

Additional Submission  
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## **BASIC RELIGIOUS CHARITIES UNDER THE *AUSTRALIAN CHARITIES AND NOT-FOR-PROFIT COMMISSION ACT 2012***

### **1. Introduction**

I refer to my original submission submitted on 30 January 2018.

The purpose of this additional submission is to argue that the exemptions for Basic Religious Charities in the *Australian Charities and Not-for-profit Commission Act* are no longer justifiable and should be removed.

Under the *Australian Charities and Not-for-profit Commission Act 2012* (ACNC Act) a ‘Basic Religious Charity’ (BRC) is entitled to three concessions: an exemption from the reporting requirements that apply to other charities, an exemption from compliance with the Governance Standards and exclusion from the removal and suspension powers of the ACNC for breach of provisions of the ACNC Act (or Standards).

Charities that have the purpose of advancing religion (religious charities) make up a significant proportion of registered charities.<sup>1</sup> Registered charities, including religious charities, are entitled to various Commonwealth tax concessions including income tax exemption,<sup>2</sup> but also a number of fringe benefits tax (FBT) concessions – some that specifically refer to religion<sup>3</sup> - as well as franking credit refunds<sup>4</sup> and GST concessions.<sup>5</sup> Tax exempt entities are also not required to submit a tax return.

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<sup>1</sup> According to A Powell, N Cortis, I Ramia, and A Marjolin, (2017) Australian Charities Report 2016. Centre for Social Impact and Social Policy Research Centre, UNSW Australia (the Charities Report 2016), the most common charitable purpose of the entities that had submitted an Annual Information Statement was ‘advancing religion’, (32.0% of charities) p 26.

<sup>2</sup> Section 50-5 of the *Income Tax Assessment Act 1997* (ITAA 1997), Item 1 ie as a registered charity. Note that prior to 2012 there was a separate item for ‘religious institutions’: Item 2 which was repealed by Act No 169 of 2012. The Explanatory Memorandum to the ACNC (Consequential and Transitional Provisions) Bill 2012 states at [15.37] “The change amalgamates the ‘religious institution’ exemption into the broader charitable exemption. The ‘religious institution’ exemption is a relic of history made redundant after the *Extension of Charitable Purpose Act 2004*.” This does not appear to be correct - the *Extension of Charitable Purposes Act* had nothing to say about religious institutions.

<sup>3</sup> Section 58 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) provides a special exemption from FBT for ‘religious practitioners’ where the employer is a ‘religious institution’ and the benefit is provided principally in respect of duties of the employee engaged in ‘pastoral duties, or any duties or activities that are related directly to the practice, study, teaching or propagation of religious beliefs’. This means that in addition to ‘pastors’, exempt benefits may be provided to educators in religious institutions. See also s 58T which provides an exemption to live-in housekeepers of religious practitioners. Unlike most of the other exemptions, for example in relation to PBIs, these exemptions are not subject to any caps.

<sup>4</sup> Div 207 and 67 ITAA 1997.

<sup>5</sup> Under *A New Tax System (Goods and Services Tax) Act 1999*.

Although registered religious charities are not entitled to gift deductibility per se, there are various categories that could be relied on to gain access to ‘deductible gift recipient’ (DGR) status including if the entity is a public benevolent institution (PBI),<sup>6</sup> or a ‘charitable services institution’,<sup>7</sup> or operates a necessitous circumstances fund,<sup>8</sup> a school building fund<sup>9</sup> or a public library.<sup>10</sup>

In other words, religious charities get the benefit of considerable tax concessions (Commonwealth as well as State and Territory) and yet, have significant exemptions under the ACNC Act that are not available to any other group of entities.

The rest of this submission deals with the following:

- the chronology of events resulting in the inclusion of the BRC exemptions;
- the current exemptions;
- rationales for the inclusion of the exemptions;
- data concerning reliance on the exemptions, and finally
- why the exemptions should now be removed.

## 2. Chronology of Events

The following Table sets out the chronology of the introduction of the ACNC Act and related legislation.

Date	Event
9 December 2011	First Exposure Draft of the Bill released <sup>11</sup> <ul style="list-style-type: none"> <li>• In the first Exposure Draft, the reporting obligations were contained in Div 55. There was no exemption for religious charities.</li> </ul>
20 January 2012	Submissions on the first Exposure Draft due <ul style="list-style-type: none"> <li>• 108 submissions were received, 23 of which were confidential<sup>12</sup></li> </ul>

<sup>6</sup> Section 30-45, Item 4.1.1 ITAA 1997.

<sup>7</sup> Section 30-45, Item 4.1.7 ITAA 1997. This item was inserted into the legislation in 2006: *Tax Laws Amendment (2006 Measures No 3) Act*. This gave effect to an announcement in the 2006 Budget introduce 5 new categories of DGRs to cover war memorials, disaster relief, animal welfare, charitable services and educational scholarships. Item 4.1.7 covers an institution that would be a PBI but for the fact that it also promotes the prevention or control of disease in human beings or behaviour that is harmful or abusive to human beings (but not as a principal activity).

<sup>8</sup> Section 30-45, Item 4.1.3 ITAA 1997.

<sup>9</sup> Section 30-25, Item 2.1.10 ITAA 1997. Note that under the Education category of DGRs there are also two items directed at religious entities: Item 2.1.8 refers to a public fund established and maintained solely for the purpose of providing religious instruction in government schools, and Item 2.1.9 refers to a public fund established and maintained by a Roman Catholic [diocese] for the purpose of providing religious instruction in government schools.

