘*Tangentyere*’). G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2017) 39 [2.36].

<sup>23</sup> *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11, [33], [39] (Mildren J) (emphasis added).

<sup>24</sup> (1996) 90 LGERA 48 at 59.

<sup>25</sup> *Ibid* [75].

<sup>26</sup> *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388, 397.

<sup>27</sup> *Tangentyere* (n 22).

material assistance. Seen in this light, the religious work of the Mission is a valuable, if not indispensable, accompaniment to its efforts in alleviating misfortune of various kinds.<sup>28</sup>

15. That benevolence is not limited to financial support was again evidenced by the 1987 recognition in *Federal Commissioner of Taxation v Launceston Legacy*<sup>29</sup> of an entity as a PBI whose objects were focussed on providing assistance ‘to widows and children of servicemen’ through ‘a caring service, not limited to the provision of money, to persons in need’; ‘something which cannot be bought’.<sup>30</sup> In the 1992 judgement of *Commissioner of Pay-roll Tax v Cairnmillar Institute*<sup>31</sup> the Appeal Division of the Supreme Court of Victoria recognised as a PBI a body whose purposes were to relieve ‘spiritual’ ‘disorders’ alongside other forms of ‘disorder’.<sup>32</sup> These authorities provide extant instantiations of the understanding that a holistic approach to benevolent relief may properly have regard to not only the physical concerns of the beneficiaries, but also their moral or spiritual welfare.
16. The Productivity Commission would provide an inaccurate account of the Australian charitable sector if it were to fail to regard the strong historical alignment between benevolent institutions and faith-based motivations. In light of that historical alignment it would not sufficiently acquit its recommendations if it were to fail to consider how the operations of faith-based charities can be enhanced in any reforms attempting to increase philanthropy in this country. Such consideration must have regard to the unique context of faith-based charities and the opportunities and threats arising in their particular context.

## **Part 2 – Information Request 3 – Role of Government in Philanthropy**

17. The Discussion Paper seeks views on the following question:

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<sup>28</sup> *Case 101* (1945) 12 CTBR 823, (*Hobart City Mission Case*) [35].

<sup>29</sup> *Federal Commissioner of Taxation v Launceston Legacy* (1987) 15 FCR 527, [29] (Northrop J) (*Launceston*).

<sup>30</sup> *Ibid* 541 (Northrop J).

<sup>31</sup> *Commissioner of Pay-roll Tax v Cairnmillar Institute* No [1992] 2 VR 706, (27 May 1992) (*Cairnmillar*).

<sup>32</sup> *Ibid*. The spiritual component of the assistance provided is outlined in the description of activities provided by Gibson in *Commissioner of Pay-roll Tax v Cairnmillar Institute* [1990] VicSC 295 (29 June 1990) 4762-3.



### Information request 3 Role of government in philanthropy

The Commission is seeking views and information on the following matters.

- The role of philanthropy, including where it can be a substitute for, or complement to, government funding or provision of services.
- The reasons why government should (or should not) support philanthropy and whether or how this may vary between causes and various types of philanthropic giving.
- The extent to which government policies can increase, impede or distort philanthropic giving, including data to support those views where possible.
- The extent that existing government support for philanthropy aligns with good policy design and community priorities, and examples where it may no longer align with community expectations.

18. In its commentary on Information request 3, the Commission notes the benefits of philanthropic behaviour in encouraging civic engagement:

Increased giving, including volunteering, is also associated with broader benefits to the community. For example, a person may volunteer to coach a football team at their child's school, but their actions can also create indirect benefits by building relationships between people and fostering social capital that benefits society more broadly. These indirect benefits may also motivate others to give their time or money. Drawing on the example above, another parent could choose to support the school football club by donating funds for new sporting equipment.

Charities, including faith-based charities, have a key role to play in encouraging civic engagement.

19. In 1995 Robert Putnam observed that 'after expanding steadily throughout most of this century, many major civic organizations have experienced a sudden, substantial, and nearly simultaneous decline in membership over the last decade or two.'<sup>33</sup> Putnam sought a potential 'counter-trend' within 'the growing prominence of nonprofit organizations, especially nonprofit service agencies',<sup>34</sup> noting that '[b]etween 1989 and 1994 the number of public

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<sup>33</sup> Robert Putnam, 'Bowling Alone' (1995)(6(1)) *Journal of Democracy* 64, 69; Thomas H Sander and Robert D Putnam, 'Still Bowling Alone? The Post-9/11 Split' (2010) 21(1) *Journal of Democracy*.

<sup>34</sup> Putnam, 'Bowling Alone' (n 33) 71.

charities in America grew nearly six times as fast as the U.S. population'.<sup>35</sup> However, this flowering was revealed to hold out false hope for civic reengagement. While in the period 1968 to 1997 'the number of voluntary associations roughly tripled ... the average membership seems to be one-tenth as large – more groups, but most of them much smaller.'<sup>36</sup>

20. Similar declining trends in civic engagement are exhibited in Australia, with the Australian Bureau of Statistics (ABS) reporting in its 2019 General Social Survey that '[s]ince 2010, there has been a general decrease in the proportion of people aged 18 years and over who are involved in Social groups, Community support groups, and Civic and political groups. Half (50.0%) of all Australians were involved in Social groups and one quarter (25.0%) were involved in Community support groups in 2019.' Most concerningly the ABS reported that '[p]articipation in Civic and political groups decreased from almost one in five (18.6%) in 2006 to less than one in ten in 2019 (9.4%)'<sup>37</sup> In England formal engagement within civic associations is similarly in decline, while informal volunteering is increasing marginally.<sup>38</sup>
21. On his appointment as Assistant Minister for Charities Andrew Leigh (an admirer of, and prior researcher for, Putnam) quickly declared his desire to inspire 'a civic renaissance' through charitable associations.<sup>39</sup> Faith-based charities will be a key plank of any such renaissance. Against the trend of declining civic engagement, the evidence suggests that religious entities are foremost amongst those charities that promote community engagement. In the Australian context, close analysis of data from the ACNC register discloses that, first, the religious charity sector is much more predominantly comprised of smaller entities, and second, that much higher volunteer participation rates are observed for religious charities, particularly in respect of small to medium charities. The ACNC reports that 30.0% of charities stated 'religious activities' as their main activity in the 2019 Annual Information Statement reporting period, exceeding the

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<sup>35</sup> Robert Putnam, *Bowling Alone* (Simon & Schuster, 2020) 118.

<sup>36</sup> *Ibid* 49.

<sup>37</sup> Australian Bureau of Statistics, 'General Social Survey: Summary Results, Australia', *People and Communities* (Web Page, 30 September 2020) <<https://www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/latest-release>>. See also Sarah and McAllister Cameron, Ian, 'Policies and Performance in the 2019 Australian Federal Election' (2020) 55(3) *Australian Journal of Political Science* 239; Sarah Cameron, 'Government Performance and Dissatisfaction with Democracy in Australia' (2020) 55(2) *Australian Journal of Political Science* 170.

<sup>38</sup> Department for Digital, Culture, Media and Sport, 'Official Statistics Volunteering and Charitable Giving - Community Life Survey 2020/21', *gov.uk* (Web Page, 29 July 2021). <https://www.gov.uk/government/statistics/community-life-survey-202021-volunteering-and-charitable-giving/volunteering-and-charitable-giving-community-life-survey-202021>.

<sup>39</sup> Kutchel (n 1).

next largest category by 21%.<sup>40</sup> When the charities that report another non-religious main activity and a religious activity are added to this number, the total rises to 34.0%.<sup>41</sup> The wider Australian charity sector is dominated by small charities, with this dominance being much more pronounced within the religious sub-sector. Table 1 displays the breakdown of small to large charities.

**Table 1: Australian charity size - religious charities compared to total charity sector<sup>42</sup>**

Charity size	Religious activity only (%)	Total Charity sector (%)
Small	73.95	65.26
Medium	14.58	16.02
Large	11.47	18.71

22. Turning to volunteering rates, the ACNC estimates that 3,579,401 people volunteered for Australian charities in the 2019 reporting period.<sup>43</sup> Smaller charities inspire greater volunteering rates. When measured by the ratio of volunteers to staff, volunteering decreases as charities grow, across both religious and non-religious charities.<sup>44</sup> 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%). Those who identified with religion gave on average nearly double that of non-religious givers.<sup>45</sup> The heightened contribution of religious believers was also reflected in

<sup>40</sup> Australian Charities and Not-for-profits Commission, 'Australian Charities Report 7<sup>th</sup> edition', May 2021, 7.

<sup>41</sup> Based on Annual Information Statement activity reporting Australian Charities and Not-for-profits Commission, 'ACNC 2019 Annual Information Statement Data', 10/05/2021, updated 28/06/2021 <<https://data.gov.au/dataset/ds-dga-34b35c52-8af0-4cc1-aa0b-2278f6416d09/details?q=acnc>>.

<sup>42</sup> Derived from *ibid*. The table includes Basic Religious Charities across the three sizes.

<sup>43</sup> Australian Charities and Not-for-profits Commission, 'Australian Charities Report 7<sup>th</sup> edition' (n 40) 12.

<sup>44</sup> *Ibid*.

<sup>45</sup> 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



a 2017 study by Deloitte Access Economics, which estimated that the total annual value to society of volunteering and giving associated with religiosity was \$481 million.<sup>46</sup>

23. Similar trends are observed within the American context. Robert Putnam has argued that ‘[f]aith communities in which people worship together are arguably the single most important repository of social capital in America ... nearly half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context.’<sup>47</sup> As the United States Republican Sub-Committee of the Congressional Joint Economic Committee (JEC Sub-Committee) recently summarised:

Americans who frequently attend religious services ... are more likely to engage in pro-social and community-building activities. They also exhibit higher levels of volunteering, charitable giving, and participation in voluntary organizations than Americans who are less religiously involved.<sup>48</sup>

24. Putnam and Campbell found a stronger intolerance of the groups and practices that respondents were inclined to disfavour to be more common among religious adherents than among other Americans.<sup>49</sup> Similarly, in Britain, Storm found that while the ‘results suggest that religion increases volunteering’, ‘people are much more likely to get involved with “people similar to themselves”’.<sup>50</sup> While these studies highlight the importance of building ‘bridging capital’ between disparate groups, 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.’<sup>51</sup>

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Nonprofit 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.

<sup>46</sup> Deloitte Access Economics, 'Economic Value of Donating and Volunteering Behaviour Associated with Religiosity' (Report prepared for The Study of the Economic Impact of Religion on Society, 2017) iii <<https://www2.deloitte.com/au/en/pages/economics/articles/donating-volunteering-behaviour-associated-with-religiosity.html>>.

<sup>47</sup> Putnam, *Bowling Alone* (n 35) 66.

<sup>48</sup> Joint Economic Committee – Republicans (United States), Senate, *The Space Between* (SCP Report 8-19, 2019) 13 ('Space').

