

9 February 2024

Productivity Commission

Level 8, Two Melbourne Quarter
697 Collins Street
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By website

Submission on the Draft Report into Philanthropy

Who are we?

1. This submission is on behalf of, and co-signed by:
 - Australian Baptist Ministries
 - Australian Christian Churches
 - Anglican Church Diocese of Sydney
 - Presbyterian Church of Australia
 - Seventh-day Adventist Church
 - Fellowship of Independent Evangelical Churches
2. The submission was coordinated by *Freedom for Faith*, a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.
3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

Freedom for Faith

Chair:	The Right Reverend Dr Michael Stead
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Executive Summary

4. We are concerned that the Commission has explicitly treated religious philanthropy differently to other forms of philanthropy. This includes:
 - Extending DGR status to a wide range of charities, but expressly not charities with the type of Advancing Religion
 - Removing DGR status from Religious Education in Government Schools
 - Removing or denying DGR status to philanthropic vehicles that are predominantly used by non-Government schooling, which is primarily religious (Primary and Secondary Education and School Building Funds categories)
5. Additionally, the Commission has overlooked the previously accepted Constitutional and human rights reasons for the formation of the Basic Religious Category (BRC), and has called for its removal.
6. We call upon the Commission to revise its recommendations and:
 - Extend DGR status to all charities without reference to religion
 - Preserve the Basic Religious Exemption

On the terms of reference

7. When comparing the Commission's recommendations regarding religious philanthropy, it appears that the recommendations are not in line with the terms of reference that the Commission was given.
8. The Commission's terms of reference call upon it to "Identify opportunities to increase philanthropic giving" and "Identify reforms to address barriers or harness opportunities to increase philanthropy". However, in relation to philanthropic giving to charities for the purpose of advancing religion, there are no measures proposed to increase giving or reduce barriers. Instead, this type of giving is one of the few types of charitable giving that the Commission recommends should not receive DGR status
9. Furthermore, the Commission's recommendations will *reduce* religious philanthropic giving by withdrawing DGR status from religious instruction in Government schools and school building funds for the explicit reason that these categories are predominantly used in religious philanthropy.

10. Tellingly, the Commission acknowledges that “substantial increases in giving over and above what is already likely, are not expected as a direct result of the changes”, this is because “the increase in giving to charities that gain DGR status would be partially offset by the withdrawal of DGR status from other charities in the medium term” (p. 206). This comment suggests that the Commission’s intended outcome was not the overall increase of philanthropic giving, but the redirection of philanthropic giving towards purposes that the Commission considered more worthy. Specifically, redirection of money away from religious philanthropic giving and towards secular organisations.
11. The Commission was asked to assess the DGR regime and “how it aligns with public policy objectives and the priorities of the broader community”. The report states “the Commission does not see a case for additional government support for the practice of religion through the DGR system, based on the first principle above” (p. 18). The first principle referred to is that “the activity is expected to generate net community-wide benefits and would otherwise likely be undersupplied by the market” (p. 17). The implication (which is later expressed explicitly on p. 192) is that DGR status for the advancement of religion would not generate additional net community-wide benefits.
12. However, there is no explanation as to how the Commission has formed this view or how it has determined public policy objectives and the priorities of the broader community. In terms of religion, the Commission failed to address any public policy objectives or poll the priorities of the broader community. Indeed, the Commission acknowledges that around 25% of all charities have the purpose of advancing religion (p. 205), yet it does not see that as a reflection of the priorities of the broader community. Notwithstanding this, the Commission does not appear to have introduced a mechanism to assess public policy or community priorities, but instead appears to have imposed its own opinions on the value of religion.
13. The terms of reference ask the Commission to examine, “[t]he burden imposed on donors, volunteers and not-for-profits by the current regulatory framework”, with a view to lessening the barriers to giving. However, the effect of their proposals will be to *increase* the compliance burden on religious organisations by removing the Basic Religious Exemption, and to give the Commission the authority to interfere directly in appointing the leadership of religious institutions – in likely violation of s116 of the Constitution.

A bias against religion

14. Throughout the Report, there is a clear difference in the way that general philanthropic activity is treated in comparison to religious philanthropy. The Commission states:

“The preferred design of a tax incentive for giving depends on three main factors [including] the type of behaviour the government wants to encourage” (p. 142)

15. Therefore, it is not unreasonable to read in the Commission’s recommendations its own preferences as to what the Government should be wanting to encourage and (as a corollary) discourage.

16. On the process of making these distinctions, the Commission states:

In practice, making assessments about which purposes or classes of charitable activities (that is, activities that are used either to further a particular charitable purpose or that share common characteristics) should be within the scope of the DGR system is challenging, subjective and contestable. The Commission therefore considers that it is vital to balance the risks of ‘type 1’ and ‘type 2’ errors. That is, the risk of including certain classes of activities in the scope of the DGR system (where this may not be warranted), should be weighed against the risk of excluding certain activities that should be in scope. (p. 184)

17. Throughout the report, the Commission has leaned towards accepting ‘type 1’ errors rather than ‘type 2’, and has advocated for the inclusion of a large range of charities to be included in DGR status.