<sup>10</sup> Section 30-15 Table, Item 4(b) ITAA 1997. There is no definition of what constitutes a ‘public library’ but presumably it includes a library that permits access beyond a closed membership. It could include books and other print resources as well as internet sources.

<sup>11</sup> Bill Shorten (Assistant Treasurer), ‘Australian Charities and Not-for-Profits Commission (ACNC) — Release of Draft Legislation and Discussion Paper on Implementation Design’ (Media Release, No 167, 9 December 2011) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/167.htm&pageID=003&min=brs&Year=&DocType=> .

	<ul style="list-style-type: none"> <li>An exemption for religious organisations from the requirement to prepare and lodge financial reports was suggested in a small number of submissions (see below)</li> </ul>
5 July 2012	<p>Second Exposure Draft of the Bill released</p> <ul style="list-style-type: none"> <li>In the second Exposure Draft, the reporting obligations were contained in div 60. Clause 60-60 had been inserted to exempt 'basic religious charities' from the financial reporting obligations in sub-div 60-C. The other provisions dealing with Governance Standards (Div 45) and the provisions dealing with removal and suspension of responsible entities were also included as was the proposed definition Clause 205-35.</li> </ul>
5 July 2012	The Assistant Treasurer requested the House of Representatives Standing Committee on Economics to inquire into and report on the Second Exposure Draft of the Bill <sup>13</sup>
15 August 2012	House of Representatives Standing Committee on Economics released its report on the Bill
23 August 2012	The Bill was introduced and had its first reading in the House of Representatives Second reading moved in the House of Representatives
23 August 2012	Bill referred to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report <sup>14</sup>
10 September 2012	The Parliamentary Joint Committee released its report on the Bill
11, 17 and 18 September 2012	Second reading debate in the House of Representatives
20 September 2012	Bill introduced and had its first reading in the Senate; Second reading moved in the Senate
29, 30, 31 October 2012	Second reading debate in the Senate
1 November 2012	Bill passed both houses

### 3. The exemptions

<sup>12</sup> See The Treasury (Cth), *Australian Charities and Not-for-Profits Commission Bill — Submissions*  
<https://treasury.gov.au/consultation/australian-charities-and-not-for-profits-commission-bill/>

<sup>13</sup> House of Representatives Standing Committee on Economics, *Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills* (2012)  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=economics/nonprofit/report.htm](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=economics/nonprofit/report.htm)

<sup>14</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Australian Charities and Not-for-Profits Commission Bill 2012* (2012)  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2010-13/charities/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/charities/index)

The ACNC Act provides concessions to 'Basic Religious Charities'. That term is defined in s 205-35 of the ACNC Act<sup>15</sup> as a 'registered charity' that:

- has the charitable purpose of 'advancing religion';<sup>16</sup>
- is unable to be registered as any other sub-type of charity;<sup>17</sup>
- is not incorporated as a company or incorporated association;<sup>18</sup>
- is not endorsed as a DGR;<sup>19</sup>
- is not allowed by the ACNC to report as part of a group;<sup>20</sup> and
- has not received more than \$100,000 in government grants in the current or previous two financial years.<sup>21</sup>

The requirement relating to **purpose** was clearly intended to restrict the scope of the exemptions to entities that are charities based on the long-recognised purpose of advancement of religion.<sup>22</sup> Charities may have more than one purpose<sup>23</sup> and can also undertake a range of activities<sup>24</sup> – for example, a school operated by a religious order will have more than one purpose and undertake various activities. As already noted charities that have the purpose of advancing religion comprise the largest sub-group of registered charities (32%).

The second requirement is that the charity is unable to register as another any other **sub-type** eg advancing education, relief of poverty etc. This indicates that the exception was intended to be limited to entities that had only one purpose – the purpose of advancing

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<sup>15</sup> References to sections in this submission are to sections in the ACNC Act unless otherwise stated.

<sup>16</sup> Section 205-35(1)(b) provides the entity must be registered as the subtype of entity mentioned in column 2 of item 4 of the table in s 25-5(5) (Entity with a purpose of advancing religion). This coincides with the category of 'charitable purpose' in s 12(1)(d) the *Charities Act 2013*.

<sup>17</sup> Section 205-35(1)(c).

<sup>18</sup> Section 205-35(2): this includes incorporation under the *Corporations Act 2001* (Cth), the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) or under any of the Associations Incorporations Acts of the States and Territories.

<sup>19</sup> Except if the entity is endorsed as a DGR for the operation of one or more funds, authorities or institutions at any time in the financial year; and the total revenue of the entity for the financial year in relation to the operation of the funds, authorities or institutions is less than \$250,000: see ss 205-35(3) & (3A).

<sup>20</sup> Section 205-35(4). The ACNC may allow related entities to submit group reports under s 60-95. The entities must apply for this treatment and the ACNC has discretion based on various criteria including 'how the public interest in the transparency and accountability of the registered entities is best served': s 60-95(4)(a). The Example in the legislation following s 60-95(2) is instructive:

*Example: The Commissioner may allow a reporting group of affiliated registered entities that advance religion and advance social or public welfare to prepare and lodge 2 financial reports, one report in relation to the reporting group's religious functions and one in relation to the reporting group's welfare functions.*

<sup>21</sup> Section 205-35(5).