<sup>49</sup> Joint Economic Committee - Republicans (United States), Senate, *What We Do Together* (SCP Report 1-17, 2017) 21 ('Together').

<sup>50</sup> Ingrid Storm, 'Civic Engagement in Britain' (2015) 31 *European Sociological Review* 14, 14, 27.

<sup>51</sup> Joint Economic Committee - Republicans, *Space* (n 48) 13.

25. The research literature accumulating over the last twenty years provides an extensive account of the practical benefits of civic engagement through associations. Putnam's analysis draws a critical distinction between 'bonding' and 'bridging capital'. 'Bonding capital' is comprised of the benefits arising from the internal life of associations.<sup>52</sup> At the level of the individual, these benefits include various forms of virtue formation, including honesty and dependability, determination and prudence, responsibility and the demonstration of the benefits of collaborative effort in personal achievement.<sup>53</sup> As Putnam found '[o]rganizational involvement seems to inculcate civic skills and a lifelong disposition toward altruism, for volunteers and givers ... in short, giving, volunteering, and joining are mutually reinforcing and habit-forming-as Tocqueville put it, "the habits of the heart".'<sup>54</sup> Participants to a 2016 Australian survey identified reciprocity, personal mental health benefits, a desire to connect with the community and the attaining of practical skills or course requirements as drivers inspiring volunteering.<sup>55</sup>
26. Involvement within associations can also increase 'bridging capital' – the connections that arise between people as a result of the interaction between their differing civic associations.<sup>56</sup> The OECD claims that 'communities characterised by higher levels of civic engagement are seen to foster more efficient and less corrupt public governance institutions and to improve institutional performance.'<sup>57</sup> Following Tocqueville, the JEC Sub-Committee assert that this is a concomitant of the role of associations in instructing 'citizens in the art of self-government, instilling ... democratic habits'.<sup>58</sup> Empirical evidence also demonstrates that neighbourhoods with a healthy associational life are closely associated with higher rates of social mobility.<sup>59</sup> Studies have also shown that communities exhibiting high social bonding and bridging capital are more likely to pool common resources when necessary, for example, in the aftermath of a

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<sup>52</sup> Putnam, *Bowling Alone* (n 35) 22-24.

<sup>53</sup> Matthew Baggetta, 'Civic Opportunities in Associations' (2009) 88(1) *Social Forces* 175; Matthew Baggetta, Hahrie Han and Kenneth T Andrews, 'Leading Associations' (2013) 78(4) *American Sociological Review* 544.

<sup>54</sup> Putnam, *Bowling Alone* (n 35) 127-8.

<sup>55</sup> McGregor-Lowndes et al (n 45) 87-8. For England see Department for Digital, Culture, Media and Sport (n 38).

<sup>56</sup> Putnam, *Bowling Alone* (n 35) 22-24.

<sup>57</sup> Katherine Scrivens and Conal Smith, 'Four Interpretations of Social Capital' Organisation for Economic Co-operation and Development (OECD Statistics Working Paper No 55, 2013) 31.

<sup>58</sup> Joint Economic Committee - Republicans, *Space* (n 48) 3.

<sup>59</sup> Joint Economic Committee - Republicans, *Together* (n 49) 23; Joint Economic Committee - Republicans, *Space* (n 48) 5; Putnam, 'Bowling Alone' (n 33).

natural disaster.<sup>60</sup> Civic reengagement theory invites an exploration of practical initiatives to meet local need with local benevolence. The following analysis does not seek to provide a comprehensive account, but to illustrate the broad range of tools through which policy makers may call upon the charity sector in reply to what Taylor claims is ‘the reality of alienation in our societies.’<sup>61</sup>

27. Any analysis of the means to encourage civic engagement through local charities must commence with an appraisal of the presence (or absence) of ‘localism’ within the charity sector. Above I introduced research suggesting an increase in volunteering against a wider trend of disengagement with associations within England, America and Australia. Religious institutions were shown to demonstrate higher rates of volunteer engagement when compared to other charities, with these higher rates being even more pronounced among small and medium sized charities. The research to date also discloses a strong correlation between the human philanthropic impulse and direct personal experience. John Locke’s intuition that benevolence is most fervent in response to need encountered personally is empirically verifiable.<sup>62</sup> Clerkin et al<sup>63</sup> and Grimson et al demonstrate that donors exhibit preference for charitable causes that are local.<sup>64</sup> In the American context, Putnam has also noted that the ‘[s]ize of community makes a difference: formal volunteering, working on community projects, informal helping behavior [and] charitable giving ... are all more common in small towns than big cities.’<sup>65</sup> Noting the statistically significant correlation between geographic location and philanthropic concern, the Productivity Commission should seek to identify initiatives that will enhance civic engagement through local associations. The remainder of

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<sup>60</sup> Australian Charities and Not-for-profits Commission, 'Bushfire Response 2019-20' (October 2020); H Hwang and D Joo, 'How to be Resilient?' (2020) *Voluntas* 430.

<sup>61</sup> Charles Taylor, *A Secular Age* (Harvard University Press, 2007) 411.

<sup>62</sup> John Locke, 'An Essay on the Poor Law' in Mark Goldie (ed), *Political Essays* (Cambridge University Press, 1997), 198. See also Ian Harris, 'Locke on Justice' in Michael Stewart (ed), *English Philosophy in the Age of Locke* (Clarendon Press, 2000), 71, fn 63; Bruno Rea, 'John Locke: Between Charity and Welfare Rights' (1987) 18(3) *Journal of Social Philosophy* 13, 23; John Winfrey, 'Charity Versus Justice in Locke's Theory of Property' (1981) 42(3) *Journal of the History of Ideas* 423; John Locke, 'A Letter Concerning Toleration' in Robert Maynard Hutchins (ed), *Great Books of the Western World* (Encyclopaedia Britannica, 1952) vol 35, 3; Locke, 'Concerning Civil Government Second Essay' (n 228) 42; John Locke, *Two Treatises of Government* (C and J Rivington and Partners, 1824) 35. See also McGregor-Lowndes et al (n 45); Duncan Grimson, Stephen Knowles and Philip Stahlmann-Brown, 'How Close to Home does Charity Begin?' (2020) 52(34) *Applied Economics* 3700; R M Clerkin et al, 'Place, Time, and Philanthropy' (2013) 73(1) *Public Administration Review* 97.

<sup>63</sup> Clerkin et al (n 62).

<sup>64</sup> Grimson, Knowles and Stahlmann-Brown (n 62).

<sup>65</sup> Putnam, *Bowling Alone* (n 35) 119.

Part 2 of this submission considers specific policy initiatives encouraging civic engagement that seek to build upon this relationship or address constraints limiting it. Faith-based charities are a critical component of any such effort.

28. The principle of ‘subsidiarity’<sup>66</sup> has had a significant influence on policy makers seeking practical tools to revive community. 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.’<sup>67</sup> The concept is present within the work of various natural law thinkers, including Aristotle, Aquinas<sup>68</sup> and Finnis.<sup>69</sup> Berger and Neuhaus argue that subsidiarity can be seen as an attempt to reconcile the challenge of the universal to the particular: ‘The management mindset of the megastructure ... is biased toward the unitary solution. ... The challenge of public policy is ... to cast aside its adversary posture toward particularism and embrace as its goal the advancement of the multitude of particular interests that in fact constitute the common weal.’<sup>70</sup>

29. The JEC Sub-Committee adopted the principle of subsidiarity as its touchstone. The Committee argues it:

leverages local expertise and relationships rather than relying on far-off and impersonal bureaucracies. It allows a diversity of solutions to respond to a diversity of situations across the country instead of relying on one-size-fits-all approaches

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<sup>66</sup> Kent van Til, 'Subsidiarity and Sphere-Sovereignty' (2008) 69 *Theological Studies* 610; Johan van der Vyver, 'The Jurisprudential Legacy of Abraham Kuyper and Leo XIII' (2002) 5(1) *Journal of Markets & Morality* 211; Stephen Pope, 'Poverty and Natural Law' in William Galston and Peter Hoffenberg (eds), *Poverty and Morality* (Cambridge University Press, 2010) 265; David McLroy, 'Subsidiarity and Sphere Sovereignty' (2003) 45 *Journal of Church and State* 739; Russell Hittinger, 'Social Pluralism and Subsidiarity in Catholic Social Doctrine' (2002) 16 *Annales Theologici* 385; Paul Horwitz, 'Churches as First Amendment Institutions' (2009) 44 *Harvard Civil Rights-Civil Liberties Law Review* 79.

<sup>67</sup> 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](https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html)>.

<sup>68</sup> Nicholas Aroney, 'Subsidiarity in the Writings of Aristotle and Aquinas' in Michelle Evans and Augusto Zimmerman (eds), *International Perspectives on Subsidiarity* (Springer, 2014).

<sup>69</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 146.

<sup>70</sup> Peter Berger and Richard Neuhaus, 'To Empower People' in Virginia Hodgkinson and Michael Foley (eds), *The Civil Society Reader* (Tufts University Press, 2003) 232.

handed down ... By giving more responsibility to local residents and institutions, it provides valuable roles to community members they might otherwise lack.<sup>71</sup>

The committee proposes a dual focus on '[p]olicies that reverse crowd-out' and refrain from impeding associations, and 'policies that prioritize local ties and expertise, or that encourage participation in voluntary associations', leveraging existing institutions to support local institutions wherever practicable.<sup>72</sup> They argue government contracting should preference national institutions that demonstrate local presence, positing that subsidiarity gives 'greater discretion to those more likely to have community-specific knowledge.'<sup>73</sup> Government should consider 'participatory bodies as the best sites for decision-making', reduce its involvement in the delivery of services wherever such would be better pursued locally 'and value membership as a good in itself'.<sup>74</sup> However, recognising 'the strengths of localism while acknowledging its weaknesses' means that 'mediating institutions' should only be utilised 'for the delivery of public services and the realization of social goals [after] careful analysis of local contexts.'<sup>75</sup>

30. One practical example of governments seeking to apply the principle of subsidiarity is provided by the United Kingdom community right to challenge.<sup>76</sup> A key component of the Cameron Government's Big Society initiative, the legislation provides a 'right for community organisations to submit an expression of interest in running services of local authority and fire and rescue authorities on behalf of that authority.'<sup>77</sup> While the early evidence indicates that further incentives may be required to drive take up of the initiative,<sup>78</sup> the framework provides an example of means by which government may encourage local civic engagement through charities.

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<sup>71</sup> Joint Economic Committee – Republicans (United States), Senate, *The Wealth of Relations* (SCP Report 3-19, 2019) 20 ('Wealth').

<sup>72</sup> Joint Economic Committee - Republicans, *Space* (n 48) 23.

<sup>73</sup> *Ibid* 27.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid* 28.