Most classes of charitable activities would be in scope for DGR status, including activities that have been largely excluded from the DGR system to date, such as advocacy in furtherance of another charitable purpose, public interest journalism, smaller social welfare charities that do not meet the criteria to be a public benevolent institution, and a more diverse range of animal welfare and health promotion charities . (p. 185)

18. However, when discussing religious philanthropy, the Commission’s language shifts suddenly and markedly to being primarily concerned about *avoiding* ‘type 1’ errors. As a result, the Commission advocates for a blanket exclusion from DGR status.

19. Indeed, the Commission has chosen to create new ‘type 2’ errors by removing existing DGR categories – apparently, simply because they are associated with religion.

Charities with DGR status withdrawn: Mainly charities that have DGR status for school building funds or to provide religious education in government schools. (p. 204)

The main cohort of charities (by number) that will remain outside the DGR system is charities with the sole purpose of advancing religion, of which there are about 15,000 charities (or about 25% of all charities). (p. 205)

Religious education activities should also be specifically excluded to maintain consistency with the approach for the advancing religion subtype (discussed below). Not doing so would risk creating an inconsistent approach to how activities related to the advancement of religion would be treated under the Commission’s proposed reforms and could cause integrity problems. (p. 190)

The main activity that would be affected by the withdrawal of DGR status under the reforms are school building funds, which are primarily used for primary and secondary schooling and religious education. (p. 205)

20. This approach is in contrast to the 75% of OECD countries that allow tax deduction for religious philanthropy,¹ a point of which the Commission is aware (pp. 168, 171). The approach is also in contrast with the Commission's own recommendation in its report *Contribution of the Not-for-Profit Sector (2010)*.

Recommendation 7.3

The Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds.²

21. In expanding the eligibility for organisations to receive DGR status, the Commission has included promotion of culture, reconciliation, human rights, health, education, and social welfare (p. 193). As we will discuss below, religion intersects with, and in many cases drives, these categories. However, in their expansion of DGR, the Commission states:

Such advocacy activities provide benefits by encouraging robust debate and enabling groups within the community to convey their perspectives on issues that affect them, facilitating their input into democratic processes and policy outcomes (where that input is in furtherance of a charitable purpose). This can include expressing views on policy issues which are different from the government or the wider public ...

The only exception to this expansion would be charities registered with the ACNC under the law subtype whose activities are to further another subtype or class of activity that is specifically excluded under the Commission's proposals. For example, a charity registered under the law and advancing religion subtypes would currently be ineligible for DGR status and this would stay the same. (p. 193)

22. By constructing its exemptions as it does, the Commission is proposing to treat religion differently from the rest of society. The Commission explicitly acknowledges that it wants to extend support to education *except religious education*. With its wider exemption, it also is implicitly stating that it wishes to support advocacy of ideas *except religious ideas*, culture *except religious culture*, human rights *except the right of freedom of religion*, health *except the health benefits of faith*, and social welfare *except the social capital benefits of religion*.

23. The Commission argues:

A more diverse range of charities with DGR status means a wider range of causes and beneficiaries could benefit from philanthropy and co-investment from Australian taxpayers, providing donors with more choice. (p. 179)

24. However, the Commission appears to wish to ensure that the choice available does not include religion.

¹ <https://www.oecd.org/tax/tax-policy/oecd-taxation-and-philanthropy.pdf>, p. 45.

² <https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf>, p. XLVI

The Commission's view of the value of religion

25. What is the reason for this clear difference in treatment of religious philanthropy and other forms of philanthropy? The Commission acknowledges that these assessments are “challenging, subjective and contestable”, and yet it has been confident to take a strong position on matters of religion.

26. The Commission makes a number of statements about the perceived value of religion in society:

Religious organisations play an important role in many people's lives and communities across Australia. However, the Commission does not see a case for additional government support for the practice of religion through the DGR system, based on the first principle above.

[that principle being that] there is a rationale for taxpayer support because the activity is expected to generate net community-wide benefits and would otherwise likely be undersupplied by the market. (pp. 17-18)

In order to refocus DGR donations toward activities with the greatest net community-wide benefits, the Commission considers that there is a need for some specific exclusions in the education subtype for the activities of primary and secondary education, religious education, and other forms of informal education. (p. 188)

However, applying the principles in figure 6.1, the Commission does not believe there is a strong rationale for expanding the scope of the DGR system to include charitable activities that are specifically for the purpose of advancing religion. As emphasised above, this is not based on a view that religious practice does not provide a benefit to the community, but rather that the additional net community benefits from extending the DGR system to include the purposes of purely advancing religion are not apparent. (p. 192)

27. In these statements, the Commission imposes a value judgment on religion – while religious belief is of importance to many people, the value is *not enough* to warrant the same level of support as other charities. Indeed, each time that the benefit of religion is discussed, the Commission feels the need to add a qualifier. For example (emphasis added):

Social capital tends to have public good characteristics (box 2.1) – a more connected society benefits us all *However, some forms of social capital (families, some religions, clubs) are excludable, and are also subject to diminishing returns to participation.* (p. 80)

Religious organisations and the practice of religion plays an important role in many people's lives and in a range of communities across Australia, *although there may be different perspectives on the personal value of religion.* (p. 191)

28. It appears that the underlying assumption of the Commission is that religion does not hold a public benefit equivalent to other charities, and is not “the type of behaviour the government wants to encourage” (p. 142)

Religion is a social good

29. In contrast to the Commission's apparent position, there is ample evidence that religion holds a significant benefit for society in and of itself. Religion is inextricably linked to a number of other public goods that the Commission wishes to see advanced, including human rights, culture, health and social capital. In addition, religion is a major driver towards wider philanthropy.