<sup>22</sup> The common law has long recognised advancement of religion as a charitable purpose: see *Special Commissioners for Income Tax v Pemsel* [1891] AC 531.

<sup>23</sup> The Faith Based Charities Report in 2015 noted that 38% of charities with the purpose of advancing religion also have other purposes. These include advancing education (24%), relief of poverty, sickness or the needs of the aged (18%), childcare services (4%), and a wide range of other charitable objectives (16%): Knight P and Gilchrist D (2015), *Australia's Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profit Commission.

<sup>24</sup> *Ibid*. According to the Report, 71% of entities that recorded advancement of religion as one of their charitable purposes nominated religious activities as their main activities.

religion. The data from the Annual Information Reports suggests that many entities with more than one purpose and falling within other sub-types are in fact claiming to be BRCs.

The third requirement relating to **incorporation** appears to reflect the argument that churches that are unincorporated had no reporting obligations prior to 2012 whereas those religious entities that were incorporated (either under Commonwealth or State or Territory law) would be used to providing such reports. The requirement has two consequences: first, it discriminates against all other unincorporated associations that had to report for the first time, and secondly, and more significantly it discriminates against newer religious entities that have (responsibly) chosen to adopt a legal form through incorporation.

The fourth requirement relates to **DGR status** and seems to be based on the argument that a BRC is not engaged in fundraising ie soliciting public donations. The late amendment to this requirement that permits DGR status to a fund, authority or institution operated by a BCR provided the revenue is less than \$250,000 would permit the BCR to operate, for example, a school building fund or public library. In other words, a BCR can have DGR status for funds that would be classified as small. This would suggest that calls for public accountability are justified as such entities do undertake fundraising.

The fifth requirement is that the entity has not been permitted to **report as part of a group**. In fact, group reporting may have been one way of ensuring some measure of transparency and accountability for religious entities. One of the submissions on the First Exposure Draft of the ACNC Bill raised concerns that group reporting would involve adding together all revenues of members of the group thus requiring greater reporting than would normally be required for small charities. In fact, the group will only be treated as large (or medium) if one of the entities in the group is large (or medium).<sup>25</sup>

The sixth requirement relates to not receiving **government grants** exceeding \$100,000 in the current or previous two years. It was argued in the submissions that the fact that these religious entities did not receive government funding meant they should not be subject to the same transparency and accountability as other charities. Indeed, many other small charities would similarly not receive funding from government. With respect this requirement should have no relevance to reporting to the ACNC. The transparency and accountability under the ACNC Act is required in exchange for access to tax concessions. Separate (and often onerous) requirements apply to entities in receipt of government funding.

As noted, there are three exemptions for BRCs in the ACNC Act. Section 45-10(5) gives an exemption from the governance standards (which are contained in the ACNC Regulations). Section 60-60 gives an exemption from annual financial reporting and s 100-5 provides that the provisions dealing with removal and suspension of responsible entities do not apply to BRCs.

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<sup>25</sup> Section 60-105.

The **Governance Standards** are a set of core, minimum standards that apply to the registered charity.<sup>26</sup> According to the ACNC they:

“deal with how charities are run (including their processes, activities and relationships) – their governance.

The Standards require charities to remain charitable, operate lawfully, and be run in an accountable and responsible way. They help charities remain trusted by the public and continue to do their charitable work. Because the Governance Standards are a set of high-level principles, not precise rules, your charity must decide how it will comply with them.”<sup>27</sup>

Prior to the commencement of the ACNC Act, the majority of charities were subject to similar obligations either because they were incorporated under the *Corporations Act* (approximately 10% of charities) or under the Associations Incorporations legislation of the States and Territories (39%) or because they were subject to fiduciary duties as trustees of charitable trusts (12%). Approximately 35% of charities are unincorporated associations and so would not have been subject to formal requirements. However, the Governance Standards are not particularly onerous and embody the principles of ‘good governance’.

Section 45-10(5) provides that “the regulations must not require a registered entity to do, or not to do, a thing (including the things mentioned in subsection (2) [ie comply with the governance standards]) if the registered entity is a basic religious charity”.

The **annual reporting** requirements are a key component of the regulatory model. The requirement assists the ACNC to meet its objective, namely “to maintain, protect and enhance public trust and confidence in the sector”<sup>28</sup> through increased “accountability and transparency”.<sup>29</sup> The information collected through the annual reporting process enables the ACNC to maintain a free and searchable online public register of charities. The ACNC Charity Register contains information about charities’ purpose, activities, financial information, responsible persons, and the people they work to benefit. This information helps donors, funders and the wider community support charities with trust and confidence. The ACNC operates a tiered reporting framework<sup>30</sup> so that small charities (revenue of less than \$250,000) are only required to submit an Annual Information Statement<sup>31</sup> (small charities comprise 67% of all registered charities<sup>32</sup>); medium charities (revenue of \$250,000 or more but less than \$1 million) must also file a financial report that is either audited or reviewed<sup>33</sup> (medium charities comprise 15.7% of all charities<sup>34</sup>) and large charities (revenue

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<sup>26</sup> For discussion of how Governance Standard 5 in particular applies, see I Ramsay and M Webster ‘Registered Charities and Governance Standard 5: An Evaluation’ (2017) *Australian Business Law Review* 127.