<sup>76</sup> Communities & Local Government Ministry of Housing, *Community Right to Challenge: Statutory Guidance* (June 2012).

<sup>77</sup> *Localism Act 2011* (UK) pt 5, ch 2 ; *Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012* (UK); *Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012* (UK).

<sup>78</sup> Steve Rolfe, 'Divergence in Community Participation Policy' (2016) 42(1) *Local Government Studies* 97, 114.

31. The imperatives compelling government to preference local bodies and cast aside an ‘adversary posture toward particularism’<sup>79</sup> are also cast upon the charity sector.<sup>80</sup> As Nisbet warned in the mid-twentieth century, large and remote associations ‘will become as centralized and as remote as the national State itself unless these great organizations are rooted in the smaller relationships which give meaning to the ends of the large associations.’<sup>81</sup> Larger charities can increase civic engagement by enhancing local participation, and in so doing further the pursuit of their own charitable purposes. The arguments supporting such a move are not merely philosophical. The ability of charities to engage local actors may impact upon their effectiveness. A recent review conducted by the ACNC into the response of three national charities to the 2020 Australian bushfires identified that the success of certain recovery efforts were determined by the strength of their local networks.<sup>82</sup>
32. A claim that attends the concern with large remote charities is that government devolution of social services has driven professionalisation to the detriment of grass-roots volunteerism. Identifying a trend also evident within Australia and the United Kingdom, the JEC Sub-Committee observes ‘American civil society [has] become more professionalized and its associations less participatory as administrative responsibilities have shifted from local volunteers to headquartered professionals.’<sup>83</sup> Berger and Neuhaus warn that the ‘trend toward government monopoly operates in tandem with the trend toward professional monopoly over social services’,<sup>84</sup> arguing increasing regulation, ‘bureaucratic controls’ and professionalisation are ‘[a]ttacks on the volunteer principle’.<sup>85</sup> Skocpol contends that the shift from ‘doing with’ to ‘doing for’ has stymied the contribution of charities to civic engagement: ‘[p]rofessionally managed, top-down civic endeavors simultaneously limit the mobilization of most citizens into public life’.<sup>86</sup>
33. While participants to recent research conducted by McGregor-Lowndes et al ‘appreciated the need for greater [non-profit organisation] efficiencies made possible by a more professional approach’, they conversely noted that ‘[t]here is a real sense of apprehension that the

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<sup>79</sup> Berger and Neuhaus (n 70) 232.

<sup>80</sup> Joint Economic Committee - Republicans, *Space* (n 48) 27.

<sup>81</sup> Robert Nisbet, *The Quest for Community* (ISI Books, 2010) 255.

<sup>82</sup> Australian Charities and Not-for-profits Commission, ‘Bushfire Response 2019-20’ (n 60).

<sup>83</sup> Joint Economic Committee - Republicans, *Space* (n 48) 3.

<sup>84</sup> Berger and Neuhaus (n 70) 229.

<sup>85</sup> *Ibid.*

<sup>86</sup> Theda Skocpol, *Diminished Democracy* (University of Oklahoma Press, 2003) 232.

transformation of the sector and giving will lead to a greater emphasis on transactions, over people and their relationships.’<sup>87</sup> Judd et al argue that ‘inevitably, the demands of the tender process, documentation, and reporting criteria diminish the charity’s capacity for spending time and resources on community engagement, communication and a volunteering program.’<sup>88</sup> Although several studies have identified concerns with professionalism as a key factor in reduced donations,<sup>89</sup> Carey cautions that ‘[t]hrough a close alignment with the State, these processes are often understood to draw organisations away from their community groups and neutralize forms of service provision.’<sup>90</sup> Accordingly, Hwang and Powell have observed a ‘tension between substantive orientation and managerial professionalism’.<sup>91</sup> Such critiques have inspired the search for initiatives whereby the devolution of public services demonstrably encourages civic engagement.

34. The concept that government should prefer the devolution of services to local participatory institutions has been taken up within Australia through ‘place-based initiatives’. Seen as a key means to address ‘wicked problems’,<sup>92</sup> to date these initiatives have sought to facilitate local charitable effort within regional communities (community foundations provide a leading example<sup>93</sup>) and disadvantaged and remote indigenous communities. Place-based initiatives resist bureaucratic paternalism by emphasising the involvement of beneficiaries in the formulation of their own solutions. Applying Butler’s proposal for a postcode test to key office holders, or the offices, of organisations delivering publicly-funded social services could also

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<sup>87</sup> McGregor-Lowndes et al (n 45) 149-150.

<sup>88</sup> Stephen Judd, Anne Robinson and Felicity Errington, *Driven by Purpose* (Australia Hammond Press, 2<sup>nd</sup> ed, 2014) 127.

<sup>89</sup> McGregor-Lowndes et al (n 45) 149.

<sup>90</sup> Gemma Carey, Annette Braunack-Mayer and Jo Barraket, 'Spaces of Care in the Third Sector' (1997) 13(6) *Health* 629 630. See also Gemma Carey, 'Conceptualising the Third Sector: Foucauldian Insights into the Relations between the Third Sector, Civil Society and the State' (2008) 14(1) *Third Sector Review* 9.

<sup>91</sup> Hoky Hwang and Walter W Powell, 'The Rationalization of Charity' (2009) 54(2) *Administrative Science Quarterly* 268, 291.

<sup>92</sup> 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 Lahaussé 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).

<sup>93</sup> 'Philanthropy Peaks Welcome Historic Federal Government Support for Community Foundations', *Philanthropy Australia* (Web Page, 29 March 2022) <<https://www.philanthropy.org.au/tools-resources/news/philanthropy-peaks-welcome-historic-federal-government-support-for-communit/>>; 'UK Community Foundations', *UK Community Foundations* (Web Page) <<https://www.ukcommunityfoundations.org/>>.

provide a practical means to drive such initiatives.<sup>94</sup> The JEC Sub-Committee argues that ‘because civil society thrives in places where it meets a material need, it has the largest role to play in places where material needs are greatest.’<sup>95</sup> However, to safeguard the success of such initiatives commensurate governance expertise must be ensured. Rolfe has also queried the extent to which communities of high disadvantage can be expected to exhibit levels of either bonding or bridging capital that would sustain viable locally driven projects.<sup>96</sup>

35. Faith-based charities have a unique contribution to make in addressing so-called ‘wicked problems’. As Berger and Neuhaus contend:

Government bureaucracies—indeed by definition, all bureaucracies—demonstrate little talent for helping the truly marginal who defy generalized categories. The Salvation Army needs no lessons from the state on how to be nonsectarian in its compassion for people.<sup>97</sup>

In a feasible recognition of this practicality, the Charitable Choice initiative and its successors have seen the United States move closer to the experience of the United Kingdom and Australia, which do not place limitations on the state funding of FBCs in the delivery of social services.<sup>98</sup>

36. Volunteering is also a critical component of any attempt to revive civic engagement through the charity sector. Various policy initiatives may be considered to further enhance it. In certain States in the United States expenses incurred in volunteering, or even the time spent volunteering in specific sectors, are recognised as deductible against taxable income. Certain states also offer tax credits or rebates for volunteers to specifically listed charitable purposes.<sup>99</sup> A recent Australian study identified the following incentives to volunteering: funding for training; appropriate supporting infrastructure; decreased ‘onerous’ regulation, consolidation of multi-jurisdiction reporting; ongoing-funding certainty; a national database of volunteers;

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<sup>94</sup> Stuart M Butler, 'Practical Principles' in Michael Novak (ed), *To Empower People* (AEI Press, 2<sup>nd</sup> ed, 1996), 120.

<sup>95</sup> Joint Economic Committee - Republicans, *Space* (n 48) 5.

<sup>96</sup> Steve Rolfe, 'Governance and Governmentality in Community Participation' (2018) 17(4) *Social Policy and Society* 579; Rolfe, 'Divergence in Community Participation Policy' (n 78); Joint Economic Committee - Republicans, *Space* (n 48) 28.

<sup>97</sup> Berger and Neuhaus (n70) 227.

<sup>98</sup> Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 279-82; *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559 ('DOG's Case') cf. *Everson v Board of Education of Ewing*, 330 US 1 (1947).

<sup>99</sup> Joint Economic Committee - Republicans, *Space* (n 48) 34.



and increasing government leadership in changing cultural perceptions of volunteer contributions.<sup>100</sup>

37. Any such initiatives must also be apprised of the challenges to, and observable trends within, volunteering. Barriers to volunteering include increasing inconsistency and fluidity in paid work requirements; the increasing demands on women to balance work life and family; a lack of recognition of the work involved in recruiting and training volunteers; and poor remuneration for volunteer managers.<sup>101</sup> Ear-marking funding in public service-delivery contracts for volunteer managers can address the latter two barriers. As noted in chapter II, studies have also observed changing expectations across generations of volunteers.<sup>102</sup> Differing cultural expectations also play a role in volunteering rates.<sup>103</sup> Various studies have found that people who volunteer more donate more.<sup>104</sup> Toran summarizes: ‘those who give more monetarily are also more likely to volunteer their time’.<sup>105</sup> The consequence for government is clear: incentivising volunteering will incentivise private philanthropy, decrease the burden on the taxpayer and reduce government crowd-out.
38. Consistent with the recognition that charitable purposes may be pursued in collaboration,<sup>106</sup> charitable bodies can adopt a purpose of assisting smaller charities to work with their local community. Such facilitating charities may give effect to their objects by matching volunteers with local charities, by assisting charities in the identification of local need and by providing training, education and governance resources. Such educative and facilitative functions may also fall within a regulator’s statutory purposes.<sup>107</sup> One recent ACNC initiative seeks to encourage local civic participation in charities by enabling members of the public to identify charitable programmes according to postcode.

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<sup>100</sup> McGregor-Lowndes et al (n 45) 92-6; 131-4.

<sup>101</sup> Ibid 92-5. See also Department for Digital, Culture, Media and Sport (n 38).

<sup>102</sup> Putnam, *Bowling Alone* (n 35); McGregor-Lowndes et al (n 45) 148.

<sup>103</sup> Sara Dolnicar and Melanie J Randle, 'Cultural Perceptions of Volunteering' (Paper, University of Wollongong, January 2005) <<https://ro.uow.edu.au/commpapers/65>>.

<sup>104</sup> Lili Wang and Elizabeth Graddy, 'Social Capital, Volunteering and Charitable Giving' (2008)(19) *Voluntas* 23, 39.

<sup>105</sup> Katherine Toran, 'Tax Policy and Volunteer Labor', *Urban Institute* (Web Page, November 2014) 6 <<https://www.urban.org/sites/default/files/publication/33561/2000008-Tax-Policy-and-Volunteer-Labor.pdf>>.

<sup>106</sup> See, eg, *Commissioner of Taxation v The Hunger Project Australia* (2014) 221 FCR 302; *London Hospital Medical College v Inland Revenue Commissioners* [1976] WLR 613, 620 (Brightman J).

