THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

CREATE CHANGE

Future Foundations for Giving

Productivity Commission

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Introduction

The University of Queensland's T.C. Beirne School of Law and the PA Research Foundation welcome the opportunity to contribute to the Productivity Commission's Review of Philanthropy.

For more than a century, The University of Queensland (UQ) has maintained a global reputation for delivering knowledge leadership for a better world.

The most prestigious and widely recognised rankings of world universities consistently place UQ among the world's top universities.

UQ has won more national teaching awards than any other Australian university. This commitment to quality teaching empowers our 52,000 current students, who study across UQ's three campuses, to create positive change for society.

Our research has a global impact, delivered by an interdisciplinary research community of more than 1500 researchers at our six faculties, eight research institutes, and more than 100 research centers.

The TC Beirne School of Law is a global center of research excellence contributing to the understanding and development of law nationally and internationally and the effectiveness of law as a discipline across a broad range of legal and policy issues.

The PA Research Foundation (the PA Foundation) was established as the philanthropic arm of the Princess Alexandra Hospital, Queensland. The PA Foundation builds relationships with the community to enable people to support research and patient care at one of Australia's leading cancer treatment and clinical trials centres.

Summary and recommendations

We congratulate the Australian Productivity Commission on publishing and are thankful for the opportunity to respond to the Australian Productivity Commission's *Future Foundations for Giving-Draft Report* (the Draft Report).

The Draft Report identifies three key areas of reform being:
1) the deductible gift receipt (DGR) system;
2) regulating Australia's charity and the not-for-profit sector; and
3) philanthropy governance.

Our response focuses on the latter areas of reform, specifically Chapters 3, 7, 8, 9, and 10.

Recommendations outlined in this document are:

1. That diversity and heterogeneity be embraced and be meaningfully represented in an expanded philanthropic system.
2. That membership fees paid to an incorporated charity with DGR status should be tax deductible for low to middle-income families and earners.
3. That a 'basic religious charity' and its exemption status be abolished.
4. That all religious charities no longer be outside the regulatory reach and investigative powers of the ACNC.
5. That a statutory meaning of religion in charity law be introduced.
6. That the statutory meaning should be constructed to reflect the broad approach by the common law, as protected by s 116 of the *Constitution*.
7. That under a statutory meaning of religion, gifts and/or donations (including the disposition of property) for the support, aid and relief is made or benefits the propagation of faith or belief is deemed *not* to be for the advancement of religion if the institution employs oppressive

psychological, emotional, physical and financial manipulation of its followers (adherents) or to gain new followers, or whose predominate object is to make a profit.

8. An application for religious charities provides objective evidence to the ACNC to best assist the ACNC Commissioner in making a legal assessment of the five indicia.

9. That the contention that surrounds the constitutional validity of the ACNC be resolved.

10. That the state and territory Attorney General's historical role and powers should not be replaced by the ACNC.

11. That further consultation and consideration be carried out if the ACNC were to have administrative powers that they be curtailed by a range of exceptions to preserve the role, duties, and power of the Attorney General.

12. That the ACNC in finding that a charity is dormant during the period of inactivity be consistent and harmonised with Australian corporate and banking laws.

13. That greater reform be targeted to stop individuals from creating platforms without the express consent of individual charities.

14. That when donated funds are distributed must remain a matter for the charity's board and/or trustees.

15. That transparency be self-regulation here to ensure strategic goals concerning the charity's purpose are reached.

17. Terms of reference

i. Draft finding 3.2

Volunteering is widespread in Australia, but the formal volunteering rate has declined.

We welcome the National Strategy for Volunteering 2023-2033 to improve knowledge and understanding of how volunteering and giving differ within First Nation Countries and communities within multicultural Australia.

As the federal government seeks to unlock philanthropy's hidden benefits, government policy, and law reform must adequately accommodate *all* (and not some) cultural differences around volunteering and giving.

The Draft Report somewhat downplays the value of respective differences between volunteering and giving. Therefore, greater attention must be given to any policy and law reform efforts to embrace diversity and personal heterogeneities (in how the act of giving transpires that which might not be regarded as strictly 'Western' or in the 'Australian way').

Recommendation:

1. That diversity and heterogeneity be embraced and be meaningfully represented in an expanded philanthropical system.

ii. Draft finding 4.2

A personal income tax deduction is likely to be an effective way to encourage giving

The main and obvious concern about Draft Finding 4.2, as noted in the Draft Report, is how to best 'level the playing' field between high- and lower-income earners.

Incentives must be astutely targeted to the available resources that each income level can realistically provide. Many middle - and low-income parents/carers are known to be members of incorporated charity organisations for any one of the reasons identified in Figure 2 (page 5) of the Draft Report.