<sup>27</sup> ACNC website:

[https://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds\\_overview.aspx?hkey=456b1d22-8869-4ad0-a0cd-48607244216e](https://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx?hkey=456b1d22-8869-4ad0-a0cd-48607244216e)

<sup>28</sup> See s 15-5(1)(a)

<sup>29</sup> See s 15-10(b).

<sup>30</sup> Section 205-25 establishes the relevant tiers for ‘small’, ‘medium’ and ‘large’ registered entities. The tiers are the same as in the Associations Incorporations legislation of the States and Territories.

<sup>31</sup> Section 60-5 requires all registered charities to file an Annual Information Statement.

<sup>32</sup> Charities Report 2016, n 1, p 26.

<sup>33</sup> Section 60-20.

<sup>34</sup> Charities Report 2016, n 1, p 26.

of \$1 million or more) must file an audited financial statement<sup>35</sup> (large charities comprise 17.3% of all registered charities<sup>36</sup>).

Section 60-60 provides that Subdivision 60-C (dealing with Annual Financial Reports) “does not apply to a basic religious charity, or to any report relating to a basic religious charity”. Subsection (2) provides that the Subdivision “applies to a basic religious charity in relation to a financial year, and to any report for the year relating to the charity, if the charity gives the Commissioner a financial report for the year”.

Rather than include an exemption, it might have been possible for a number of related religious entities to undertake group reporting. The ACNC Act provides for ‘collective or joint reporting by related entities’.<sup>37</sup> The ability to utilise this method of reporting is subject to the Commissioner’s discretion.<sup>38</sup> According to the Charities Report 2016, 958 charities reported as part of 170 groups and, for the purposes of the Report, each group was treated as a single charitable record for analysis purposes.<sup>39</sup> Religious groups may not have favoured this approach because of the need to obtain the exercise of the Commissioner’s discretion.

The provisions dealing with **removal and suspension of responsible entities** are concerned with the enforcement powers of the ACNC. The ACNC relies on ‘light-touch’ enforcement but as a last resort may revoke the charity’s registration and/or suspend or remove individuals (responsible entities) who have been involved in serious wrongdoing. Even when there was an exemption for certain religious charities from various obligations to the Charity Commission for England and Wales, the entities (and those running them) were still subject to the regulatory powers of the Commission.<sup>40</sup>

Section 100-5(3) provides that the Commissioner cannot exercise a power of suspension or removal of a responsible entity in relation to a registered charity that is a BRC. This effectively means that even if the Commissioner became aware of egregious conduct by an individual running a BRC, no action can be taken.

#### 4. Rationales for the exemptions

As noted, the exemptions for BRCs were not in the first draft of the ACNC legislation – Exposure Draft of the ACNC Bill (Exposure Draft) (Dec 2011) but were inserted into the legislation following consultation by Treasury (December 2011 to January 2012). Following

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<sup>35</sup> Section 60-30.

<sup>36</sup> Charities Report 2016, n 1, p 26.

<sup>37</sup> Section 60-95.

<sup>38</sup> Section 60-95(4) provides that in deciding whether to allow 2 or more registered entities to form a reporting group, the Commissioner must consider, inter alia, (a) how the public interest in the transparency and accountability of the registered entities is best served, including the possible effect on:

- (i) the public’s understanding of the activities of the registered entities and the information provided in the information statement or financial report; and
- (ii) the public’s ability to rely upon the information provided in the information statement or financial report.

<sup>39</sup> Charities Report 2016, n 1 p 10.

<sup>40</sup> The current position in England and Wales is discussed below.

the release of the first Exposure Draft, there was both formal consultation on the terms of the legislation, but also informal or private consultation. From the discussion which follows, it would appear that the inclusion of the exemptions and the breadth of the exemptions were matters that were negotiated in private consultation with various churches.

The Explanatory Memorandum to the ACNC Bill 2012 does not provide any explanation for the special treatment for BRCs.

In relation to formal consultation there were a number of submissions to Treasury that related to the issue of exemptions for BRCs. Of the submissions that were made public, there is some insight into the rationales for inclusion of the exemptions in the submissions by the following:

- Moore Stephens Australia;
- Add-Ministry Inc;
- Anglican Church Diocese of Sydney and the Anglican Church of Australia General Synod;
- Australian Baptist Ministries;
- Australian Catholic Bishops Conference; and
- Uniting Care Australia.

#### **The Moore Stephens Australia submission**

Moore Stephens describes itself as 'business advisers and chartered accountants' and as providing services 'to a number of key clients operating in the NFP sector, including religious organisations'.<sup>41</sup> In relation to reporting by charities, they submitted:

“[6.3.8] We recommend an exception for the preparation and lodgement of financial reports be made where religious entities, organisations or branches are ‘wholly or mainly concerned with the advancement of religion’ except where the organisation has an obligation to lodge financial reports with a regulator (eg ASIC); chooses to voluntary report or the regulator makes a direction under the proposed Division 140. This exception would not extend to other charitable or not for profit works of these organisations such as education, aged care and public benevolent institutions undertaken with a religious affiliation or ethos.

[6.3.9] There are a significant number of places of worship such as churches, synagogues, temples and ancillary administration entities for the advancement of religion in Australia, this exception would significantly reduce the burden placed on the sector by the introduction of the reporting requirements and in our view would not result in a dilution of the public benefit of these reforms.