<sup>107</sup> See, eg, *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5.

39. Finally, a broad range of recent initiatives that fall within the rubric of ‘market-driven philanthropy’ have instigated direct engagements between philanthropists, institutional investors and local charities. While such initiatives typically involve large sized charities, they generally operate by facilitating engagement between donors and beneficiaries within a given locale. These engagements include venture philanthropy,<sup>108</sup> ‘impact investing’ through microfinance to social enterprises<sup>109</sup> and social impact bonds. The latter include the seminal Peterborough recidivism project in the United Kingdom,<sup>110</sup> the Utah High Quality Preschool Program in the United States,<sup>111</sup> and the Benevolent Society bond in Australia.<sup>112</sup> Governments have undertaken varying methods to encourage such initiatives, including the drafting of a template tripartite social bond in the United Kingdom<sup>113</sup> and the establishment of the Social Innovation Fund under the Obama administration to provide grants to venture philanthropy funds matched to private philanthropy.<sup>114</sup>

### **Part 3 - Information Request 5 – Other tax concessions for not-for-profit organisations**

40. The Discussion Paper seeks views on the following question:

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<sup>108</sup> OECD netFWD, 'Venture Philanthropy in Development', OECD Development Centre (Report, 2014); Allen Grossman, Sarah Appleby and Caitlin Reimers, 'Venture Philanthropy' (2015) *Harvard Business School Background Note* 313-111.

<sup>109</sup> See, eg, John D and Catherine T MacArthur Foundation 'Benefit Chicago', MacArthur Foundation (Web Page) <<https://www.macfound.org/programs/benefit-chicago/>>.

<sup>110</sup> Ministry of Justice, 'Social Impact Bond Pilot at HMP Peterborough', *gov.uk* (Final Report, 17 December 2015) <<https://www.gov.uk/government/publications/social-impact-bond-pilot-at-hmp-peterborough-final-report>>.

<sup>111</sup> Emily DeRuy, 'How Goldman Sachs Made Money Investing in Preschool in Utah', *The Atlantic* (online, 7 August 2010) <<https://www.theatlantic.com/politics/archive/2015/10/how-goldman-sachs-made-money-investing-in-preschool-in-utah/433248/>>.

<sup>112</sup> The Benevolent Society, 'Resilient Families Social Benefit Bond', *www.benevolent.org.au* (Web Page, 2019) <<https://www.benevolent.org.au/about-us/innovative-approaches/social-benefit-bond>>.

<sup>113</sup> Department for Digital, Culture, Media & Sport, 'Guidance on Template Contract for Social Impact Bonds and Payment by Results', *A Guide to Social Impact Bonds* (Web Page, 26 September 2017) <<https://www.gov.uk/guidance/social-impact-bonds>>.

<sup>114</sup> Office of Social Innovation and Civic Participation, The Whitehouse 'Social Innovation Fund' (2012) <<https://obamawhitehouse.archives.gov/administration/eop/sicp/initiatives/social-innovation-fund>>; *Serve America Act 2009* 42 USC § 12501 (2009).



### Information request 5 Other tax concessions for not-for-profit organisations

The Commission is seeking views and information on the following.

- The role and effectiveness of tax concessions (other than those available under the DGR framework — see above) in supporting the operation of not-for-profit organisations and philanthropy.
- Anomalies and inequities in the operation and application of particular concessions.
- Unintended and adverse consequences arising from compliance with concession eligibility criteria, including those applicable in Australian States and Territories.
- The efficiency, effectiveness and equity of tax concessions in supporting not-for-profit organisations, and how they compare with alternative approaches to providing government support for not-for-profit organisations.

41. In the following section I respond to information request 5 by making comment on:

- a. Tax exemption for religious institutions; and
- b. The fringe-benefits exemption for employees of religious institutions that are religious practitioners;
- c. The Productivity Commission's prior recommendation that Deductible Gift Recipient status should be given to all charities, and the effect on basic religious charities; and
- d. Competitive neutrality concerns as applied to the tax exemption of charities.

#### **Exemption from Taxation: Historical Perspectives**

42. The question of the tax concessions granted to religious institutions invites consideration of the historical framework that has led to that regime, as applies to religious charities within Australia. Strong practical and policy considerations and legal precedent within that historical tradition lead to the conclusion that tax exemption for religious institutions should be maintained in the interest of ensuring a proper expression of religious freedom within contemporary Australia and to avoid unconstitutional curtailing of that freedom. Some comment on the historical and philosophical framework that has led to the current regime is warranted. Brody notes that 'various forms of taxation have existed as long as organized communities have formed governments. Whether couched in terms of tribute, feudal dues,

property tax, or corporate income tax---as appropriate to the prevailing economic system---public finance schemes have always had to take account of a nontaxable sector.’<sup>115</sup>

43. The Productivity Commission places heavy reliance upon subsidy theory, for example, when it states:

The value of these tax concessions is estimated as tax expenditures, defined as variations in revenue compared with a ‘benchmark’ tax treatment (for example, a situation with no tax concessions) (Krever 1991, pp. 2–8). Estimates of tax concessions do not necessarily account for the behavioural changes that would typically occur in response to a change in the system. The existence of tax expenditures also does not necessarily mean that ‘concessional’ tax treatment is inappropriate, inefficient or inequitable.

However, tax expenditure, or ‘subsidy theory’ is an inappropriate measure by which to weigh the contribution of religious institutions.

44. The theme of a ‘boundary’ delineating civil society from the state plays an important role within the debate over the tax favour afforded to civil society in economic theory, as evidenced by the works of Hansmann,<sup>116</sup> Bittker,<sup>117</sup> Surrey<sup>118</sup> and Weisbrod.<sup>119</sup> Even though tax exemption traverses the boundary between *civil society* and the state, the traditional economic rationales for charitable tax favour are either inapplicable to *religious institutions*, or do not offer a complete account for their distinct purposes or activities. Consider, for example, the following rationales: that it relieves the burden of government; it is an efficient way to deliver aid to the sector; it offers creative solutions for societal problems, ensuring alternative views in arts and culture; it boosts pluralism and experimentation; and that it promotes altruism.<sup>120</sup> While these rationales may explain the non-religious charity sector, they each fail to provide a sufficient basis for assessing why religious charitable institutions should receive tax favour.

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<sup>115</sup> Evelyn Brody, ‘Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption’ (1998) 23(4) *The Journal of Corporation Law*, 587.

<sup>116</sup> Henry Hansmann, ‘The Rationale for Exempting Nonprofit Organizations from the Corporate Income Tax’ (1981) 91 *Yale Law Journal* 54.

<sup>117</sup> Boris I Bittker, ‘Churches, Taxes and the Constitution’ (1969) 78 *Yale Law Journal* 1285; Boris Bittker and George Rahdert, ‘The Exemption of Nonprofit Organizations from Federal Income Taxation’ (1976) 85(3) *Yale Law Journal* 299.

<sup>118</sup> Stanley Surrey, *Pathways to Tax Reform* (Harvard University Press, 1973).

<sup>119</sup> Burton Weisbrod, ‘Toward A Theory of The Voluntary Non-Profit Sector in a Three-Sector Economy’ (Discussion Paper No 132-72, Conference on Altruism and Economic Theory, 3-4 March 1972).

<sup>120</sup> Miranda Perry Fleischer, ‘Charitable Giving and Utilitarianism’ (2014) 89(4) *Indiana Law Journal* 1485.

45. Subsidy theory has been prominent amongst economic rationales. It has received a degree of judicial affirmation<sup>121</sup> and is frequently influential in reform efforts.<sup>122</sup> Surrey's classification of tax exemption and deductibility as 'expenditure', and therefore as a *subsidy* proceeds on the presupposition that tax favours reflect revenue foregone by the state that it would otherwise be entitled to exact.<sup>123</sup> Critics of expenditure theory argue that tax favours are a structural element of the tax system, not expenditure, and highlight the difficulties of quantifying purported 'lost revenue' (for example, by reference to the three means the Australian National Audit Office identify for lost revenue quantification).<sup>124</sup> Subsidy theory is deployed by opponents of tax favour for religious institutions as in a liberal state, which does not provide religious 'services' to its citizens, *subsidy* theory cannot readily offer a rationale for that favour.<sup>125</sup>
46. This suggests that, when it comes to the contribution of religious institutions, other measures of the value of tax concessions are warranted. One particular benefit that is often overlooked in that context flows from observance of the century's old and ongoing dialogue concerning the Separation of Church and State evidenced in the Western tradition. This is necessary as it is that dialogue in which the right of the State to tax religious institutions and the bases for the exemptions have arisen. That dialogue concerns whether the State should impose a religious belief on its citizens and the extent of the State's power to regulate the Church's ability to act in accordance with its beliefs. In the British common law that dialogue traces back to the Magna Carta of 1215 AD, and further than that, the dialogue streams back to Emperor Constantine and the Edict of Milan in 313 AD.

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<sup>121</sup> Subsidy theory has received recognition in case law, see, eg, *Dingle v Turner* [1972] AC 601, 624 (Cross LJ); *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* (2008) 236 CLR 204, 228 (Kirby J); *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 [25]; *Re Dunlop* [1984] NI 408; *Global Citizen Ltd v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313, [21] (McCabe DP, O'Connell M).

<sup>122</sup> See Australia's Future Tax System Review Panel *Australia's Future Tax System*, (Final Report, December 2009) ('*Henry Review*') pt 2, vol 2 pt 2, vol 1, ch B3; Commonwealth of Australia Productivity Commission, *Contribution of the Not-for-Profit Sector*, (Report, January 2010) ('*Productivity Commission Report*') ch E.3.

<sup>123</sup> Surrey (n 118). See also Myles McGregor-Lowndes, Matthew D Turnour and Elizabeth Turnour, 'Not for Profit Income Tax Exemption' (2011) 26 *Australian Tax Forum* 601, 607; Natalie Silver, 'Beyond the Water's Edge' (PhD Thesis, Queensland University of Technology, 2016); Fleischer (n 120) 1513.

<sup>124</sup> McGregor-Lowndes, Turnour and Turnour (n 123) 608 discussing *Henry Review* (n 122) 731.

<sup>125</sup> *Henry Review* (n 122) pt 2, vol 1, ch B3.

47. Brody has argued that the philosophical origins of the exemption granted to religious institutions can be best understood from a ‘sovereignty’ view of the charitable sector. Drawing from the independence and sovereignty of the Church in English history, and the use of the Church, at times, as an arm of the State, she posits that the development of exemptions from taxation for religious entities is best understood when one observes the historical tension between the two ‘sovereigns’ Church and State, residing within the one polity:

A sovereignty perspective allows us to see how government simultaneously defers to and restricts charitable activity. I suggest ... that underlying some of the more perplexing rules limiting the scope of exemption is an unarticulated vestigial fear of a too-powerful non-profit sector, traceable to earlier periods when the most powerful charity was the church.