Religion as a Human Right

30. Freedom of religion has been recognised as a fundamental human right at least since the creation of the Universal Declaration of Human Rights (Art 18). This right is articulated in Article 18 of the International Covenant on Civil and Political Rights (ICCPR):
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.
 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
31. Article 18(1) expressly states that the human right is not simply to believe a faith, but to hold it *in community*. It is a human right to participate in corporate religious expression and faith communities, and for those communities to express their faith.
32. If the Commission wishes to see the advancement of human rights, then it would be counter-productive to explicitly exclude the advancement of one of the most fundamental rights – religion.

Religion, Culture and Social Capital

33. Religion holds a central role in many, if not most, of the world's cultures. Sociologists have consistently found that religion reinforces social bonds in the society and contributes to a collective conscience. Religion has historically held a central place in the lives of many Australians. It remains central to the development of our nation's social capital and is vital to many people in the Australian community. According to the 2021 Australian census results, 43.9% of Australians identified their religion as Christianity, with a further 10% identifying with another religion. The numbers are even more pronounced when it comes to recent migrants with 69.1%, holding to some form of religious affiliation.

34. Religion also has an impact on the moral and social development of young people. King and Farrow conclude that religiously active youth show higher levels of social capital and experience various social and wellbeing benefits by engaging in religious life.³
35. Religion also increases wider social capital. For example, recent Australian research shows the increased contribution to social welfare and social brought about by religious faith.⁴

Health benefits of religion

36. There are many studies that indicate the benefits of religious involvement for the individual and for society. Previous studies have shown that religious people live longer and tend to be healthier and have higher levels of subjective wellbeing.⁵ In the study by Mochon, a strong link was found between religiosity and well-being, with the “highly religious” having greater subjective wellbeing. Further, they noted that religion has social benefits like lower crime rates and greater civic involvement.⁶
37. Research by Ferraro and Kim shows that religion is associated other health benefits like reduced inflammation among older adults. They also found that religion has been shown to potentially reduce the prevalence of hypertension and cardiovascular disease.⁷
38. This is further supported by research that shows that religion can reduce mortality by 20-30% over a 15-year period.⁸ Additional research has also shown the vital benefits of religion service attendance in improving the physical and mental health for the adherents. This research has found that those who attend religious services have lower rates of depression and are generally more optimistic.⁹ Much work relating to the impacts of religion on health has been undertaken by Harvard Professor of Epidemiology Tyler VanderWeele. One of his studies has highlighted some of the data that shows that religious service attendance may be a stronger predictor of health and longevity than any other social support variable.¹⁰

³ King, P; Farrow, J, *religion as a resource for positive youth development: religion, social capital, and moral outcomes* (2004), p. 703.

⁴ A. Keith Thompson (ed), *The Economic Impact of Religion on Society in Australia. Recent Research and Commentary* (2023)

⁵ Mochon, D et al, *Who Benefits from Religion* (2010), p.1.

⁶ Ibid, p. 8.

⁷ Ferraro, K; Kim, S, *Health benefits of religion among Black and White older adults? Race, religiosity, and C-reactive protein* (2014).

⁸ Koenig, H et al, *Does religious attendance prolong survival? A six year follow-up study of 3,968 older adults* (1999).

⁹ Strawbridge, W et al, *Religious attendance increases survival by improving and maintaining good health behaviours, mental health, and social relationships* (2001).

¹⁰ VanderWeele, T, *religious Communities and Human Flourishing* (2017), p.5.

Religion and Philanthropy

39. Religious people make up one of the most generous demographics. Dr Andrew Leigh has highlighted in his book *Disconnected* that religious people are twice as likely to be involved in community service or civil associations. Further, regular attenders of religious services are 22% more likely to have helped the needy.¹¹ Research from the Lilly School of Philanthropy at Indiana University found that Americans with any religious affiliation contributed on average \$1,590 to charitable causes, compared to \$695 for those without any religious affiliation.¹²
40. As outlined by the submission made by the Anglican Church Diocese of Sydney, church attendance in Australia is strongly associated with higher levels of volunteering, and thus, a contribution to the social capital of the nation. This is because church attendees are regularly reminded of the Christian message about helping others and they are provided with many structured opportunities for engagement in welfare and social justice initiatives.¹³ This is further outlined by the Baptist Care submission to this commission where they say that “Sharing of one’s resources with people who are suffering is a central tenant of the Christian faith, and is often expressed through giving to charitable causes.”¹⁴ Further, they go on to say that this philanthropy is an expression of the beliefs of Christians and a living out of their values.