[6.3.10] We note that the UK Charity Commission [sic] has a specific exception in relation to certain charities who are wholly or mainly concerned with the advancement of religion. These bodies are regulated by the Commission but not required to be registered with the Commission and as a result are not required to prepare and lodge financial reports with the Commission. Under the UK legislation,

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<sup>41</sup> See the submission at <https://treasury.gov.au/consultation/australian-charities-and-not-for-profits-commission-bill/> and Moore Stephens Australia website: <http://www.moorestephens.com.au/>



the Commission has investigative powers for these organisations. Our proposed exception is narrower than that of the UK Charity Commission, as we are proposing a limited financial reporting mechanism. However, we recommend that unlike the UK model, the exception is not limited to a particular religion and its selective denominations given the diversity of religious practice in Australia.”

### **The Add-Ministry Inc submission**

Add-Ministry Inc describes itself as 'a not-for-profit entity established for the specific purpose of providing administrative support to charitable and religious entities'.<sup>42</sup> It submitted (at pages 3-4):

“The overall implication emerging from the Bill, and the several discussion papers made available, is that a significant obligation in reporting and governance matters will be imposed on the Sector. ... On behalf of our member churches, we are of the opinion that many church organisations do not have the resources to handle the changes needed. This will also be the position for many other charities. This is an inappropriate and inequitable impost on the Sector.”

### **The Anglican Diocese of Sydney and the Anglican Church of Australia General Synod submission:**

The relevant parts of this submission were as follows:

#### “9 Reporting and Audit tiers

(b) We have no objection to the proposal that all registered entities should provide a level of reporting to the ACNC, although note that one of the primary drivers for the ACNC is the reduction of unnecessary red-tape through a ‘report once use often’ outcome which will not necessarily be relevant to a large number of NFP entities who have little or no interaction with Government in terms of funding (for example most Anglican churches). The introduction of reporting for those entities which were previously under no obligation to report will generally add to the regulatory burden on such entities.

(c) However our main concern is the number of registered entities who currently have no reporting obligation to any Government agency which will be required to prepare general purpose financial statements subject to audit or review under tier 2 or 3. In many cases, general purpose financial statements will be significantly less useful to an entity’s stakeholders than special purpose financial statements. The significant cost of preparing general purpose financial statements and having such statements reviewed or audited in accordance with Australian Accounting Standards will therefore be difficult to justify for many entities, even if their annual revenue exceeds \$250,000.

(d) We therefore recommend that the applicable thresholds for entity tiers (small, medium and large) and the reporting and audit requirements applicable to each tier be carefully reviewed in light of the full range of factors identified in the Final report on a Scoping Study For a National Regulator as relevant matters to take into account in determining reporting by registered entities. Such factors include not only size and DGR status, but also risk factors such as the receipt of Government funding.

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<sup>42</sup> Add-Ministry Inc website: <http://www.addministry.org.au/>

(e) As a minimum, we recommend that the Government consider the following modifications to the proposed entity tier structure and reporting/audit requirements:

- (i) registered entities with annual revenues of less than \$500k which are not DGRs and do not receive Government funding be treated as Tier 1 (small) entities (with reporting requirements as currently proposed).
- (ii) registered entities with annual revenues of between \$500k and \$2m or registered entities with annual revenues of less than \$500k which are DGRs or receive Government funding be treated as Tier 2 (medium) entities.
- (iii) Tier 2 entities be permitted to provide financial reports in the form of special purpose financial statements as an alternative to general purpose financial statements (with audit and review requirements as currently proposed).
- (iv) registered entities with annual revenues exceeding \$2m be treated as Tier 3 (large) entities (with reporting and audit requirements as currently proposed)."

#### **Australian Baptist Ministries submission**

The relevant parts of this submission were as follows:

"While Australian Baptist Ministries commend the Government in seeking to provide a separate commission for the benefit of charities and not-for-profit entities in Australia, we are concerned that in addition to the issues around freedom of religion religious organisations will have to bear significant additional administrative burden and associated cost in order to comply with the reporting and review and audit requirements.

...

#### **Reporting & Audit**

Australian Baptist Ministries is concerned that the reporting requirements contained in the proposed legislation will be extremely onerous on the majority of Baptist churches in Australia. Currently 850 or 89% of Baptist churches in Australia are unincorporated associations. These unincorporated associations would typically prepare financial reports and other reports purely for use by their members. Approximately 20% or 170 of the Baptist Churches in Australia would, we believe fall into the proposed categories of medium or large entities. While we would anticipate that many of these would prepare financial reports for their members, most are unincorporated associations and so currently are not required to have their accounts audited and those accounts prepared in accordance with Australian Accounting Standards.

Many churches currently find it difficult to enlist the services of a volunteer treasurer and in our view this additional requirement will only serve to exacerbate that situation. The requirements of auditors of any registered entity under the proposed legislation will require professional audit firms to carry out the audit rather than, as is the case for some of our churches, the task being undertaken by a member who is a retired accountant.

In terms of these 170 churches being required to have their accounts and financial reports audited it is our estimation that for those who currently do not prepare financial reports according to Australian Accounting Standards to do so and for all of these churches to have audits that would meet the requirements of the proposed legislation would incur an additional cost approaching \$1 Million per annum including costs of property valuations etc. Unfortunately if this money has to be spent on compliance matters to satisfy government requirements, it cannot be spent in the service of others, on the disadvantaged in the community or for any other purpose for the public benefit.

In our view it is virtually pointless to publish publically financial information relating to religious organisations, particularly local churches. We believe that the information may be used in public campaigns against religious entities and against their long standing receipt of tax concessions.

