

**Future Foundations for Giving**  
**Productivity Commission Draft Report**  
**Submission**

Professor Nicholas Aroney, University of Queensland Law School  
Associate Professor Mark Fowler, University of Notre Dame Law School  
Dr Joel Harrison, Sydney Law School

13 February 2024

Thank you for the opportunity to make these submissions to the Commission.

**Submission 1**

Our first submission is that the ACNC Act and Regulations confer exceptional discretionary powers on the ACNC Commissioner which are insufficiently determined or constrained by law.<sup>1</sup> This has two consequences. Firstly, it renders the Act and Regulations vulnerable to constitutional challenge on the basis that they are not supported by the taxation power.<sup>2</sup> Secondly, there are good reasons to surmise that the legal uncertainty and unpredictability surrounding the exercise of the ACNC Commissioner's extraordinary powers of intervention are having an adverse impact on productivity within the charity sector.<sup>3</sup> This undermines an essential premise of the current inquiry into philanthropy, namely that levels of giving and volunteering are affected by the regulatory framework within which charities must operate. This uncertainty also hampers the attainment of the objects of the ACNC Act, which are:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not for profit sector; and
- (b) to support and sustain a robust, vibrant, independent and innovative Australian not for profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not for profit sector.<sup>4</sup>

The limited data currently available suggests that non-government entities, charitable bodies and local community organisations enjoy higher levels of public trust than government

---

<sup>1</sup> Nicholas Aroney, 'Federal Charities Law and the Taxation Power: Three Constitutional Problems' (2023) 51(1) *Federal Law Review* 78, 93-99 (referring to the 'complex, aggregating and ramifying set of judgements of fact and value' that the Commissioner must undertake when exercising his or her regulatory and coercive powers).

<sup>2</sup> *Ibid.*

<sup>3</sup> Richard Craswell and John E Calfee, 'Deterrence and Uncertain Legal Standards' (1986) 2(2) *Journal of law, economics, & organization* 279.

<sup>4</sup> ACNC Act s 15-5.

agencies.<sup>5</sup> We therefore urge the Productivity Commission to undertake an evidence-based assessment of the anti-productive impact of the ACNC regulatory regime, consistent with its core functions and operative principles.<sup>6</sup> We submit that such an assessment is needed in order for the Productivity Commission to assess the burden imposed on charities by the current regulatory framework and how this affects their philanthropic decisions.<sup>7</sup>

## Submission 2

Our second submission is that, given the risk that the power conferred on the ACNC Commissioner to replace the leadership of religious charities contravenes s 116 of the Constitution,<sup>8</sup> the extension of these powers to basic religious charities (BRCs) would only exacerbate the constitutional problem. There is a problem in the political compromise which originally differentiated between basic religious charities and other charitable organisations. However, this is not best addressed through an amendment to the Act that specifically targets basic religious charities, rendering them subject to the exercise of discretionary regulatory powers that are more extensive than those conferred upon the Australian Securities and Investments Commission in respect of ordinary trading corporations and the regulatory powers exercised by courts in respect of trustees of charitable trusts under state laws.<sup>9</sup>

The application of this power to religious charities generally should accordingly be reviewed. It would be better if the ACNC Act was reformed to remove the condition that excludes incorporated religious bodies from the definition of ‘basic religious charity’.

It should also be noted that while BRCs are currently not covered by the Commissioner’s powers to suspend, remove and replace their leadership, they are liable to the power to issue directions.<sup>10</sup>

Extending the ACNC’s power to remove and replace the leadership of a charity to religious charities is presumably based on the principle of neutrality: why should a different approach apply to religious charities when other forms of charitable endeavour (functionally equivalent for this purpose) must comply with the governance standards and be subject to the Commissioner’s powers?<sup>11</sup> Quite independently of our first submission on the overreach of the

---

<sup>5</sup> <https://mccrindle.com.au/article/where-australians-place-their-trust/>;

<https://www.edelman.com.au/trust-barometer-2022-australia>;

<https://australianleadershipindex.org/dashboard/executivesummary.aspx>.

<sup>6</sup> *Productivity Commission Act 1998* (Cth) s 6; <https://www.pc.gov.au/about/operate>.

<sup>7</sup> Terms of Reference, 3(i).