As highlighted by Assoc Prof Mark Fowler in his submission to the commission, the NSW Court of Appeal held in *Joyce v Ashfield Municipal Council* that worship services are for the benefit of the public because these services equip the adherents to apply religious principles in society.¹⁵ Thus, there is judicial support for the contention that adhering to the tenets of one’s religion provides a public benefit. Organisations that seek to advance the role of religion in Australian society ought to be supported through the DGR status, because they provide this public benefit.

41. These brief examinations of the evidence demonstrate that religion is a significant social good in itself, and improves many of the social outcomes that the Commission is interested in, including health, culture and social capital. The advancement of religion will also have knock-on effects in growing wider philanthropy. Rather than treating religion as a less-valuable form of philanthropy, the Commission should be considering the multiplication effect that religion has on the Commission’s other priorities.

¹¹ Leigh, A, *Disconnected*, (2010), p. 32

¹² Zimsmelster, K, *Less God, Less Giving?* (2019)

¹³ Anglican Church Diocese of Sydney, *Submission to the productivity Commission Inquiry into Philanthropy* (2024), p. 5.

¹⁴ Baptist Care, *Productivity Commission (Philanthropic Inquiry)* (2023), p. 3.

¹⁵ Fowler, M, *Submission to the Australian Government, Productivity Commission Review of Philanthropy, Discussion Paper*, p. 41.

42. We now turn to consider specific proposals from the Commission.

Advancement of Religion DGR Exemption

43. As noted above, the Commission draws a clear distinction between religious philanthropy and other philanthropy. The Commission notes that 15,000 charities (or about 25% of all charities) have the sole purpose of advancing religion (p. 205). However, the Commission proposes to exclude these charities from gaining the increase in philanthropic giving that would come with DGR status – ensuring that 25% of charities would not have the means to increase philanthropy that the Commission is recommending be given to others.

44. This is in contrast with the Commission’s own recommendation in its report *Contribution of the Not-for-Profit Sector (2010)*.

Recommendation 7.3

The Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds.¹⁶

45. The Commission’s current report does not acknowledge or address this previous recommendation or the reasoning behind it. Instead the current report states:

the Commission does not believe there is a strong rationale for expanding the scope of the DGR system to include charitable activities that are specifically for the purpose of advancing religion. As emphasised above, this is not based on a view that religious practice does not provide a benefit to the community, but rather that the additional net community benefits from extending the DGR system to include the purposes of purely advancing religion are not apparent.

There is also a material 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. (p. 192)

46. The basis of the first objection – that of insufficient net community benefits – has been demonstrated to be deeply flawed in our previous section, and by previous submissions that the Commission has referenced (p. 191-192). There is wide recognition of the value of religion to society. The Commission has asserted that there is insufficient benefit without any reference to research or data.

47. The Anglican Church Diocese of Sydney makes a compelling case in its submission for the long-running recognition in common law for the value of religion for wider society, and the case for it to receive full charitable status including tax deductibility.¹⁷ We will not repeat the case law provided, except to commend the Anglican submission, and note that 75% of OECD countries also agree with this analysis and extend tax deductibility to the

¹⁶ <https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf>, p. XLVI

¹⁷ Australian Church Diocese of Sydney submission, pp. 10ff.

advancement of religion.¹⁸

48. The Commission's second argument against providing DGR status is:

Donations to a religious institution for purely religious activities [...] primarily benefit the people who regularly participate in the activities of the institution. (p. 192)

49. This statement works off an extremely broad definition of "benefit". It is important to note that the Australian Taxation Office has provided a functional definition of benefit for this context. They state that a true charitable donation:

must truly be a gift or donation – that is, you are voluntarily transferring money or property without receiving, or expecting to receive, any material benefit or advantage in return. A material benefit is something that has a monetary value.¹⁹

50. This is not the definition that the Commission has applied in determining that religious institutions give a "benefit" to their donors. Instead, they have adopted a definition where simply participating in a religious institution is a "benefit".

51. If this definition was applied outside of religious institutions, it would invalidate the DGR status of many institutions that the Commission wishes to extend it to, such as an art museum or many other cultural institutions. That is, the benefit of an art museum is participating in (i.e. attending) the museum and enjoying the art. Donations to the art museum allow the service to continue, which directly benefits the donor who enjoys attending, and only those who "participate" can gain the benefit.

52. It would appear that the Commission is applying a different standard of "benefit" to religious charities than any other organisation.

53. In contrast, in its 2010 report, the Commission saw the value that religion providers to its participants as something beneficial for all of society and worthy of support through DGR status. The report outlines four broad ways that non-profits contribute to community wellbeing, which include:

Service delivery either to people outside the organisation (such as social support or emergency services) or to members (this may include the opportunity to participate in worship through a religious organisation or the benefits of participating in a community club) ...

Connecting the community and expanding the social networks available to individuals. Connection through worship, social and sporting clubs and other organisations that promote community engagement are obvious examples, but connection can also occur through volunteering, such as with a service delivery organisation...²⁰

¹⁸ <https://www.oecd.org/tax/tax-policy/oecd-taxation-and-philanthropy.pdf>, p. 45.