...

#### Recommendations

(4) We believe that religious entities with income under \$5 Million per annum should be treated, for reporting and audit purposes as small entities under the Act.”

#### **Australian Catholic Bishops Conference submission**

The relevant parts of the submission by the Australian Catholic Bishops Conference (ACBC) were as follows (at pp 8-9):

“The proposed levels of financial and other reporting impose a disproportionate burden on NFPs in general and many Catholic Church bodies in particular, the additional costs of which will substantially reduce capacity for service delivery. While para 1.4 of the EM notes the diversity of the NFP sector, this is not reflected sufficiently in the drafting of the bill. Consideration should be given, for instance, to potential for grouping of like entities, such as parishes of the Catholic Church, where governance and reporting protocols are intertwined. Such drafting would flow more logically if this diversity of the sector was reflected in the primary object of the bill and reporting obligations were modified accordingly.

As it stands the ED introduces new levels of reporting and other regulation that do not currently apply to some entities. In accordance with the Australian Government’s National Compact with the NFP sector, all the proposals for reform of the regulation of NFPs should aim to reduce administrative burden and promote clarity and certainty. The EM notes (p 7) that ‘a consistent theme’ of various inquiries and reviews is that, ‘the regulation of the NFP sector should be significantly improved by establishing a national regulator and harmonising and simplifying regulatory and taxation arrangements’. Contrary to the stated terms of the National Compact and this comment in the EM, there is little evidence that the ED has removed any currently existing burden. There is no harmonisation and little simplification.

Rather than promote clarity and certainty the ED has, as will be discussed in detail below, introduced new concepts and provisions that are unclear and far from certain both as to meaning and application.

One matter that is of particular significance to the ACBC and many Church entities is the question of public reporting, including of financial data. In the time available for a response on the ED it has not been possible to investigate the impact of this new requirement on various dioceses, parishes and religious orders. Some further representations will be made in the light of the internal consultation that is presently underway. The ED (100-20) acknowledges that there may be instances relating to commercial sensitivity and possible detriment involved in including information on the register. Initial indications from many Catholic Church entities are that this is a matter of real concern.

The proposed disclosure and public access regime do not serve any legitimate public purpose and risks causing more harm than good through encouraging ill-informed 'league tables' which focus organisations on counter-productive objectives to satisfy artificial measures of performance.

Other than access to basic information about an entity, there is no existing rights of public access to detailed information (indeed, it contravenes strict secrecy obligations in the existing tax law) and no detail of the problems that such a measure is intended to overcome."

### **Uniting Care Australia submission**

The relevant parts of this submission were as follows (at pp 5-6):

"Reading the Bill in conjunction with the ACNC Interim Taskforce's discussion paper (Australian Charities and Not-for-profit: Implementation and design) it becomes clear that the context of the Bill's development is founded on an idea that most of the NFP entities subject to the new regulatory framework have simple (standard) governance structures and a narrow or single purpose. While this assumption may be correct for many NFP entities, it is not the case for a large number of Church based entities. The implications of such an assumption on agencies within the Uniting Church would be significant both in terms regulatory compliance and reporting obligations.

...

A specific concern which may arise through this Bill is the potential for a significant increase in reporting requirements of a registered entity that may have a range of unincorporated entities within its legal structure. Again this issue may be particular to the Churches however there is concern about the capability and cost associated with the development of reporting processes particularly if the composite value of the various entities result in the registered entity meeting the definition of a large entity (ie for entities with revenue in excess of a \$1 million)."

It should be noted that only one submission (Moore Stephens) calls for an exception. Only one of the submissions (Ad-Ministry Inc) references the governance standards. None of the

public submissions referred to an exception from the removal and suspension power for wrongdoing.

## Summary

Based on the submissions made to Treasury in 2011, the rationales for reduced reporting appear to have been as follows:

- Introduction of a reporting obligation would place additional pressure on entities such as small parishes which have not previously had to report to any government regulator.

Although this is no doubt true, it was also true for all unincorporated associations (35% of all charities). The desire for transparency and accountability was thought to justify regulation and tiered reporting and modest governance standards are the price for access to generous tax concessions.

- Public disclosure of financial information may be harmful.

It is not really clear in what way disclosure could be 'harmful' in any way other than lifting the veil of secrecy that many such organisations have operated under. It should be noted that in the US exempt entities must lodge tax returns so at least the government knows how much tax it is not collecting. In Australia, it is not possible to estimate the cost of providing income tax exemption not only to the 50,000 registered charities but also many other not-for-profit entities granted tax exemption under Div 50 of the ITAA 1997. It should also be noted that entities that value secrecy can choose not to register with the ACNC – although this will, of course, mean that tax exemption would not be available.

- An obligation to report would result in diminution of other service provision.

This argument suggests that religious bodies would have trouble paying for services to ensure they comply with their obligations. This is true of many other unincorporated associations. In response to the argument that church-provided services would suffer – this is the same argument that has been used to resist paying compensation to victims of child abuse and yet, at the same time, churches have been engaged in various property purchases that suggest they are not cash-strapped.<sup>43</sup>

- There is (was) an exemption in the UK.