Membership with an incorporated charity is governed by a formal contract. The consideration paid in the formation of this contract provides an opportunity for Australia's income tax deduction system to be extended to include membership fees (or a nominal amount) with tax deductibility status.

Including membership fees as part of the overall taxation reform agenda will elevate the cost of living pressures for families, as well as encourage healthy play and promote grassroots volunteering and giving.

Recommendation:

1. That membership fees paid to an incorporated charity with DGR status should be tax deductable for low to middle-income families or earners.

iii. Draft recommendation 7.1

A more transparent and consistent approach to regulating basic religious charities

The recommendation to abolish a 'basic religious charity' and its exemption status from the ACNC's regulatory powers is welcomed.

If this recommendation is adopted, it will confer the legal status of a pure religious group as an exclusive charitable trust. On that footing, there is an opportunity to consider whether it would be appropriate for Australia to draft a statutory definition or an indicia of religion relating to charity law.

Given that the charitable purpose, the 'advancement of religion' is complex and has a particular meaning grounded in the common law. Importantly, the construction of a statutory definition must reflect and support Australia's spiritual belief system.[1] The construing of religion under s 116 of the *Constitution* has been unaided by the Commonwealth and left to the judiciary to define.[2] The following indicia assist the judiciary's commitment to describing religion:

1) a 'collection of ideas and/or practices involves beliefs in the supernatural;
2) ideas that relate to man's nature and place in the universe and his relation to things supernatural;
3) ideas are accepted by adherents as requiring or encouraging observance of particular standards or codes of conduct or to participate in specific practices having supernatural significance;
4) however, loosely knit and varying in beliefs and practices, adherents may constitute an identifiable group/s; and
5) the adherents themselves see the collection of ideas and/or practices as constituting a religion.'[3]

The above indicia reflect a generous understanding of religious liberty protected by s 116 of the *Constitution*. If the statutory meaning of religion is to be introduced, it must be drafted in a manner that facilitates the common law indicia to allow the courts and regulators discretion and choice that will be constitutionally sound.

[1] It is imperative for the drafters to have an awareness of how Australia's belief system differs to that of England and Ireland where religion is statutorily defined. See s 3(3) *Charities Act 2011* (Cth).
[2] See *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559 (*DOGS case*) (Murphy J).
[3] *Church of the New Faith v Comr of Pay-Roll Tax* (Victoria) (1983) 154 CLR 120 (Wilson and Deane JJ).

Conversely, in the absence of a determinative element in the characterisation of religion, it is arguable that all (or at least most) fiction-based religions[4] can easily be found to be charitable.[5]

If a statutory definition of religion were to be introduced, it must not be narrow or create a single criterion that falls outside the liberal protection of s 116 of the Constitution. A narrow or even indeterminate meaning of religion would harm those with minority beliefs, as well as individual autonomy. Therefore, adopting the wider and more liberal meaning of religion, charity law will cultivate minority beliefs and ideas of non-traditional religions in an ever-increasing Australian secular society.

The widespread child abuse, harm, and detriment that was found to have occurred in a broad range of religious institutions (and charities) was described by the Royal Commission's Inquiry into Institutional Responses to Child Sexual Abuse concluded to be a 'national tragedy.'[6] One striking aspect of the public debate was the disbelief as to how it was it is 'right' that religious institutions were capable of leveraging numerous fiscal and legal advantages offered by charity law when spiritual or moral authority enabled perpetrators.

Parallel to this disbelief was the issue of religious institutions that were found to have caused harm, as well as subordinated, discriminated, oppressed, and inflicted determinate on children, women, First Nations people, the LGBTIA+ community, and other vulnerable members of society are out of reach of the law. Rationalising the disbelief is to point out that charity law has numerous shortcomings, and one substantive error that exists is the law's focus on maximizing public welfare, and not on self-centred welfare.

Whether Australia decides to learn from this 'national tragedy' and be brave enough to consider how other common law jurisdictions (such as the Republic of Ireland) have taken action to protect the vulnerable from charity law shortcomings concerning religion remains to be seen.

[4] For example, Jediism (*Star Wars*), Church of All Words (*Stranger in a Strange Land*), and Tolkien religionists (*The Lord of the Rings*). Markus Davidson, 'Fiction-Based Religion: conceptualizing a new category against history-based religion and fandom' (2014) 14(4) *Cultural and Religion* 378.

[5] The Temple of the Jedi Order was held in England not to be a religious group capable of being a charitable incorporated organisation. Charity Commission for England and Wales, *The Temple of the Jedi Order Registration: Decision of the Commission* (16 December 2016). See also S C Derrington, 'Faith, Hope, and Charity – Religion as a Public Benefit in Modern Australia', CLAANZ Public Lecture, 2019, Melbourne. <https://www.alrc.gov.au/wp-content/uploads/2020/03/Faith-Hope-and-Charity-Religion-as-a-Public-Benefit.pdf>.