¹⁹ <https://www.ato.gov.au/individuals-and-families/income-deductions-offsets-and-records/deductions-you-can-claim/gifts-and-donations>

²⁰ <https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf>, p. 37 (underline added)

54. Rather than heeding its own previous recommendation, the data provided in submissions, or the example of 75% of the OECD, the Commission has determined that religious institutions do not provide adequate benefits to the wider community, and has applied a restrictive standard of “benefit” that is not applied anywhere else.
55. The Commission’s own standard is that tax concessions “should be effective, efficient and equitable” (p. 69). But it is hardly equitable to exclude 25% of all charities from a tax concession based on a measure that is not applied to any other category.
56. In conclusion, we reject the arbitrary exclusion of advancing religion from DGR status. Instead, we recommend expanding DGR status to all categories of charity, without faith-based discrimination.

Primary and Secondary education

57. The specific exclusion of primary and secondary education only applies to non-Government schools, as government schools are excluded from the legal definition of “charity” and are not part of the DGR system. Further, the exclusion is almost entirely focused on faith-based schools, since over 98% of students in non-Government schools are in faith-based schools. In 2022, the distribution of enrolments in non-Government schools was:²¹

	Students	%	Schools	%
<i>Catholic (Systemic)</i>	747,415	52.05%	1,759	56.98%
<i>Independent – religious</i>	669,737	46.64%	1,209	39.16%
<i>Independent - non-religious</i>	18,901	1.31%	119	3.85%
	1,436,053	100.00%	3,087	100.00%

58. As with the recommendation above, this recommendation has the appearance of treating religious philanthropy differently to all other forms.
59. The sole rationale that the Commission provides for excluding Primary and Secondary education from DGR status (stated twice in the report) is:

The potential for a donor to be able to convert a tax-deductible donation into a private benefit is especially apparent for primary and secondary education activities, particularly where students are charged fees. While such donations undoubtedly provide benefits, the likelihood that they generate broader community-wide benefits is reduced. Potential donors are most likely to be those directly involved with the organisation, such as students, their parents or alumni. This could lead to tax-deductible donations being directly converted into lower fees. (p. 188)

²¹ <https://isa.edu.au/wp-content/uploads/2023/09/Enrolment-Trends-and-Projections-2023-Edition.pdf>
<https://isa.edu.au/our-sector/about-independent-schools/characteristics-of-independent-schools/>
<https://ncec.catholic.edu.au/wp-content/uploads/2023/08/2022-NCEC-Annual-Report.pdf>

60. The Commission gives no data or scenarios to support this assertion. The only example the Commission raises of this alleged nexus is in regards to school building funds, which we discuss below. In wider giving to primary and secondary education, this assertion of a nexus does not stand up.
61. For example: A parent gives a donation to a private school, on top of their existing fees, to buy some books for the library. That parent's child will benefit from reading those books, but so will all the other children in the school at that time, and future enrolments. There is no disproportionate benefit to the donor. Quite the opposite, the whole community benefits – the very purpose of DGR giving – while the donor receives a very small portion of the overall gain.
62. Considering the claimed nexus between the donation and fees. If the donation was significant enough, it might result in the school not having to spend other funds and reduce fees. However, that reduction is equal across the whole school community. There is no disproportionate benefit to that donor. Quite the opposite, if a donor gave \$10,000 to a school with population of 1000, they would receive only a \$10 fee discount.
63. The one circumstance that justifiably concerns the Commission is if a specific individual (or their child) gained special treatment, or an individual reduction in fees, based on their donation. However, the Commission can be comforted that this situation is already prohibited by the Australian Taxation Office. They state that a gift:
- must truly be a gift or donation – that is, you are voluntarily transferring money or property without receiving, or expecting to receive, any material benefit or advantage in return. A material benefit is something that has a monetary value.²²
64. The Commission's arguments against giving to primary and secondary schooling appear to be based on nothing more than an a-priori position that non-Government (predominantly religious) schooling is less valuable to the community than other forms of education. This stance is revealed in their comments:
- Expressly excluding these primary and secondary education activities (except where these have an equity objective) would refocus taxpayer support toward other activities that are likely to have a greater community-wide benefit. (p. 190)
- most activities in the education subtype would remain within the scope of the DGR system – including formal higher education and research activities. (p. 188)
65. The Commission's attitude to religious philanthropy as a whole appears to have been applied to education.
66. There is no justification for excluding primary and secondary education from DGR status while other education is included. The Commission could easily recommend tightening of specific regulations to prevent potential abuses that they are concerned about.