48. She argues that the curtailing of exemptions can be linked to concerns by the State over the power base of the Church, noting that ‘after all rival sovereigns rarely feel too comfortable letting the other grow too powerful’.<sup>126</sup> Similarly, Ridge argues that charity law has been used to control religion, positing that the ‘degree of control exercised by the state over religious groups through charity law will wax and wane according to the relative strengths of the two parties to this symbiotic relationship.’<sup>127</sup>

49. The British position, from which we derive the Australian common law, was at one time categorised by a strict enforcement of religion. Thus, an English court could state in 1727 that:

[R]eligion [is] part of the ... law; and therefore whatever is an offence against that, is evidently an offence against ... the law [and] morality is the fundamental part of religion, and therefore whatever strikes against that, must, for the same reason, be an offence against the ... law.<sup>128</sup>

As noted by former Western Australian Chief Justice David Malcolm ‘This view of the proper relationship between religion and the law owed much to the fact that at that time a clear separation between Church and State had not yet developed, and, in particular, to the then

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<sup>126</sup> Ibid 586.

<sup>127</sup> Pauline Ridge, ‘Religious Charitable Status and Public Benefit in Australia’ (2011) 35 *Melbourne University Law Review*, 1079.

<sup>128</sup> *R v Curl* (1727) 94 ER 20.

current belief that the enforcement of religious conformity was a legitimate object of government.’<sup>129</sup> Such a position, it is submitted, rightly finds no expression within modern Australian law, being potentially as socially divisive as government attempts to curtail religious expression.

50. The United States’ founding fathers were the children of those who had fled State sanctioned religious persecution in Europe, the outcome of Established Religion. Their experience led to their dual aversion to any form of State enforced religious practice, and any State effort at curtailing religious practice. This duality ultimately found expression in the First Amendment to the United States Constitution. Whilst the jurisprudence within the United States has in certain respects taken a differing course from that in Australia, most notably in the area of provision of funding to private religious schools,<sup>130</sup> much of the philosophical and practical rationales concerning the separation of Church and State are informative for the debate as concerns religious exemptions within Australia. This is particularly the case when the almost identical nature of the US Constitution’s First Amendment and section 116 of the Australian Constitution is considered.

51. Chief Justice Malcolm argues that the US Constitutional provisions sought to enshrine two fundamental protections, firstly, the preservation of social harmony and, secondly, the preservation of the individual’s freedom of conscience:

The architect of the Religion Clause of the First Amendment was a legislator from Virginia, James Madison. He argued in favour of the principle of “religious freedom” from two points of view. First, he said that the lessons of history were that religious discord would not be eliminated by a State determined to eliminate religious differences, but rather by a State committed to tolerate, and protect, those religious differences. Secondly, he said that “religious freedom” was a right of the individual which originated in a person’s individual conscience, and which both restricts that person’s ability to follow the dictates of others and casts upon that person a duty of obedience to that person’s Creator, as that person’s

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<sup>129</sup> See *R v Big M Drug Mart* (1985) 18 CCC (3d) 385, 429 (Dickson J).

<sup>130</sup> See for example *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 582 (*‘The DOGs Case’*).

conscience leads him or her to perceive him.<sup>131</sup> As Hughes CJ put it: “The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”<sup>132</sup>

52. Professor Tom Frame argues that the colonies were characterised by a focus on religious plurality, acknowledging the many differing religious inclinations amongst those who were arriving on our shores. In that context a single State Established Church was seen as potentially divisive, so Frame records that ‘by the late 1800s Anglicans had accepted that there was no prospect of Establishment in Australia.’<sup>133</sup> In Australia the Church / State debate ultimately found expression in section 116 of the Constitution of 1901, enshrining the separation of Church and State. Section 116, largely drawn from the US Constitution, contains the ‘Establishment Clause’, namely ‘The Commonwealth shall not make any law for establishing any religion’ and the ‘Free Exercise Clause’: ‘The Commonwealth shall not make any law ... for prohibiting the free exercise of any religion’. Having outlined the historical context, the submission turns to consider how a proper appreciation of doctrine of the separation of Church and State is fundamental to an understanding of many of the principal rationales behind the exemption from taxation of religious entities within Australia.

### **Exemption from Taxation: Philosophical and Practical Perspectives**

53. There is a paucity of Australian judicial treatment concerning the relationship between tax exemptions and religious freedoms.<sup>134</sup> In the United States the leading Supreme Court decision on the question of exemptions to religious institutions is *Walz v Tax Commission of the City of New York* (Walz).<sup>135</sup> In considering arguments that such exemptions, as applied by the State of New York, offend the separation of Church and State provisions in the US Constitution (which are, as noted above, largely replicated in our Constitution) by providing support to religion, the Supreme Court gave detailed consideration to the policy rationales underpinning

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<sup>131</sup> See *Everson v Board of Education* (1947) 67 S Ct 504, 535.

<sup>132</sup> David Malcolm CJ ‘Religion, Tolerance and the Law’ *The Australian Law Journal* (1996) vol 70 976.

<sup>133</sup> Tom Frame, *Losing My Religion* (UNSW Press, 2009), 56.

<sup>134</sup> The closest treatment of the subject, as noted by Ridge is found in the ‘judicial treatment, over the last four decades, of rates exemptions for places of public religious worship. This case law is not directly concerned with charitable status but is sufficiently related, through the concept of public benefit, to be relevant’: Ridge (n 127) 1079. I will return to these cases later in discussing the public benefit of religion.

<sup>135</sup> (1970) 397 U.S. 664.



exemption from taxation given to religious entities. In reference to those provisions Chief Justice Burger noted:

[T]he basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.

54. Whilst *Walz* was decided in the US context, in the absence of on-point Australian precedent, it provides a useful summation of the policy imperatives and practical benefits underpinning the exemption from taxation for religious institutions. It also provides a useful overview of the public benefit to be ascribed to religious institutions within the context of the debate over the maintenance of the tax exemption for religious institutions. It further bases the rationale for the exemption upon the constitutional separation of Church and State enshrined in both jurisdiction's founding Constitution, therefore raising questions as to the Constitutionality of any removal of the exemption.

55. Several of the reasons for maintaining the exemption regime provided by the Supreme Court in *Walz* are relevant to the issues under consideration by the Panel. They demonstrate the nature of the fundamental compact between Church and State undergirding modern Australian society, and its expression within the history of exemption from taxation for religious institutions. In holding that the exemptions neither establish nor curtail religion, the Court's reasoning (noting that not all judges were in agreement on each of the below points) provides a helpful consolidation of many of the principal arguments supporting the granting of exemption to religious entities. Those practical and policy considerations are furthered by the additional sources also provided under each of the following rationales, many of which also further the argument that the advancement of religion is undertaken for the public benefit:

1. Exemption reflects the concern for separation of Church and State, in that the State does no harm to the Church by limiting the proper extension of religious sentiment:

Per Burger CJ 'Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of

property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.’

2. The law favours institutions that foster ‘moral or mental improvement’ in the community:  
Per Chief Justice Burger: ‘The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes.’

This rationale reiterates certain of the motivations underpinning the introduction of the deductibility regime in Australia, to which the submission will return in Part 4.

3. The activities undertaken by religious institutions, as far as they enhance community benefit, are not required to be performed by government, and therefore avoid expense to the tax payer:

Per Brennan J: ‘these organizations are exempted because they, among a range of other private, nonprofit organizations, contribute to the wellbeing of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation or be left undone, to the detriment of the community.’

As for rationale 2, this rationale reiterates certain of the motivations underpinning the introduction of the deductibility regime in Australia, to which we will return in Part 4.

4. Freedom of religious expression through the granting of exemption from taxation contributes to a more pluralistic society:

Per Brennan J: ‘government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.’

Ridge points out that the decision of the High Court in *Aid/Watch Inc v Federal Commissioner of Taxation*<sup>136</sup> might be drawn upon to ground an argument in support of this rationale. She says that if it can

be argued that religious pluralism and purely religious activity contribute to a healthy, flourishing society and, as such, the advancement of religion is a collective good in and of itself ... there is no need for proof of benefit from specific religious purposes to be shown ... Using the approach of the High Court in the *Aid/Watch* case, one could argue that there is public benefit in the promotion of religious pluralism through charity law in Australian society.

In considering the argument that religious pluralism is to the public benefit Ridge directs attention to the international human rights framework governing the protection of freedom of religion, quoting Harding to that effect:

For example, international human rights bodies have emphasised the indispensability of freedom of religion to a democratic society. It is

one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.’

5. The exemptions are granted to religious entities as one of a number of similar entities that contribute to the public benefit. To this end they express no particular preference for religious entities, but merely include religious entities as one of a number of entities that similarly operate for the public benefit:

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<sup>136</sup> (2010) 241 CLR 539, 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

Per Brennan J: ‘To this end, New York extends its exemptions not only to religious and social service organizations, but also to scientific, literary, bar, library, patriotic, and historical groups, and generally to institutions "organized exclusively for the moral or mental improvement of men and women." ... No particular activity of a religious organization -- for example, the propagation of its beliefs -- is specially promoted by the exemptions. They merely facilitate the existence of a broad range of private, nonprofit organizations, among them religious groups, by leaving each free to come into existence, then to flourish or wither, without being burdened by real property taxes.’

6. The exemption, in being granted to all religions, avoids granting favour to one religion over another, and so avoids concerns of discrimination between religious institutions:

Per Burger CJ: ‘It has not singled out one particular church or religious group, or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, *quasi*-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.’

Per Burger CJ: United States law permits ‘the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.’

Pre Brennan J: ‘The very breadth of this scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference. The scheme is not designed to inject any religious activity into a nonreligious context’

7. Granting tax exemption to all religious entities entails lesser involvement between Church and State than would the taxation of those entities.

Per Burger CJ: ‘Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit, and also gives rise to some, but yet a lesser, involvement than taxing them.’

In support of this view Brody has similarly argued that ‘tax exemption keeps government out of the charities’ day-to-day businesses, and keeps charities out of the business of petitioning government for subvention.’<sup>137</sup>

Chief Justice Burger, in delivering the lead judgement of the Court ultimately concluded:

The legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion ... The grant of a tax exemption is not sponsorship, since the government does not transfer part of its revenue to churches, but simply abstains from demanding that the church support the State. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the State or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.... The exemption creates only a minimal and remote involvement between Church and State, and far less than taxation of churches. It restricts the fiscal relationship between Church and State, and tends to complement and reinforce the desired separation insulating each from the other.’