[6] The Royal Commission, 5 <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf>.

Recommendations:

1. That a 'basic religious charity' and its exemption status be abolished.
2. That all religious charities no longer be outside the regulatory reach and investigative powers of the ACNC.
3. That a statutory meaning of religion in charity law be introduced.
4. That the statutory meaning should be constructed to reflect the broad approach by the common law, as protected by s 116 of the Constitution.
5. That under a statutory meaning of religion, gifts and/or donations (including the disposition of property) for the support, aid and relief is made or benefits the propagation of faith or belief is deemed *not* to be for the advancement of religion if the institution employs oppressive psychological, emotional, physical and financial manipulation of its followers (adherents) or to gain new followers, or whose predominate object is to make a profit.
6. An application for religious charities provides objective evidence to the ACNC to best assist the ACNC Commissioner in making a legal assessment of the five indica.

iv. Information Request 7.1

Building a stronger regulatory framework

From a strategic perspective, the Draft Report may be read to mean that a federal takeover of the not-for-profit sector is inevitable.

The draft recommendation for the ACNC to direct a registered charity undergoing revocation to transfer assets to another charity either by way of administrative power or an intergovernmental agreement raises some legal concerns.

If the ACNC was to have exercisable administrative powers great care must be taken not to replace the general *parens patria* role and powers of the Attorney General.[7]

Indeed, the statutory powers of a charity regulator appear to be incrementally replacing the historical role and function of the Attorney General, but as illustrated in the case of *Lehtimaki and others v Cooper* [2020] UKSC 33 it is wrong to think the Attorney General no longer has as significant role overseeing charities. The Supreme Court found in *Lehtimaki* that it was proper for the Charity Commission for England and Wales not to play a part in the appeal.

Perhaps in less complicated matters cases where the ACNC has the administrative power and the jurisdiction to establish and manage a scheme under revocation, it must be subject to exceptions and restrictions, to preserve the common law role and power of the Attorney General.[8]

Regarding whether or not the ACNC should be granted legal standing before state and territory Supreme Courts the Draft Report overlooks several pragmatic legal issues that need to be resolved. For instance, some entities are registerable charities despite falling outside the charitable purposes provisions. Moreover, there remains much contention around the constitutional validity of the ACNC, and these main concerns must be resolved with some urgency before the ACNC has broader powers.

Determining whether a charity is dormant or not should be harmonised with unclaimed money and property provisions in the *Corporations Act 2000*, the *Banking Act 1959,* and *Banking (Unclaimed Money) Regulations 2016*. Identifying the period where monies are unclaimed the ACNC should follow the laws currently in place that being a period of seven (7) years.

If the ACNC were to step into the Attorney General's role (that being similar to ASIC here) the order to transfer assets to another charity under the doctrine of *cy pres* might be seen as an overreach of the state. Again, greater care and further attention are needed as to how the Attorney General's role and common law powers will not be eliminated.

[7] See *Attorney General v Brown* (1818) 36 ER 384, 394-395 (Lord Eldon LC).
[8] See for example s 70 of the *Charities Act 2011* (UK).

Recommendations:

1. That the contention that surrounds the constitutional validity of the ACNC be resolved.
2. That the state and territory Attorney Generals historical role and powers should not be replaced by the ACNC.
3. That further consultation and consideration be carried out if the ACNC was to have administrative powers that they be curtailed by a range of exceptions so to preserve the role, duties and power of the Attorney General.
4. That the ACNC in finding that a charity is dormant the time period of inactivity be consistent and harmonised with Australian corporate and banking laws.

v. Draft recommendation 7.2

Regulation to strengthen donor protection through online giving platforms

So far online providers and charities have been doing a sound job it is regulating this space.

However, the one place where online giving platforms are open to fraud is when individuals are:

1. allowed to create a page to raise funds for themselves; or

2. establish a page to support a charity without going through the charity's online platform.

Therefore, we recommend that regulation be targeted to address these soft spots where fraud too easily occurs.

Recommendation:

1. That greater reform be targeted to stop individual's creating platforms without the express consent of individual charities.

vi. Information request 8.2

Timely distributions of donated funds for charitable purposes

We strongly hold the view that this is a matter that should be left to the board or trustee of the charity.

At times, it is necessary for a charity to accumulate funds (for an expensive piece of medical equipment or to build patient accommodation). As long as, the charity is transparent to its donors it is better being self-regulated.

Recommendations:

1. That when donated funds are distributed must remain a matter for the charity's board and/or trustees.
2. That transparency be self-regulation here to ensure strategic goals concerning the charity's purpose are reached.

Contributing authors

This submission has been written by the following authors.

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