There was an exemption from registration and reporting for certain Christian churches and other charities that were wholly or mainly for public religious worship if their income was £100,000 or less. Despite this the regulatory powers of the Charity Commission for England and Wales still applied. The exemption was due to expire in 2014 but has been extended to March 2021 to give affected charities time to prepare.<sup>44</sup> Charities exempted under the *Charities Act 2011* (UK) are exempted because they are principally regulated by another regulator.

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<sup>43</sup> Chris Vedelago, Royce Millar & Ben Schneiders, 'The archbishop, the mansion and the beach house', *The Age*, 12 February 2018.

<sup>44</sup> See Charity Commission for England and Wales guidance at <https://www.gov.uk/government/publications/excepted-charities/excepted-charities--2#churches-which-are-no-longer-excepted>

## 5. The data relating to BCRs

All registered charities are required to provide an Annual Information Statement.<sup>45</sup> The data is then analysed and a report is produced that includes the information submitted. There have now been four reports (2013, 2014, 2015 and 2016) – although the data for the financial year 2012-2013 was smaller than for other years as the ACNC had only been in operation for approximately 6 months. The number of entities that submit an AIS will be less than the number of registered charities as some entities are not required to submit an AIS. The number of entities reporting in each period varies over time as entities may not have lodged by the time for lodgement. The number of registered charities, the number of Annual Information Statements received on time and the number of entities that self-identified as BCRs for each of the four periods are as follows:

	Total registered charities as at 30 June	Submitted an AIS on time	Self-identified as BCRs in the AIS
2013	57,672	38,341	9,809 (26%)
2014	60,736	32,519	5,331 (16%)
2015	54,468	46,292	7,095 (15%)
2016	N/A	46,945	8,188 (17%)

Religious charities are by far the largest single category of charity in Australia with approximately one third of all charities including ‘Advancement of Religion’ as one of their charitable purposes. According to the Charities Report 2016, thirty eight per cent of charities with the purpose of advancing religion also have other purposes. These include advancing education (24%), relief of poverty, sickness or the needs of the aged (18%), childcare services (4%), and a wide range of other charitable objectives (16%).<sup>46</sup> The AIS also requires charities to nominate their activities. ‘Religion’ was nominated as the main activity for a quarter of all charities, more than four times the size of the next largest category of activity.

According to the Charities Report 2016, 8188 of 46,945 registered charities self-identified as BCRs – a subset of religious charities (17% of all charities that lodged an AIS). This is lower than the first Charities Report<sup>47</sup> where 26% of the registered charities that filed an Annual Information Statement self-identified as BCRs.

There have been several analyses of the data relating to BCRs. Professor David Gilchrist and Penny Knight from Curtin University of Technology analysed the data relating to the 2013 AIS as at 30 June 2014.<sup>48</sup> Professor McGregor-Lowndes from Queensland University of Technology analysed the data from the 2013 AIS (supplemented by some additional data

<sup>45</sup> There are some exceptions – Aboriginal and Torres Strait Islander corporations that report to the Office of the Registrar of Indigenous Corporations (ORIC) do not need to submit an AIS or Financial Report. There are also special arrangements for non-government schools. BCRs are not required to submit financial reports.

<sup>46</sup> Australian Charities 2016, n 1, p3.

<sup>47</sup> N Cortis, I Lee, A Powell, R Simnett, and R Reeve, (2015) Australian Charities Report 2014. Centre for Social Impact and Social Policy Research Centre, UNSW Australia. (Australian Charities Report 2014).

<sup>48</sup> Knight P and Gilchrist D (2015), Australia’s Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report, for the Australian Charities and Not-for-profit Commission.

from the Australian Tax Office).<sup>49</sup> Both analyses noted that the number of entities self-identifying as BRCs was very high and that it was likely that many entities did not meet the requirements to be classified as such. Professor McGregor-Lowndes noted that the ACNC estimates that around 10% of charities are BRCs.<sup>50</sup> Following each of the four Charities reports, the ACNC has published statements concerning ‘common errors’ and ‘lessons’ relating to material issues/errors identified with reporting. Each year the ACNC has noted that religious charities had wrongly self-assessed themselves as BRCs. For example, in 2014 they identified 464 charities that were incorporated or had another sub-type (and so ineligible to be a BRC). In 2015, 354 charities were identified as being incorporated and in 2016, 371 charities were identified as having misclassified themselves as BRCs.<sup>51</sup> Although these numbers are fairly modest, the numbers do not reflect the full number of entities that may have incorrectly claimed to be BRCs, only those that the ACNC was able to pick up through its data integrity checks.<sup>52</sup>

In terms of size, in the Charities Report 2014, just over 80% of BRCs were small charities, meaning that just under 20% were medium or large ie had annual revenue of \$250,000 or more and so, without the exception, would be required to provide annual financial reports.

In addition, there are also transitional rules for non-government schools (many of which will be operated by religious entities. Non-government schools that submit a financial questionnaire to the Department of Education and Training (DET), do not have to provide financial information to the ACNC for the 2014 to 2017 reporting periods.

## **6. Reasons to remove the exemptions**

### **1. The exemption is not well understood and may mean that there is significant underreporting in relation to religious charities.**

As noted above, the number of entities self-identifying as BRCs is very high and is likely to mean that many religious charities are not fully complying with their reporting obligations. Although additional questions in the AIS should enable entities to work out if they are eligible for the financial reporting exemption, the numbers self-assessing continue to be high. Combined with the special transitional rules available to non-government schools, it seems likely that the amount of information available to the public is less than it should be.

