

# **SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO PHILANTHROPY**

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on behalf of Australian Christian Churches**

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**Australian Government  
Productivity Commission**



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# **Submission in relation to Productivity Commission Future Foundations for Giving Draft Report released November 2023**

## **1. Introduction**

My name is Mark Llewellyn Edwards. I am the Founding Pastor of Cityhope Church in Ipswich Queensland, affiliated with **Australian Christian Churches (ACC)**. I am the author of this submission.

The submission is made on behalf of ACC of which I am their advocate and representative on matters of Religious Freedom.

ACC is the largest Pentecostal movement in Australia consisting of in excess of 1,000 churches, 3,300 credentialed pastors and 400,000 constituents.

## **2. General comments on substance of draft report and ambit of this submission**

This submission on behalf of the ACC will only seek to address one aspect of the draft report into 'Future Foundations for Giving'.

As outlined in the draft report, the Productivity Commission does not see a case for additional Government support for 'the practice of religion through the Deductible Gift Receipts (DGR) system'. Page 191 of the draft report states, there is 'no strong case for Government support of religion through the DGR system'.

Therefore, in reference to Table 6.1 of the draft report, the Productivity Commission is recommending that charitable activities that are specifically for the purpose of 'advancing religion' should be removed from the scope of the DGR system.

This aspect of the draft report will be the sole focus of this submission.

## **3. Acknowledgement of Productivity Commission rationale in relation to removing 'advancing religion'**

In recommending the removal of 'advancing religion' from the charitable activities 'list', it seems that the Productivity Commission does acknowledge the following:

- a) 'Religious organisations and the practice of religion plays an important role in many people's lives and in a range of communities across Australia'
- b) 'Religious beliefs are associated with higher economic growth' according to some research (McCleary and Barro, 2019; Webber, 1905).
- c) 'Religious faith and values can provide important inspiration for undertaking a range of charitable activities.'

In summary, it could therefore be reasonably concluded, even by the authors of the draft report, that there are definite community benefits when religious activities and the practice of religion is interconnected with charitable activities.

The authors of the draft report are clear in stating that charities (including religious organisations) that undertake 'excluded activities', namely advancing religion, could still have DGR status for any 'non-excluded' charitable activities.

Yet despite these acknowledgments, the draft report recommends the removal of 'advancing religion' from the charities list.

#### 4. Basis and foundation of this submission: Freedom of religion is a human right

##### *The diminishing of religious freedom in Australia*

The recommendation of the Productivity Commission in this draft report, despite the above acknowledgements, without doubt, diminishes religious freedom in Australia. Religious Freedom is an essential human right.

'Human rights recognise the inherent value of each person, regardless of background, where we live, what we look like, what we think or what we believe. They are based on principles of dignity, equality and mutual respect, which are shared across cultures, religions and philosophies. They are about being treated fairly, treating others fairly and having the ability to make genuine choices in our daily lives. Respect for human rights is the cornerstone of strong communities in which everyone can make a contribution and feel included.'

The above paragraph is taken directly from the home page of the Australian Human Rights Commission ([humanrights.gov.au](http://humanrights.gov.au))

Human rights such as freedom of religion are inalienable. They are not capable of being taken away or denied by anyone including governments.

If any other human right was diminished in a way such as this draft report proposes to diminish religious freedom, the proponents of the human right in question would not accept such a proposal.

Removing 'advancing religion', as is proposed, is removing freedom of religion and this should not be accepted by religious communities but also not be accepted by those who do not participate in any 'religion', as freedom of religion includes the freedom to not practice a religion.

In the High Court of Australia – *Church of the New Faith v Commissioner of Pay Roll Tax* (1983) 57 ALRJ 785 at 787, per Mason ACJ and Brennan J, it was stated, '**Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.** The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of section 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.'

The proposed removal of 'advancing religion' as a non-excluded charitable activity in the draft report implies that this fundamental human right is of no importance in a modern society, particularly in terms of philanthropy in Australia.