²² <https://www.ato.gov.au/individuals-and-families/income-deductions-offsets-and-records/deductions-you-can-claim/gifts-and-donations>

School Building Fund

67. The removal of DGR status for school building funds is also disproportionately targeted at faith-based education. While some public schools do use the category, the vast majority of uses are non-Government schools, which we have already seen are overwhelmingly faith-based.
68. Population growth is putting significant pressure on the education system (both public and private).²³ Some NSW schools are enrolling up to 1000 students over their capacity.²⁴ Australia needs to dramatically increase its education infrastructure.
69. A third of parents choose to send their children to non-Government schools, with that number increasing.²⁵ Accordingly, well over a third of the infrastructure growth needed to ensure quality educational outcomes will be in the non-Government space.
70. The Independent Schools Association estimates:

Over the next 10 years, ISA projects that Independent schools could enrol an additional 195,000 students. Based on an average school size of 570, around 342 additional Independent schools would be required to accommodate the increase in students.²⁶
71. While Government school growth will be funded by State and Federal Governments, only 14% of capital needs for non-Government schools are provided by Government.²⁷ This non-Government growth will be funded by the communities that support the school. As the Commission notes:

School building funds can be an important way of funding the infrastructure improvements necessary for delivering education outcomes in school communities. (p. 189)
72. The only alternative to donations for funding this growth is to take it out of the current income. That is, increase fees for current students to be able to build infrastructure for future students.
73. Again, we need to consider the Commission's argument about a nexus between donations and fees.
74. The initial analysis above applies to school building funds. If a donor gives \$10,000 to support infrastructure for a school of 1000 students, at best they can expect a \$10 discount to their fees.
75. However, it is important to note that, given the lead time for capital infrastructure, if a parent gave to a school to start a building, it is quite likely that their child will have left

²³ <https://grattan.edu.au/news/people-pressure-planning-changes-in-your-school-population/>

²⁴ <https://www.smh.com.au/national/nsw/some-sydney-high-schools-take-hundreds-of-extra-students-yet-selectives-haven-t-budged-20240115-p5exdz.html>

²⁵ <https://www.acara.edu.au/reporting/national-report-on-schooling-in-australia/student-numbers>

²⁶ <https://isa.edu.au/wp-content/uploads/2023/09/Enrolment-Trends-and-Projections-2023-Edition.pdf>

²⁷ <https://isa.edu.au/our-sector/funding/capital-funding/>

that school before any student gains a benefit. In that scenario, there is absolutely no nexus between donation, fees and benefit. The donation is entirely philanthropic and is given to support the education of children unrelated to the donor.

76. The only example the Commission raises is in regards to this nexus is:

The Commission has observed the practice of schools including voluntary contributions to school building funds on fee invoices, alongside tuition fees. (p. 188)

77. If the Commission felt that this was a violation of the purpose of DGR giving, then they should recommend regulation tightening to prevent this sort of specific behaviour – for all forms of DGR giving. It would be an overreaction to remove an entire DGR status which is used by almost all non-Government schools to advance education for one third of Australian children, but fail to regulate against this behaviour in other non-religious scenarios.

Religious Instruction in Government Schools

78. The Commission interchangeably uses the terms “Religious Instruction in Government Schools” (3 times) and “Religious Education in Government Schools” (3 times). In most of these cases, it is describing the nature of the DGR category. In two, the Commission are explicitly calling for its removal (pp. 19, 204).

79. However, there is no rationale provided for the removal of this category. Instead, there is a series of confusing references to “religious education” that appear to refer to different activities in each reference.

The Commission’s view is that converting a tax-deductible donation into a private benefit is, in principle, a substantial risk for primary and secondary education, religious education, and other forms of informal education, including school building funds. (p. 18)

In order to refocus DGR donations toward activities with the greatest net community-wide benefits, the Commission considers that there is a need for some specific exclusions in the education subtype for the activities of primary and secondary education, religious education, and other forms of informal education. (p. 188)

The likelihood of a close nexus between fees and donations means that there is a case for expressly excluding education activities related to primary, secondary and religious education, and other forms of informal education. (p. 188)

Religious education activities should also be specifically excluded to maintain consistency with the approach for the advancing religion subtype (discussed below). Not doing so would risk creating an inconsistent approach to how activities related to the advancement of religion would be treated under the Commission’s proposed reforms and could cause integrity problems. (p. 190)

The main activity that would be affected by the withdrawal of DGR status under the reforms are school building funds, which are primarily used for primary and secondary schooling and religious education. (p. 205)

80. If all these references are towards the “Religious Education in Government Schools” category, then it appears that the Commission simply does not understand the category. How can buildings built with a school building fund (i.e. a private school), be used for “Religious Education in *Government Schools*”? How can a service provided for free to public school children have a “close nexus between fees and donations”?
81. The Commission appears to have equivocated on the meaning of “religious education”. The effect is that “Religious Education in Government Schools” DGR category is tarred with the same “brush” of accusations that the Commission levels against other religious endeavours.
82. The alternative is that the Commission has used its terms precisely, and has only mentioned the “Religious Education in Government Schools” DGR category 6 times, has called on it to be removed, but provided absolutely no rationale for that call.
83. However, for the sake of completeness, we will address the two “accusations” implied in the quotes above.
84. Firstly, the accusation that “Religious Education in Government Schools” does not provide sufficient value to the wider society to justify DGR status.
85. Apart from the data above demonstrating the various benefits of religion itself, there has been specific research into the value of Religious Education in Government Schools (which they term SRE) by Professor Zehavit Gross and Professor Emerita Suzanne Rutland OAM.²⁸ They found that SRE provided an effective values education that empowered student decision making, provided benefits to student’s mental health and wellbeing, strengthened the multicultural fabric of schools, and created safe spaces for students to explore faith and questions of identity, especially students of minority faiths.
86. In addition, it is worth reiterating the results of the research from Professor Tyler VanderWeele of the Harvard School of Public Health who identified that attending a religious service once a week improved both physical and mental health.²⁹ By providing the opportunity to public school children to engage with the faith of their family on a weekly basis within the public school system, Religious Education in Government Schools is providing a valuable service.
87. Secondly, regarding the accusation of “providing benefits” to members, the Commission claims:

The likelihood of a close nexus between fees and donations means that there is a case for expressly excluding education activities related to primary, secondary and religious education, and other forms of informal education (p. 188)

²⁸ Zehavit Gross, Suzanne D. Rutland, *Special Religious Education in Australia and its Value to Contemporary Society* (2021).