56. Thus it can be concluded that a historical and philosophical overview of the separation of Church and State in the Western tradition supports the conclusion that the exemption regime is grounded in the fundamental freedom of the Church to pursue its activities without undue limitation by the State. Further to this, the exemption regime can be justified through a number of practical policy considerations, including the public benefit provided by religious institutions, the role of religious institutions in supplanting the need for government intervention at the cost of the tax payer. It has also been shown that the universality of the exemption is rooted in the Constitutional proscription on founding a State religion.

57. A holistic consideration of amendments to the exemption from income taxation granted to religious institutions requires reference to the rationales underpinning that regime, rationales

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<sup>137</sup> Brody (n 115) 586.

which have led to a settled position through the resolution of differing tensions across centuries of debate. Such a review, conducted through the lens of the hard-worn experience and the wisdom of our forebears, ensures proper regard is given to the centrality of the foundations formed in the resolution of those historical tensions, for it is those foundations which have led to the stable, multicultural and pluralistic modern Australian polity. To adequately engage with the intricacies that have led to the current settled position is also required to avoid unintended consequences and to avoid repeating the mistakes of our forebears. As noted by former United States Chief Justice Berger:

[A]n unbroken practice of according the exemption to churches, openly and by affirmative State action, not covertly or by State inaction, is not something to be lightly cast aside. Nearly 50 years ago, Mr. Justice Holmes stated: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." <sup>138</sup>

58. It is the argument of this submission that that framework has led to a proliferation of religions within Australia, to the benefit of the public, and to the benefit of individual liberty and expression within Australia. The above establishes that a loss of exemption from taxation correlates with a loss in religious freedom. Taxation regimes must not be used as a basis for denying religious liberty.

### **Public Benefit of Religious Institutions**

59. To the extent that the Discussion Paper invites consideration of the ongoing tax exemption of religious institutions, it necessitates consideration of whether religion can be said to be for the public benefit. The discussion proceeds from the argument, put above, that ‘subsidy theory’ is an inappropriate measure by which to weigh the contribution of religious institutions. For the reasons stated below, the advancement of religion should not be classified as providing significant private benefit, so as to call into question the public benefit the advancement of

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<sup>138</sup> *Walz v Tax Commission of City of New York* (1970) 397 U.S. 664, citing Holmes J in *Jackman v Rosenbaum Co.* (1922) 260 U. S. 22, 260 U. S. 31.

religion confers. The weight of judicial authority within Australia, in applying the presumption of the public benefit of religion, supports this submission.

60. The question of whether religion provides a private benefit of such moment as to outweigh any public benefit conferred by the religion is one that has been addressed extensively by the courts over hundreds of years. Several themes may be observed arising from that judicial treatment. It is first to be noted that the courts have held that gifts to a particular denomination do not infringe the public benefit requirement, on the basis that it is open for any member of the public to join the denomination.<sup>139</sup>
61. It can be observed that underlying the common law presumption that religious entities are for the public benefit are practical, administrative and policy rationales that have been developed by the courts. These rationales arise from their seasoned experience in deciding matters in which they have been asked to consider the public benefit of religion. The first of those rationales is the courts' general historical reluctance to enter into questions concerning the comparative worth of religions that may be invited by a requirement to consider evidence of the public benefit of any given religion.<sup>140</sup> Justices Wilson and Deane have held that the question of whether a belief is "religious" should be "approached and determined is one of arid characterisation not involving any element of assessment of the utility, the intellectual quality, or the essential 'Truth' or 'worth' of tenets of the claimed religion."<sup>141</sup> As noted by Ridge 'any exercise in determining whether public benefit flows from the exercise of certain religious beliefs does not entail an examination of the merits of those beliefs.'<sup>142</sup>
62. Several further practical policy imperatives have driven the courts' reticence to wade into determining whether any given religion is for the public benefit. A further concern is to avoid accusation of preferring one religious belief over another.<sup>143</sup> The courts' reticence to sanction one religious entity over another is also an expression of the doctrine of separation of Church

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<sup>139</sup> Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 166.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid* 174.

<sup>142</sup> Ridge (n 127) 1084.

<sup>143</sup> *Thornton v Howe* (1862) 31 Beav 13; 54 ER 1042.

and State. That reticence is required as a natural extension of the Constitutional prohibition on the Commonwealth establishing a religion or restricting the flourishing of a religion by giving preference to any one religion over another. This requirement has been discussed above in the context of the granting of exemption to all religious entities, and is particularly reflected in the comments of Justices Burger and Brennan at paragraph 74 above.

63. Any regime that requires the court to make determinations of worth would be further complicated by the difficulty in determining whether a system of belief comprises a religion, which is a necessary precursor to any determination of worth. Chief Justice Malcolm notes:

In discharging that responsibility, the courts have recognised that our language has a strictly limited capacity to capture the nature of “religious belief”. Indeed, one judge has ventured the opinion that: “... in no field of human endeavour has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgement and retribution.”<sup>144</sup> The courts have also been influenced by the essentially unknowable nature of “religious truth”<sup>145</sup>, and by an awareness of the lessons of history in relation to religious persecution and intolerance.

64. A further rationale for maintaining the presumption that religious institutions operate for the public benefit is found in the general acceptance within Australian law of the reasoning that private spiritual advancement leads necessarily to public benefit through the good works of religious adherents. As acknowledged by the United Kingdom Secretary of State for the Home Department:

The importance of religion as a fundamental spring of charity can scarcely be overestimated. It is part of the make-up of Man to want to give. It is part of the ethics of most religions to encourage that. Trusts for the advancement of religion have contributed much to the spiritual welfare of generations of individuals and to the sound development of our society.<sup>146</sup>

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<sup>144</sup> *United States v Seeger* (1965) 85 S Ct 850, 858 (Clark J).

<sup>145</sup> See, eg *United States v Ballard* (1944) 64 S Ct 882, 889-890.

<sup>146</sup> *Charities a Framework for the Future* HMO, London, 1989, Cm 694 p. 8.



65. Such sentiments have found acceptance within Australian judicial opinion. The New South Wales Court of Appeal held in *Joyce v Ashfield Municipal Council*<sup>147</sup> that private worship services are for the public benefit, in that the services equip adherents to apply religious principles in their respective roles in society. In that case proof of actual public benefit in the form of demonstrable efficacy of the relevant worship was not required.<sup>148</sup> Such was the concern over requiring such proof that Reynolds JA held the ‘doctrine that religious activities are subject to proof that they are for the public benefit could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of all religious practices.’<sup>149</sup>
66. The decision of Gobbo J in *Crowther v Brophy*<sup>150</sup> provides similar support for the proposition that the advancement of religion is for the public benefit. Justice Gobbo held that the success of private intercessory prayer is an inappropriate test for public benefit and that instead the enhancement in the life of those who find comfort in intercessory prayer is the relevant criterion. Ridge notes that the decision ‘suggested that in finding public benefit from the practice of intercessory prayer, one should look not to ‘the success of intercessory prayer’, but to ‘the enhancement in the life, both religious and otherwise, of those who found comfort and peace of mind in their resort to intercessory prayer.’<sup>151</sup>
67. Ridge notes that the application of a presumption of public benefit of religion by the courts has significant benefits for the efficient administration of justice. In proposing a model that ‘presupposes that an evidential test has been satisfied at some higher level of abstraction, whether this is according to empirical evidence of the general benefits provided by all religious purposes, or according to recognition of the contribution of religious pluralism and religious activity to a healthy society, or according to moral argument (the highest levels of abstraction of benefit)’, (a model she notes ‘suggests the status quo should be maintained’) she argues that such a framework is ‘cost-effective ... because individual religious groups do not need to prove

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<sup>147</sup> [1975] 1 NSWLR 744.

<sup>148</sup> Courts in the United Kingdom have drawn a line, denying charitable status to closed contemplative orders (See *Gilmour v Coats* [1949] AC 426). But this position may not be accepted in Australia, see Joyce Chia and Ann O’Connell, ‘Charitable Treatment?—A short History of the Taxation of Charities in Australia’ (Research Report, *University of Melbourne*, 2010) and see also *Crowther v Brophy* [1992] VR 97.

<sup>149</sup> *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744, 750.

<sup>150</sup> [1992] VR 97.

<sup>151</sup> Ridge (n 127) 1084.

public benefit in relation to their specific purposes and nor does the state have to assess such evidence.<sup>152</sup>

68. In determining whether any particular religion is for the public benefit the courts have also displayed a strong appreciation of the dangers involved in tailoring legal protection according to the views of the prevailing majority.<sup>153</sup> As highlighted in ex curial commentary by Malcolm CJ:

One of the problems with claims to necessity is that what is considered necessary usually depends on the experience and values of those who impose the relevant restriction. In these circumstances, as Brennan J observed in *Goldman v Weinberger*<sup>154</sup>, one of the tasks of the courts must be: "... to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."

In making this reference to the "quiet erosion" of the right freely to exercise a religion, Brennan J highlights the ever-present potential of the majority, indirectly and unthinkingly, to discriminate against the religious practices of a minority. Regulations and restrictions which are not intended to discriminate against religious practice, and are applied uniformly, may nevertheless in their effect discriminate to the extent of imposing an intolerable burden on the adherents of a particular religion.<sup>155</sup>

69. The above arguments strongly support the conclusion that religious entities operate for the public benefit and that the existing presumption of public benefit should be maintained. Such reflects the very practical policy and administrative position adopted by the courts in the interest of avoiding questions of relative worth and in recognition of the difficulties in defining religion. The position is consistent with the doctrine of the separation of Church and State and expresses a concern to avoid an erosion of the rights of the minority by majority rule.

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<sup>152</sup> Ibid 1098.

<sup>153</sup> See, eg *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 131.

<sup>154</sup> (1986) 475 U.S. 503.

<sup>155</sup> Malcolm (n 132) 981.

70. It is noted that the Productivity Commission formerly recommended that all religious charities be granted deductible gift recipient status (recommendation 7.3) as follows

*The Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds. Consistent with the Australian Taxation Office rulings on what constitutes a gift, payments for services should not qualify as a gift.*

It grounded that recommendation on the following rationales:

- Equity;
- Simplicity;
- The resulting removal of donor bias towards charities with DGR status at the expense of other charities;
- It would increase the choice of DGRs for donors; and
- The use of PBI status is no longer an appropriate basis for determining DGR eligibility for charitable behaviour.

71. To render each church a deductible gift recipient, would be to remove that church from the ‘basic religious charity’ designation found at section 205-35 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), and thus subject the church to the greater reporting obligations contained therein. Such a removal would be inconsistent with the policy intent of the concept of basic religious charity, which included to reduce the regulatory burden on small religious institutions, and to avoid disclosure of financial information for institutions that are heavily reliant on private philanthropy (the same rationale that giving to private ancillary funds is not publicly available). Reforms recommended by the Productivity Commission should not cause those churches which currently satisfy the status of a ‘basic religious charity’ to lose that criterion. If the Productivity Commission retains the recommendation that deductibility status should be extended to religious institutions it should ensure that such does not undermine the regulatory settings encompassed within the concept of the basic religious charity.