Removing 'advancing religion' does not require a 'strong case' of support as stated at page 191 of the draft report. This is because, freedom of religion as an inalienable human right must always be protected.

There are limits to all human rights and this aspect will be addressed later in this submission.

Religious freedom, as previously stated is a human right yet it is indeed one of the oldest human rights.

As early as the 2nd century the son of a Roman Centurion, Tertullian, a Roman citizen, lawyer and historian wrote, 'Rome should allow Christians to exercise their faith because religious freedom is an essential component of human nature.... Every person should be able to worship according to (their) own convictions.' This is the first and oldest recorded written statement that expresses the need for religious freedom to be an essential human right.

Without progressing into a thesis on religious freedom and its acceptance throughout history, there are now numerous international treaties, declarations and other instruments which seek to protect religious freedom. Australia is a party to some and has an obligation in international law to comply with them.

Certainly, the most well-known of these international 'accords', in a modern context, in terms of the protection of religious freedom, is the **1948 United Nations Universal Declaration of Human Rights (Universal Declaration)**. Passed by the UN General Assembly, including Australia, the Universal Declaration has not become part of Australian law. However, this Universal Declaration must influence lawmakers and policy-makers in considering any proposed legislation or changes to existing legislation, in relation to anything which seeks to diminish religious freedom, as this draft report clearly does.

Several of the Universal Declaration's provisions relate to religious freedom. However, for the purpose of this submission, **Article 18** is the most significant.

**Article 18 (1-3) of the International Covenant on Civil and Political Rights (ICCPR)** states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The Department of Foreign Affairs and Trade on its website ([dfat.gov.au](http://dfat.gov.au)) states, 'Australia's commitment to human rights is enduring: we were an original signatory to the Universal Declaration of Human Rights in 1948. We have been a leading proponent of its consistent and comprehensive implementation.'

I accept, as previously stated, there are limits for all human rights and freedoms being exercised. In the case of religious freedom, **Article 18(3)** above, imposes limits on the practice of religion if it can be justified as prescribed by law 'where this is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. The acceptance of such limits (in accordance with other UN documents, such as the *Siracusa Principles*) must be shown

to be 'necessary' and 'proportionate', with a key question being whether, if there are limits imposed for a specific reason, that the limits be as least restrictive as possible.

Does the proposed removal of 'advancing religion' somehow meet the above criteria to impose a limit on religious freedom, in order 'to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'? In addition, if the removal is within those 'phrases', is it 'necessary and proportionate' in accordance with the Siracusa principles?

By the Productivity Commission's own acknowledgments (see above paragraph 3) there is clearly no protection of public safety issue nor any issue in relation to the other criteria namely, 'order, health, or morals or the fundamental rights and freedoms of others'.

Therefore, the human right of religious freedom must never be eroded, as would be the case if this recommendation is maintained, in the final report after public hearings.

## 5. Apparent reasoning for removal of 'advancing religion' criteria

The Explanatory Memorandum for the *Charities Bill 2013* (Cth) states that advancing religion involves 'the promotion of spiritual teaching and the observances that act to promote and manifest it.'. For this to be charitable, the purpose 'must be directly and immediately religious and involve ways of advancing religion, including providing and maintaining facilities for worship; supporting religious clergy; missionary bodies; and religious associations.'

The Australian Charities and Not-for-Profits Commission (**ACNC**) provides the following examples of charities which advance religion:

- a) religious congregations;
- b) religious education bodies; and
- c) funds for establishing and maintaining religious buildings.

It is worth noting that the phrase, 'the promotion of spiritual teaching and the observances that act to promote and manifest it', is remarkably similar to phrases contained in **Article 18** of the **ICCPR** namely 'manifest his religion or belief in worship, observance, practice and teaching. Once again, this direct correlation between the Explanatory Memorandum of 'advancing religion' and **Article 18** is further evidence that the removal of 'advancing religion' from the charities list is a diminishment of the human right of freedom of religion.