### **2. Exemption operates in a discriminatory way**

The exemption is discriminatory in two ways: first, it discriminates against churches, generally the non-established churches, that have adopted legal form by becoming incorporated – either as a company limited by guarantee or under the State and Territory incorporated associations legislation. These newer churches have been complying with reporting requirements and governance standards as a result of incorporation, and upon registration with the ACNC are subject to all the relevant provisions of the ACNC Act. The

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<sup>49</sup> M McGregor-Lowndes, Basic Religious Charities, ACPNS Current Issues Information Sheet 2015/2, April 2015

<sup>50</sup> Ibid, p 2.

<sup>51</sup> ACNC, Reporting trends in the 2016 Annual Information Statement, Nov 2017:

[http://www.acnc.gov.au/ACNC/Publications/Reports/Reporting\\_trends2016AIS.aspx](http://www.acnc.gov.au/ACNC/Publications/Reports/Reporting_trends2016AIS.aspx)

<sup>52</sup> Note that following the 2014 AIS, the information required to be completed by an entity claiming to be a BRC was increased – charities were asked if they were incorporated, were registered as other sub-types, had DGR status etc - and so there should be less room for unintended error.

second way in which the exemptions are discriminatory is that all other unincorporated entities that wish to claim Commonwealth tax concessions as charities have had to undertake appropriate reporting and comply with governance standards for the first time. There has been no public outcry about the imposition of these obligations and so it is likely that the benefit (access to tax concessions) is worth any inconvenience involved. Moreover, being subject to possible regulatory consequences is likely to send a positive signal about such entities. By contrast a desire to keep information secret sends a negative message.

### **3. Not clear why the exemptions are linked to receipt of government funding**

The condition in the definition of BRC about government funding implies that entities that receive no government funding should have no obligations of transparency and accountability. It is clear that receipt of government funding would require greater levels of accounting for that funding, but the key consequence of registration by the ACNC is access to tax concessions.

### **4. Some reporting is desirable as opposed to secrecy**

The introduction of a regulatory model for charities was based on principles of transparency and accountability. The accountability in this instance is for the benefit of all stakeholders not just 'members'. Entities that wish to keep their affairs secret may opt into the tax system, that is, they can give up their tax exempt status and rely on the clear provisions of secrecy that apply to taxpayers. Although it is not possible to estimate how much tax is not being collected, it is likely to be considerable and as religious charities comprise more than a third of all charities, the amount not collected from them is also likely to be high. In the absence of reliable information estimates of the revenue of religious charities is likely to be the subject of speculation. Secrecy suggests something to hide.

### **5. No longer an exemption in England and Wales**

As noted above, there is no equivalent exemption from the oversight of the Charity Commission for England and Wales. When the exemption was formulated it exempted certain Christian churches from registration and reporting if their annual revenue was GBP100,000 or less. Those churches were still subject to the powers of the Commission in the event of mismanagement or wrongdoing.

### **6. No evidence that reporting would require a reduction of services**

Some of the submissions to Treasury in 2011 suggested that if the obligations relating to reporting applied, there would be a reduction in the provision of services. This same argument has been raised in relation to suggestions that additional compensation should be paid to victims of child sex abuse. Even if this was true it should not suffice to say that obligations of transparency and accountability should be downgraded. The religious entities get the benefit of tax concessions and should provide information that many believe would be readily available. Accounts of the property holdings of the Catholic Church in the Fairfax press<sup>53</sup> suggest that this sort of choice is not really required.

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<sup>53</sup> Chris Vedelago, Royce Millar & Ben Schneiders, 'Catholic Inc. What the Church is really worth', The Age, 12 February 2018.



## **7. Exemptions are not a good look for churches following the findings of the Royal Commission**

One of the suggested reasons for the exemptions and in particular the exemption from governance standards was that Churches have good governance structures in place and are well run. Following the Report of the Royal Commission into Institutional Responses to Child Sex Abuse, this claim can no longer be convincingly made. The Report of the Royal Commission made the following recommendation:

### “Recommendation 16.7

The Australian Catholic Bishops Conference should conduct a national review of the governance and management structures of dioceses and parishes, including in relation to issues of transparency, accountability, consultation and the participation of lay men and women.”<sup>54</sup>

In this regard, it is also worth noting that Francis Sullivan, CEO of the Catholic Church in Australia's Truth, Justice and Healing Council, recently stated that he agreed that there was no good reason for churches to be treated differently to other charities registered by the ACNC.<sup>55</sup>

## **7. Conclusion**

The three concessions for BRCs in the ACNC Act were included in the Act as a political response to pressure from the churches. It is doubtful whether the rationales advanced for the exemptions would have stood up to public scrutiny in 2012 – the rationales provided are even less convincing now. The existence of the concessions means that almost 1/5<sup>th</sup> of registered charities are not providing full disclosure to the ACNC and are not subject to minimum standards of corporate governance or accountability. This is unacceptable.

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<sup>54</sup> See the Report of the Royal Commission into Institutional Responses to Child Sex Abuse: <https://www.childabuseroyalcommission.gov.au/recommendations>

<sup>55</sup> ABC News “Catholic Church national wealth estimated to be \$30 billion, investigation finds”, 12 Feb 2018, [http://www.abc.net.au/news/2018-02-12/catholic-church-worth-\\$30-billion-investigation-finds/9422246](http://www.abc.net.au/news/2018-02-12/catholic-church-worth-$30-billion-investigation-finds/9422246)