72. Professor Ann O’Connell has argued that:

A good tax system should be as simple as possible. A complex tax system makes it difficult for people to understand the law and apply it to their circumstances. The present law has become so complex that it is difficult to convey its meaning simply and adequately on tax returns forms and in other printed matter. Complexity imposes high compliance costs on the community and high administrative costs on the tax authorities. Complex tax laws also result in socially unproductive and costly tax litigation. These considerations suggest that, where possible, tax reform measures capable of ready comprehension and application should be preferred over more complex alternatives.<sup>156</sup>

73. She also points out that the Review of Business Taxation in 1999 identified one of the major objectives guiding development of the tax system as “promoting simplification and certainty”<sup>157</sup> and that the Inspector-General of Taxation has also identified simplicity as one of the “fundamental principles” of tax policy.<sup>158</sup> She further argues, with reference to the Inquiry into the Definition of Charities and Related Organisations:

‘It is clear from submissions to the Inquiry that much of the confusion in the sector is related to what tax or other concessions attach to what type of entities and what the boundaries are between different types of entities. This is not surprising given the wide range of categories of entities that can access the concessions.’<sup>159</sup>

74. It is however acknowledged that in its 2010 Contribution of the Not-for-profit Sector Report, the Productivity Commission noted:

[T]he scope of eligible activities is narrow in Australia relative to that in comparable overseas countries. For example, donations to all charities and Community Amateur Sports Clubs are eligible for Gift Aid in the UK, while in Australia only 40 per cent of all tax concession charities are DGRs.<sup>160</sup>

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<sup>156</sup> Treasury, *Reform of the Australian Tax System*, Draft White Discussion Paper (1985), [1.8].

<sup>157</sup> Review of Business Taxation Final Report, *A Tax System Redesigned: More Certain, Equitable and Durable* (1999), 104.

<sup>158</sup> Inspector-General of Taxation, *Issues Paper No 2 – Policy Framework for Review Selection* (2003).

<sup>159</sup> Ann O’Connell, ‘The tax position of charities in Australia – why does it have to be so complicated?’ (2008) 37 *Australian Tax Review* 17, 19 quoting The Inquiry into the Definition of Charities and Related Organisations Report (CDI Report), 34.

<sup>160</sup> Productivity Commission (n 122) 177.

75. A brief overview of the international position leads to the conclusion that deductibility is a common measure by which States across a wide range of cultural and national contexts sanction charitable religious pursuits. The United States, Canada and New Zealand all provide a subsidy to churches in the form of simple deductibility. A similar subsidy in the form of the percentage tax has been favoured more recently by some Eastern European countries. A Singaporean variation on deductibility permits more than 100% deductibility for some donations, operating in the space between direct grants and deductibility. The application of the deductibility mechanism to religious institutions would align Australia with the approach of many other countries.

## **Part 4 - Information Request 5 - Fringe Benefits Tax**

76. The Discussion Paper also makes reference to use of fringe benefit tax concessions for the encouragement of philanthropy. The existing fringe-benefits exemption for employees of religious institutions that are religious practitioners (located within current section 57 of the *Fringe Benefits Assessment Act 1986* (Cth)) should be retained. The operation of that exemption is explained in the *Fringe Benefits Tax Assessment Bill 1986 – Explanatory Memorandum* as follows:

*Clause 57: Provision of benefits to employees of religious institutions to be exempt in certain cases*

By clause 57, the provision of benefits by a religious institution to a minister of religion or a full-time member of a religious order are generally to be exempt from tax. The exemption does not, however, extend to benefits provided in respect of duties that are not religious in nature.

The exemption conferred by clause 57 also applies to benefits provided to a person who is training to be a member of a religious order and to benefits provided to a spouse or child of the minister or member of the religious order (e.g., where board and quarters are provided to a minister and the minister's family).

### **The History of the Exemption**

77. The history of the introduction of the exemption is again illustrative of the original underlying intent and policy rationale behind the exemption, a rationale that continues to this day.

78. The *Fringe Benefits Tax Assessment Bill 1986* was introduced by the Hawke Government to address a perceived hole in the revenue base arising from the provision of non-taxable benefits to employees. Both the Democrats and the Coalition Opposition parties raised their concern that the tax, in the absence of an exemption for charities, would amount to a tax upon entities that would otherwise be exempt from taxation. Senator Flo Bjelke-Peterson typified this concern in her speech to the Australian Senate:

**Senator BJELKE-PETERSEN** — “Charitable organisations, which need every dollar of income that they can get, will be required to pay fringe benefits tax on benefits supplied to employees. I believe that this is completely contrary to the previous basic exemption of charities from income tax, sales tax, bank account debit tax, and other levies and taxes. The result of this tax on charities will be counterproductive, because the charities will be forced either to reduce services or approach the Government for additional subsidies. I think there are not too many people who want to give their donations to charities realising that they are helping those charities to pay income tax.”

“I turn to another aspect of the tax which I find extremely worrying—that is, the effects it will have on charities. I realise that certain exemptions will apply to ministers of religion engaged in religious duties. However, what about ministers of religion who are working for charitable and educational institutions?”

**Senator Siddons** — “We will move an amendment on that, Senator.”

**Senator BJELKE-PETERSEN** — “That will be very good. I hope that the Government will accept it because it is very important. I feel that these people are just as involved in a religious occupation as is the normal parish minister. I refer, for example, to a chaplain at a hospital or a supervisor at a youth rehabilitation centre. Committed lay persons employed by the churches, although not ordained ministers, exercise the duties of a religious ministry just as effectively as if they were ordained clergy. At the same time they are paid minimum salaries in comparison with those receiving secular wages.”<sup>161</sup>

79. The principal concern driving the Liberal Opposition Party was expressed by Senator Baume in his speech to Senate, namely that the ‘great institutions that care for other Australians’ would become subject to taxation in the absence of an exemption.

From the moment that the fringe benefits tax was announced it became clear that its effect would fall upon charities. I am using the word ‘charities’ in the sense that most of us understand that word—the great institutions that care for other Australians. It is quite clear that they would be caught by this Bill, that the application of the fringe benefits tax would

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<sup>161</sup> Commonwealth, *Parliamentary Debates*, Senate, 30 May 1986, 3075 (Bjelke-Petersen).

mean that they would be paying tax where they pay no tax now and that that tax would have to be paid from moneys that would otherwise go to doing the charitable work for which they are responsible.

The Opposition parties announced early, following party and shadow Cabinet consideration, that we would move to try to exempt charities from the effect of this impost. We issued Press releases at the time and we have issued some subsequently. I must say that the Australian Democrats have also had a concern about the effect of this tax on charities and I understand that they have negotiated with the Government on their own. We determined that we would move an appropriate amendment.

I wish to indicate that Senator Haines has pointed out to me, with accuracy, that my understanding of the word 'charity' and the legal meaning of the word are quite different. Let me acknowledge that it has been possible, working with the Australian Democrats, to develop a form of words which talk about the provision of benefits to employees of public benevolent institutions. The words 'public benevolent institutions' have their own meaning in law but they cover the great charities of Australia. If this amendment is picked up it will ensure that, where these public benevolent institutions provide a benefit to an employee, that benefit is exempt.<sup>162</sup>

80. The Senator's speech, made with reference to the exemption granted to Public Benevolent Institutions, disclosed an appreciation of the difference between what the community considers to be charitable, and the definition of charity at law. The exemptions, it was thought, should be granted to those entities that fell generally within the common public conception of charity. It appears from the above Senate records that the exemption for benefits provided by religious institutions to religious practitioners was passed into law on that rationale. It can be argued that exemption from fringe benefits tax to religious institutions who supply fringe benefits to religious practitioners continues to accord with community expectations of the support to be given to religious institutions and is consistent with the policy of not taxing charitable entities that would, but for the exemption, otherwise be taxable. Having established that there are clear

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<sup>162</sup> Commonwealth, *Parliamentary Debates*, Senate, 3 June 1986, 3271 (Peter Baume).



policy grounds for maintenance of the exemption I turn to consider several common objections against the exemption.

### **FBT Concessions and Competitive Neutrality Concerns**

81. The Not-For-Profit Sector Tax Concession Working Group argued that ‘[i]ssues of competitive neutrality arise where eligible entities compete directly with businesses that do not benefit from FBT concessions.’<sup>163</sup> The Working Group Paper referred to the Productivity Commission’s 2010 report as confirming this concern. This conclusion should not be accepted as applicable to religious institutions. The Productivity Commission’s report raised no concern in relation to the exemption granted to religious institutions. The Commission’s report was principally concerned with competitive neutrality in the hospital and aged care sectors. The Working Group Paper also referenced The A Fairer Tax System Report as being in support of this concern, however such report, whilst raising a general concern, similarly directed its particular attention to hospitals ‘where nursing shortages are an ongoing concern.’<sup>164</sup> Evidence has not been presented that competitive neutrality issues have any distortionary effect in the labour market for religious practitioners. Conclusively, there is no real competition between religious and non-religious institutions for the provision of pastoral duties or practice, study, teaching or propagation of religious beliefs. Religious institutions have no opportunity to take a benefit over their competitors, as all competitors have access to the same exemption.

### **Concerns Over the Abuse of the FBT System**

82. Similarly I am not aware of any evidence to suggest that abuse of the FBT regime is occurring in religious institutions. Not one of the Industry Commission Report, the A Fairer Tax System Report nor the Productivity Commission singled out religious institutions as being culpable in any such abuse of the fringe benefits tax system, or any giving rise to any particular concern. To the contrary the overwhelming majority of religious institutions have shown the ability to self-regulate the use of the exemption so as to avoid any inappropriate use.

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<sup>163</sup> Not-For-Profit Sector Tax Concession Working Group, ‘Fairer, simpler and more effective tax concessions for the not-for-profit sector’ (Discussion Paper, The Treasury, November 2012) 37.

<sup>164</sup> Ibid 44.

## **Administrative Burden**

83. The Not-for-profit Working Group also highlighted the administrative burden imposed on charities by the fringe benefits tax exemption as being a central rationale for the removal of the exemption. It states:

The perceived need to offer fringe benefits imposes considerable compliance burdens on eligible entities. This includes the requirement to organise and offer salary packaging and the recording and reporting requirements for fringe benefits.<sup>165</sup>

84. It is submitted that this concern is entirely irrelevant to the question of whether the exemption for religious institutions providing benefits to religious practitioners should be maintained. This is because the provision of the benefits to religious practitioners are non-reportable, and therefore impose no administrative burden on religious institutions at all. This simplicity and absence of administrative burden is another clear rationale for the maintenance of the existing exemption as applies to religious institutions.