²⁹ <https://www.hsph.harvard.edu/wp-content/uploads/sites/603/2017/08/ReligionFlourishingCDPS.pdf>
<https://www.usatoday.com/story/opinion/2016/10/28/religion-church-attendance-mortality-column/92676964/>

88. However, this is manifestly not the case for Religious Education in Government Schools. RIGS programs, such as SRE in NSW and RI in Queensland, are provided to public school students whose parents have opted them into the program. The teachers are almost always volunteers, so donations given to RIGS programs rarely pay for salaries. Instead, they usually cover the cost of the teaching materials that the volunteers give – at no charge – to the students that they teach each week.
89. Once properly understood, “Religious Education in Government Schools” not only fits in the current standards for DGR status, it even fits with the restrictive criteria that the Commission laid out exclusively for religious charities to avoid a nexus between giving and benefit. There is no reason to remove the DGR status.
90. The most disappointing part of the Commission’s recommendation to remove the “Religious Education in Government Schools” DGR status is that they appear not to even understand what the category was intended for. In the end, it appears that the only justification that the Commission has for removing it is that it is religious. As they state:
- Religious education activities should also be specifically excluded to maintain consistency with the approach for the advancing religion subtype (discussed below). Not doing so would risk creating an inconsistent approach to how activities related to the advancement of religion would be treated under the Commission’s proposed reforms and could cause integrity problems. (p. 190)
91. As with all other DGR categories, “Religious Education in Government Schools” should be retained.

Basic Religious Charity

92. The Commission proposes to amend the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) to remove the concept of ‘basic religious charity’ (BRC) and associated exemptions for the purposes of a more transparent and consistent approach to regulating BRCs.
93. This would have a number of significant impacts on churches, synagogues, mosques and temples across Australia. Firstly, it would impose an increase in compliance for little to no additional benefit to the community. More significantly, it would allow the ACNC to intervene in the operations of faith communities in contradiction to the Constitution and international human rights.

Undue Governance Burden

94. The removal of the BRC will increase the governance burden on many faith communities and places of worship that are unnecessary and unjustified.

95. The Commission's report outlined that basic religious charities have a lower administrative burden, and that it was a bad thing. However, the report failed to describe why this was a problem, apart from the assertion:

This means that their revenue and assets are unknown to the regulator or to the public – compromising transparency and levels of understanding on giving trends. (p. 223)

96. The Commission also quotes the Rationalist Society of Australia that

basic religious charities are inequitable as they result in charities of a similar size (and risk profile) being subject to different levels of public accountability. (p. 224)

97. However BRC organisations are not charities soliciting donations from the public in “competition” with other charities. They are faith communities that solely have the charitable status of “advancing religion”. As demonstrated above, they provide significant benefit to society, yet they gain their support from their members and adherents. These members have not chosen their faith community by shopping around a “free market” of faiths and analysing financial statements. They are members because they believe the faith, and they give because they want to see it upheld and advanced. The responsibility of basic religious organisations is to be accountable to their membership.

98. Most religious organisations, including all well-known religious denominations, are transparent and accountable to their own religious adherents. Religious organisations would not be able to sustain themselves without the trust and confidence of their adherents. This is because religious organisations ordinarily require ongoing financial and non-financial support by their members. Unless highly transparent and appropriately governed in the eyes of their membership, religious organisations would not be able to maintain the ongoing support and participation.

99. Additionally, it is an ongoing concern of religious organisations that media and other anti-religious advocacy groups often misuse financial and operational information of a religious organisation by providing distorted, incomplete and uncontextualized information to the public. Financial disclosure to the public (as an outcome of a removal of BRC exemptions) will cause a greater risk for these religious organisations. We submit that the BRC exemption from financial disclosure should be retained in order to address the concerns of religious organisations, which are vulnerable to misuse of information.

100. We note that the Commission's recommendation is that charities of the subtype “advancing religion” are excluded from DGR status while it is extended to almost every other category. Simultaneously the Commission wishes to impose increased administrative and reporting load in order that they “should be put on the same footing and subject to the same governance obligations and reporting requirements as other charities” (p. 224).