The draft report makes two observations that seem to have some bearing on the decision in relation to removing 'advancing religion'. The first, located on page 192 of the draft report, states that '25% of charities have a sole charity subtype of advancing religion with a further 3% which combine this with another subtype.' The second outlined on page 192 of the draft report identifies a potential 'risk of a nexus between donors to religious organisations and beneficiaries. Donations to a religious institution for purely religious activities (as opposed to other services that religious institutions may provide, such as relief from hardship) primarily benefit the people who regularly participate in the activities of the institution.'

The argument I am placing before the Commission is that the removal of 'advancing religion' is an invasive and destructive threat to one of the oldest human rights known to civilisation. The change recommended in the draft report should not take place due to the human right implications alone.

However, as I have stated previously, freedom of religion has limits. So, do the above two matters raise sufficient justification to 'limit' religious freedom?

Considering the quantum matter first, namely the small number of charities that would be affected by this proposal. Surely this is *not* a serious argument for the removal of the 'advancing religion' criteria. If this statistic is placed in the draft report purely to identify numbers of charities affected, then that is entirely proper to do so. Facts should be made available. However, the small number of charities affected should never be used as an argument on any basis for any proposition, especially one as important as the diminishing of the human right of religious freedom. Human rights protect the 'ones' as well as the 'many'.

As Chief Justice Latham in the High Court case of *Adelaide Company of Jehovah's Witness v Commonwealth of Australia* (1943) 67 CLR 116 said, 'Section 116 (of the Constitution) is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities'. In other words, by extension, the number of entities affected should have no application to issues of religious freedom as a human right.

Secondly, the 'nexus risk'. In the case of religious freedom and more particularly people who are part of religious institutions, an individual's religion or faith is the guiding foundation of their life. To be generous in terms of philanthropy is the very core of their religion and faith. As part of this faith, of course these individuals are going to participate to 'promote spiritual teaching and the observances that act to promote and manifest it.' This is the very religious freedom protected in **Article 18** of the **ICCPR**. This includes 'providing and maintaining facilities for worship; supporting religious clergy; missionary bodies; and religious associations.' There is no risk. People who live a religious life have been acting in this manner for centuries with no suggestion that this so called 'primary benefit', which this draft report says is a risk, is anything more than essential servanthood and self sacrifice. These virtues are the essence of religious faith.

One of the fundamental and important functions of *any* government is the protection of all human rights and the oldest amongst those rights is freedom of religion.

## 6. Section 116 of the Constitution

Section 116 of the Constitution states that: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

Professor Nick Aroney, Professor of Constitutional Law at the University of Queensland, argues in a number of scholarly articles that Section 116 protects religious freedom as an 'associational right as a function of its text, clear acknowledgement in the case law, and the nature of Australian religious practice as communal in the late 19<sup>th</sup> century.' As a result, Section 116 protects religious organisations and communities, including religious charities.

My professional legal experience does not extend to constitutional law, however I rely on the content of the final submission to the Commission by Dr Alex Deagon and Dr Mark Fowler (undated), which states, 'The text of section 116 operates as a limit on Commonwealth power, which means persons (whether natural or artificial – including corporations and associations) are protected from laws which breach section 116. For example, since the free exercise of any religion includes 'conducting religious services, disseminating religious teachings, determining religious doctrines, establishing standards of religious conduct, identifying conditions of

membership, appointing officers (leaders), ordaining religious leaders and engaging employees', these practices are all protected regardless of whether they are engaged in by individuals or associations.' Therefore, it seems there are serious concerns as to whether the Government has the Constitutional power to actually make these recommendations law.

## **7. Conclusion**

The submission by ACC is that the exclusion of 'advancing religion' criteria from charitable activities and as a result, removal of its DGR status, is a deliberate diminishment of the human right of freedom of religion in Australia. It is constitutionally uncertain and against International Covenants. It must not proceed further.

Written by Mark Llewellyn Edwards OAM, January 2024