## **The Alternative of Government Grant Funding**

85. One option that has been mooted is the replacement of the FBT exemption with direct government grants. This recommendation was proposed by the A Fairer Tax System Report. It is submitted that this proposal is entirely inappropriate for the religious sector. Applications for direct grants and reporting on those grants to government agencies can involve significant compliance costs that would replace those tax compliance burdens. Given that there is no compliance costs associated with the existing regime, the increase in administrative burden proposed by a grants system would be significant. The further level of concern is the limited and periodic nature of government grants. This would introduce an unacceptable level of uncertainty for religious institutions and their employees. Such a proposal would undermine the certainty of the contribution to the community that can be made by a religious institution with a policy of placing Pastors on longer term assignments. Generally the ongoing provision of direct grants are usually tied to progressive reporting indicators. Such a level of scrutiny

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<sup>165</sup> Not-For-Profit Sector Tax Concession Working Group, 'Fairer, simpler and more effective tax concessions for the not-for-profit sector' (Discussion Paper, The Treasury, November 2012) 38.

raises a concern for the maintenance of a separate of Church and State, as has been outlined in sufficient detail at Part 2.

86. On the basis of the benefit extended to the public by the exemption, recognised by the original policy rationales underpinning its introduction, there is no logical argument as to why the exemption should also not only be extended to religious practitioners, but also to those administrative staff who support religious practitioners in performing the activities endorsed by the exemption. Such an extension would also recognise the difficulty for smaller religious institutions in raising finance for the employment of key staff. This difficulty has only been enhanced due to funds that must now be committed in response to an increase in the compliance burden placed upon religious institutions in recent years through the introduction of the GST reforms and other legislative changes (including the introduction of the Australian Charities and Not-for-profits Commission). For many religious institutions their principal revenue stream is often the provision of donations by members of the congregation. The current economic climate leads to the concern that any loss of FBT benefits will have a significant detrimental impact on religious institutions and their ability to attract and retain staff.
87. In 2013 the Tax Reform Working Group noted that the Commonwealth expenditure for exemption for the practice, study, teaching or propagation of religious beliefs by religious practitioners was estimated by Treasury to be \$85 million. This is less than 3.5% of the total estimated total quantifiable Commonwealth tax expenditures on FBT concessions to the NFP sector. The above analysis leads to the following propositions:

The existing criteria for the provision of fringe benefits to religious practitioners by religious institutions should be maintained. There is also a case that the exemption should be extended to administrative staff who support religious practitioners in the performance of those functions endorsed by the exemption.

Direct government grants are not an inappropriate means with which to replace the existing FBT exemption for religious institutions.

### **Part 5 – Information Request 5 - Competitive Neutrality**

88. Finally, it is noted that the Discussion Paper states that tax ‘concessions can increase the ability of charities to compete with other organisations and businesses that are unable to access them

and can raise competitive neutrality concerns.’ However, in respect of tax exemption, this statement is inconsistent with the Productivity Commission’s 2010 conclusion that ‘[o]n balance, income tax exemptions are not significantly distortionary as not-for-profits (NFPs) have an incentive to maximise the returns on their commercial activities that they then put towards achieving their community purpose.’ The Productivity Commission offered the following rationale for its conclusion that ‘[i]ncome tax exemptions are unlikely to violate competitive neutrality’:

Most NFPs are exempt from income tax. The Industry Commission in the Charitable Organisations in Australia report concluded that such exemptions were unlikely to provide an unfair advantage to NFPs. Whether or not there is an income tax exemption, the output and pricing decisions to maximise a surplus (or profit) are the same. Thus the income tax exemption does not distort decisions such as how many people to employ, what price to charge and so forth, as long as tax is a fixed share of profit. Put another way, the objective of a for-profit business is to maximise profit by either (or both) increasing revenue or cutting expenditure. For a given profit, the tax on the profit — income tax — does not affect the decision to maximise profit (although a sufficiently high income tax could make the business unviable). This applies similarly to income tax exempt NFPs, which seek to maximise their output for a given cost.

89. It should also be noted that the Industry Commission reached the same conclusion in 1995:

Income Tax Income tax exemption does not compromise competitive neutrality between organisations. All organisations which, regardless of their taxation status, aim to maximise their surplus (profit), are unaffected in their business decisions by their tax or tax-exempt status.

## **Conclusion and Summary of Argument**

90. This submission has been directed to questions posed by the Productivity Commission’s Discussion Paper. It has directed its attention principally towards those matters raised in the Discussion Paper that concern: the means by which local faith-based charities may contribute to civic reengagement; the public benefit of religion, as applies to tax exemption and deductibility of gifts; the Productivity Commission’s prior recommendation that Deductible

Gift Recipient status should be given to all charities, and the effect of this on basic religious charities; the maintenance of the existing fringe benefit tax exemption for religious institutions; and competitive neutrality concerns as applied to the tax exemption of charities. The following provides a summary of the key propositions.

### **Information Requests 1 & 3 – Defining Philanthropy and Role of Government**

91. The Productivity Commission would not offer an accurate understanding of the Australian charitable sector if it failed to accurately regard the strong historical alignment between benevolent institutions and faith-based motivations. In light of that historical alignment it would not sufficiently acquit its terms of reference if it did not consider how the operations of faith-based charities can be enhanced in any reforms attempting to increase philanthropy in this country. Such consideration must have regard to the unique context of faith-based charities and the opportunities and threats arising in their particular context. The common law recognition that benevolent relief may incorporate regard to a person's 'spiritual welfare' is important for the current inquiry, as it allows the Productivity Commission to consider how faith-based charities may be placed at the centre of reforms seeking to enhance philanthropy within Australia. In light of the strong historical presence of faith-based charities within the benevolent charitable sector, the Productivity Commission should give specific consideration to how that contribution may be not only maintained, but enhanced. Incorporating the notion that philanthropic benevolence may include regard to a person's spiritual welfare within the definitional boundaries of the 'philanthropy' that the Commission seeks to enhance is therefore critical to ensure that the Commission accurately engages with the character of the Australian charitable sector and to maximise the impact of its recommendations.
92. In my response to information request 3, I note that on his appointment as Assistant Minister for Charities Andrew Leigh quickly declared his desire to inspire 'a civic renaissance' through charitable associations.<sup>166</sup> Faith-based charities will be a key plank of any such renaissance. Against the trend of declining civic engagement, the evidence suggests that religious entities are foremost amongst those charities that promote community engagement. Civic reengagement theory invites an exploration of practical initiatives to meet local need with local

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<sup>166</sup> Kutchel (n 1).

benevolence. The response to information request 3 provides an analysis of such of initiatives illustrating the broad range of tools through which policy makers may call upon the charity sector in order to inspire civic reengagement.

### **Information Request 5 - Income Tax Exemption**

93. Part 3 argues that religious institutions should continue to be tax exempt on the following bases:
1. Such is consistent with the Constitutional doctrine of the separation of Church and State, raising questions as to the Constitutionality of any removal of the exemption.
  2. Such ensures a proper expression of religious freedom within contemporary Australia and avoids unconstitutional curtailing of that freedom.
  3. The law rightly favours institutions that foster ‘moral or mental improvement’ in the community.
  4. The activities undertaken by religious institutions, as far as they enhance community benefit, are not required to be performed by government, and therefore avoid expense to the tax payer.
  5. Freedom of religious expression through the granting of exemption from taxation contributes to a more pluralistic society, consistent with the principles outlined by the High Court in *Aid/Watch Inc v Federal Commissioner of Taxation*.
  6. The exemptions are granted to religious entities as one of a number of similar entities that contribute to the public benefit. To this end they avoid expressing any particular preference for religious entities, but merely include religious entities as one of a number of entities that similarly operate for the public benefit.
  7. The exemption, in being granted to all religions, avoids granting favour to one religion over another, and so avoids concerns of discrimination between religious institutions.
  8. Granting tax exemption to all religious entities entails lesser involvement between Church and State than would the taxation of those entities.
94. The submission has argued that the tax exemption framework has led to a proliferation of religions within Australia, to the benefit of the public, and to the benefit of individual liberty and expression within Australia. A loss of exemption from taxation correlates with a loss in religious freedom. Taxation regimes must not be used as a basis for denying religious liberty.

### **Information Request 5 - Deductibility**

95. To the extent that the Productivity Commission formerly recommended that all charitable religious entities should be granted Deductible Gift Recipient status, it necessitates consideration of whether religion can be said to be for the public benefit. It can be observed that underlying the common law presumption that religious entities are for the public benefit are practical, administrative and policy rationales that have been developed by the courts across centuries, they include:
1. The acceptance within Australian law that private spiritual advancement leads necessarily to public benefit through the good works of religious adherents.
  2. General reluctance to enter into questions concerning the comparative worth of religions.
  3. Avoidance of any accusation of preferring one religious belief over another.
  4. The Constitutional prohibition on the Commonwealth establishing a religion or restricting the flourishing of a religion by giving preference to any one religion over another.
  5. The difficulty in determining whether a system of belief comprises a religion.
  6. Significant benefits for the efficient, cost-effective administration of justice.
  7. A strong appreciation of the dangers involved in tailoring legal protection according to the views of the prevailing majority.
96. It has also been argued that the grant of deductibility status to all religious institutions should not cause those churches which currently satisfy the status of a 'basic religious charity' to lose that criterion.

### **Information Request 5 - Fringe Benefits Tax Exemption**

97. It has been argued that the existing fringe-benefits exemption for employees of religious institutions that are religious practitioners should be retained. There is also a cogent argument for extending that exemption to administrative staff who support religious practitioners in the performance of those functions endorsed by the exemption. This is because the exemption continues to accord with community expectations of the support to be given to religious institutions and is consistent with the policy of not taxing charitable entities that would, but for the exemption, otherwise be taxable. In respect of the application of principles of competitive neutrality to the fringe benefit exemption for religious practitioners it has been noted that:

- a. prior inquiries have not raised this concern with respect to the exemption for religious institutions.
- b. there is no real competition between religious and non-religious institutions for the provision of pastoral duties or practice, study, teaching or propagation of religious beliefs, and that all ‘competitors’ have access to the same exemption.

It has also been argued that the simplicity and absence of administrative burden associated with the exemption (which distinguish it from other forms of FBT exemption or rebate) provide a clear rationale for the maintenance of the existing exemption. It is also concluded that replacing the FBT exemption with direct government grants would be entirely inappropriate for the religious sector, imposing a significant increase in administrative burden.

#### **Information Request 5 – Competitive Neutrality and Tax Exemption**

98. Finally, in reply to the Discussion Paper’s claim that tax ‘concessions can increase the ability of charities to compete with other organisations and businesses that are unable to access them and can raise competitive neutrality concerns’ it was noted that, in respect of tax exemption, this statement is inconsistent with the Productivity Commission’s 2010 considered conclusion that ‘[i]ncome tax exemptions are unlikely to violate competitive neutrality’. I wish to conclude in thanking the Commission for the opportunity to make submissions in respect of the Discussion Paper.