<sup>8</sup> Nicholas Aroney and Matthew Turnour, ‘Charities Are the New Constitutional Law Frontier’ (2017) 41(2) *Melbourne University Law Review* 446, 481-490, discussing *ACNC Act*, ss 100-10–100-15, 100-30, as well as the power to the power to issue directions to a registered entity (ss 85-5). This point is also made by Alex Deagon and Mark Fowler in their submission to the Productivity Commission in response to the Commission’s Draft Report on Philanthropy.

<sup>9</sup> See Nicholas Aroney and Matthew Turnour, ‘Charities Are the New Constitutional Law Frontier’ (2017) 41(2) *Melbourne University Law Review* 446, 486-487, discussing the *Corporations Act 2001* (Cth) s 206F and the *Trusts Act 1973* (Qld) s 106(1).

<sup>10</sup> ACNC Act s 100-5(3).

<sup>11</sup> Ann O’Connell, ‘Additional Submission’, *Australian Charities and Not-for-profits Commission Legislation Review* (2018). See Australian Government Productivity Commission, *Future Foundations for Giving: Draft Report* (November 2023) p 224.

regulatory powers of the ACNC Commissioner generally, our second submission is that there are good reasons to conclude that *religious* charities require a different approach to that which is being implemented through the current legislative framework.

The internal autonomy to choose, train, and discipline leaders is fundamental to religious liberty. Historically, the *libertas ecclesia* or liberty of the Church over its own appointments, at times contested by civil rulers, reflected the principle that religious authority is distinct from civil authority.<sup>12</sup> In modern terms, it is one of the central features of the non-establishment of religion that the State has no control over the appointment of religious leaders. Contemporary case law and commentary has emphasised that this rule is necessary to prevent undue entanglement of the State in religion. One of the fundamental reasons for this is that civil agencies do not have the competence to address theological issues or to second-guess the theological determinations of religious groups. Notably, the ACNC Commissioner’s statutory powers extend to appointing a responsible entity to replace those suspended or removed.<sup>13</sup> Such an appointee has all the powers and responsibilities of the removed or suspended responsible entities and the obligation to perform all of their functions.<sup>14</sup> If exercised with respect to a religious group, the Commissioner will be making a decision that is theological in nature. This is because religious bodies make such appointment decisions not only on the basis of principles of good governance, but also on the basis of religious considerations that very commonly involve prayer, spiritual discernment and doctrinal examination of the applicant. A Commissioner exercising such powers of appointment will either have to attempt to mirror the efforts of the religious group as closely as possible, or else ignore the group’s religious commitments and obligations. Either way, the appointee will be required to perform all the functions of the suspended person(s). For the religious body, there is no separation of the governance functions and the religious functions of the religious leader.

For these reasons, reflecting a concern to protect the internal authority of religious groups to make religious decisions and a concern to prevent secular entanglement, courts are frequently critical of State-based interventions in the leadership of religious groups and critical of petitions to interfere in the decisions of a group’s leaders.<sup>15</sup> The United Nations Human Rights Committee refers to the freedom to choose religious leaders as one of the ‘acts integral to the conduct of by religious groups of their basic affairs’.<sup>16</sup> Art 6 of the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) provides that the right to freedom of religion includes maintaining charitable institutions and the freedom ‘to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief’.

In line with these concerns, a statutory Review of the ACNC legislation recognised that s 116 of the *Constitution* ‘imposes some limits on the power of the Commonwealth to make laws in relation to religious registered entities which do not apply to the making of laws in relation to

---

<sup>12</sup> See, e.g., Richard W Garnett, “‘The Freedom of the Church’: (Towards) an Exposition, Translation, and Defense’ (2013) 21 *Journal of Contemporary Legal Issues* 33.

<sup>13</sup> *ACNC Act* s 100-30.

<sup>14</sup> *Ibid* s 100-55.

<sup>15</sup> See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commissioner* 565 US 171 (2012); *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 (ECtHR); and *Iliafi v Church of Jesus Christ of Latter-Day Saints of Australia* (2014) 221 FCR 86.

<sup>16</sup> CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion) (CCPR/C/21/Rev.1/Add.4, General Comment No 22), 30 July 1993.

other registered entities'.<sup>17</sup> The Review recommended that a legislative amendment require the Commissioner of the ACNC to:

respect the independence of the sector in carrying out duties under the ACNC Act. This would include respecting the fundamental rights and freedoms protected by section 116 of the Australian Constitution or set out in the ICCPR, the UDHR and other international treaties and covenants ... (including the freedoms of religion, peaceful assembly and association).<sup>18</sup>

To treat a religious entity differently is consequently a matter of recognising the different context and the different authority structures and modes that obtain in such settings, an approach consistent with contemporary understandings of the principle of substantive equality.