Government intervention in faith communities

101. The removal of BRC exemptions would mean that religious institutions such as churches and mosques would come under the direct authority of the ACNC Commissioner. The Commissioner could exercise enforcement powers, such as the power to give directions; power to issue enforceable undertakings; and the power to appoint or remove responsible entities. This would allow the Commissioner to instruct a religious institution about spending and activities. It would also give the power to remove leaders, including senior minister, elders or even Archbishop, and replace them with the Commissioner's preferred people.
102. Additionally, pursuant to the governance standards 2, 4 and 5, a charity is required to take "reasonable steps" to comply with these standards. A removal of BRC exemptions would put the ACNC Commissioner in a position to determine whether an action of a religious charity following theological teachings, spiritual guidance or religious practices is "reasonable".
103. Appropriate governance of a religion (or religious organisation) should be assessed and determined by the theology, practices and spiritual guidance adopted by the religion and not by the ACNC Commissioner. The ACNC Commissioner is not a religious authority and is not capable of assessing whether a religious organisation is reasonably governed. The BRC exemption acknowledges this limit of the ACNC Commissioner in the governance of a religion (or religious organisation).
104. Removing the BRC and placing religious institutions under the authority of the ACNC Commissioner would be creating an unprecedented level of State power over religion. This would risk violating both the Australian Constitution and our international human right obligations.
105. Constitutionally, s 116 states: "The Commonwealth shall not make any law [...] for prohibiting the free exercise of any religion". as Professor Nicholas Aroney has argued, there is a clear history of case law demonstrating that s 116 protects religious freedom as an associational right.³⁰ This includes protection of faith communities, religious organisations, and the charities that are their outworkings, from Commonwealth laws which unduly infringe on the free exercise of religion. For the reasons provided above, removing the BRC exception would be a law which unduly infringes on the free exercise of religion to create charitable institutions and regulate their leaders. It is also worth noting that, as Aroney argues, the Commonwealth does not have legislative power to regulate the charities and non-profit sector as such. Rather, it relies on a combination of the corporations, taxation, communications, external affairs and territories powers. This places the Constitutional validity of the proposed changes in doubt both in terms of Commonwealth legislative power and the limits imposed by s 116.

³⁰ Nicholas Aroney and Matthew Turnour, 'Charities are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446; Nicholas Aroney, 'Federal Charities Law and the Taxation Power: Three Constitutional Problems' (2023) 51(1) *Federal Law Review* 78.

106. In international human rights, ICCPR Article 18(1) protects the manifestation of religion “either individually or in community with others and in public or private”. General Comment 22 elaborates that this freedom “encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”³¹
107. Article 6 of the General Assembly’s *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* states that the right to freedom of religion includes the appointment of leaders of faith communities, including leaders of charitable institutions, by the members of that community and consistent with the requirements and standards of the religion.³²
108. The removal of the BRC and the provision of the ACNC Commissioner to remove and replace faith leaders on their own terms is a clear violation of both Constitutional responsibilities and foundational international human rights.
109. For a further analysis of the Constitutional and human rights implications of the Commission’s recommendations, we endorse the submission from Associate Professor Alex Deagon and Adjunct Associate Professor Mark Fowler.

Rationale for removing the BRC

110. In its rationale for removing the BRC, the Commission asserted:

There is no stated policy rationale for treating basic religious charities differently to other religious and non-religious charities.

111. It is disappointing that the Commission made this claim without considering the various legal, constitutional and ethical reasons for the BRC’s initial introduction, as outlined above, and as canvassed widely in the creation of the BRC. As the Australian Centre for Philanthropy and Non-profit Studies explains:

The BRC was intended as a classification for faith-based congregations to be granted a lower reporting burden and be exempt from certain mandatory governance arrangements for charities, because it was regarded as inappropriate for the ACNC to interfere in the governance of small religious bodies which were not incorporated and received little direct funds from government.³³

112. The Commission also ignored the ACNC Advisory Board to the 2018 Legislative Review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) which recognised a possible constitutional breach of the ACNC Commissioner’s existing powers and

³¹ *Human Rights Committee, General comment No. 22 (48) (art. 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), [1] (emphasis added) (*Human Rights Committee, General comment No. 22 (48) (art. 18)*).

³² Nicholas Aroney, ‘Can Australian Law Better Protect Freedom of Religion?’ (2019) 93(9) *Australian Law Journal* 708, 711-712; *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, Supp No 51, UN Doc A/RES/26/55 (25 November 1981) Art 6.

³³ Australian Centre for Philanthropy and Non-profit Studies, Queensland University of Technology Business School, *ACPNS Current Issues Information Sheet 2015/2 (April 2015) 2*.

recommended a legislative amendment to require the ACNC Commissioner to respect the independence of the religious sector in carrying out duties under the ACNC Act. The review noted:

'the operation of section 205-35 has not been controversial, and the review panel should affirm the continued operation of the provision.'³⁴

Conclusion

113. If the Government is to reach its stated goal of doubling philanthropic giving by 2030, we call on the Commission to re-examine its approach to the role and value of religion in Australian society. Religion is a good in itself; a foundational human right; it contributes heavily to other philanthropic outcomes such as health, culture and social capital; and people of faith are one of the most generous categories of philanthropic givers.
114. Accordingly, we call upon the Commission to revise its recommendations and:
 - Extend DGR status to all charities, rather than explicitly excluding religion
 - Retain the Basic Religious Charity category as a recognition of the Constitutional and human rights issues raised by ACNC oversight of religion

³⁴ Cited in Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* 66.



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