Any power to affect or change the leadership of a religious charity must be necessary to achieving a legitimate aim. It is difficult to see how the Commissioner's power to determine new leadership is necessary to achieving effective governance. It would be better if the ACNC Act was reformed to remove the condition that excludes incorporated religious bodies from the definition of 'basic religious charity', so that both incorporated and unincorporated religious bodies and groups are not subject to the Commissioner's powers of appointment.

### **Submission 3**

Our third submission concerns the proposal to apply the governance standards to BRCs. Having heard submissions from a wide range of religious institutions in response to terms of reference that were relevant to the maintenance of the BRC exception, the statutory Review of the ACNC legislation endorsed the view that the governance standards need not apply to BRCs where a 'comparable governance framework' is in place. The Panel was concerned to avoid overriding 'tailored governance requirements' specific to the theological understandings and related authority structures of individual religious institutions. The rationale for this recommendation included the importance of avoiding 'duplication and red tape', a concern that is directly relevant to the Commission's terms of reference. The Panel stated:

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

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

To avoid duplication and reduce red tape, a registered entity should be deemed to be in compliance with the governance standards if it already applies a separate set of governance standards which meet minimum requirements.<sup>19</sup>

The Panel was comprised of leading experts and advisers with many years of experience in the charity sector. Their view was formed after considered investigation of the existing frameworks

---

<sup>17</sup> Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*, 64 ('ACNC Review').

<sup>18</sup> Ibid 67.

<sup>19</sup> ACNC Review (n 22) 48, 49.

adopted by Australia's leading religious institutions and extensive submissions offered by those institutions in response to terms of reference that required consideration of the issue.

In contrast to that Review, the Productivity Commission has not yet had the opportunity to consider detailed submissions on the question of the sufficiency of internal religious institution governance and its alignment with secular governance requirements. Nor does this important issue appear to feature in any significant way within the publicly available submissions made to the Commission thus far. We can only assume that this is because it was not immediately apparent to the sector how the Commission's own terms of reference would enliven that issue. In our view if the Commission is inclined to proceed with its recommendation concerning governance within BRCs, it should undertake in the remaining time available a targeted focus on the question of the sufficiency of internal governance mechanisms within religious institutions. The Commission should only depart from the considered recommendation of the statutory review if its own investigations identify mischief sufficient to warrant that departure and which prevail against the rationales for retaining the existing arrangements, as identified by the prior review.

#### **Submission 4**

Our fourth submission concerns the transparency recommendations in the Draft Report.

Recommendation 7.2 in the Draft Report includes the following:

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

- publish details of recommendations given to a charity to address actual or potential non-compliance with the Act or the *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth)
- publish circumstances and reasons for referrals made to other Australian government agencies (including state and territory regulators) under section 150-40 of the Act, in instances where harm caused by the disclosure does not outweigh the public benefit of that disclosure.<sup>20</sup>

We noted above our concerns about the broad discretions currently granted to the ACNC Commissioner. The proposal that the Commissioner would be able to make public untested and unproven allegations against charities in the exercise of those broad discretions will only further exacerbate the adverse impacts upon productivity. If put into practice, such a recommendation would undermine the attainment of the objects of the ACNC Act, particularly the maintenance of public trust and confidence in the sector.<sup>21</sup> Unlike for-profit entities whose ongoing viability is buffered by the contractual certainty attending commercial finance facilities, charities that rely on private philanthropy exist at the voluntary favour of their donors. The publication of unproven allegations by an entity with the gravitas of the Commonwealth regulator could have immediate and disastrous implications for a charity reliant on private philanthropy, seriously prejudicing its operations as well as the reputations of its responsible persons. The exercise of such powers could very readily lead to a charity and the beneficiaries it serves being punished for an unauthorised infraction by an individual staff member or director, in circumstances where the charity as a whole, and its governance arrangements, are

---

<sup>20</sup> ACNC Review 23.

<sup>21</sup> ACNC Act, s 15-5.

not at fault. Rather, we submit that any power to make public disclosure or to issue directions should be subject to accessible, proportionate and economical avenues of appeal exercisable prior to any such disclosure.