AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

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HAILEYBURY COLLEGE AND FLAGSTAFF GARDENS
SHOULD PRIVATE SCHOOLS PAY TAX?

Residents of North and West Melbourne and office workers from the CBD have a wonderful leisure playground at the north western edge of the city. This is the Flagstaff gardens which surround the Flagstaff Hill. In the early days the flagstaff stood unimpeded by skyscrapers receiving signals from the Williamstown flagstaff when a ship was coming up the bay, laden with news from 'home'.

In Bicentennial year, 1988, despite the efforts of locals, the view from Flagstaff to Williamstown was lost when a multi-storied National Bank building was built on King Street. This towered over the gardens, diminishing the pepperpot towner of the old cathedral of St James nearby.

This building is now occupied by a branch of Haileybury College, a multi-million dollar business run by the Uniting Church and heavily subsidised by the taxpayers in direct grants.

But now, to add insult to injury for the Flagstaff, this school is now using the Flagstaff gardens, a resource paid for by local Council ratepayers, as a playground.

And here it should be noted that Haileybury, a school for the wealthy, is a 'charity' and does not pay any rates, land tax, income tax or GST or any other taxes for that matter.

DOGS – and others like the humanists and rationalists have for some years been questioning this extraordinary situation in which billions of dollars in taxation expenditures are channelled every year into private sector schools. They are now joined by Max Harding, a Law Professor at the University of Melbourne.

In the Conversation of 15 March 2016 The C15 March 2017 at https://theconversation.com/should-wealthy-private-schools-and-hospitals-have-charity-status-in-australia-73055
and reproduced on the ABC website, Max Harding sked:

Do wealthy private schools and hospitals deserve exemption from paying income tax when they charge heavy fees that most people cannot afford for their services?

This important question has not been tested legally until recently. And then it has only been tested in England. Harding wrote:

"There is no reason why being a charity must lead to tax exemptions. And there are benefits — and burdens — to being a charity that have nothing to do with tax.

How the legal definition has evolved

The legal definition of charity in Australia is drawn from a complex combination of statutory and judge-made law going back hundreds of years.

But not only is the definition complex, it is also — in some ways — counter-intuitive.

Outside legal circles, "charity" is usually associated with helping the poor or those who are disadvantaged in other ways.

But, in a landmark case in the late 19th century, the UK House of Lords ruled that organisations could be charitable in law even where their purposes were not directed at assisting the disadvantaged in society.

The Law Lords said that educational and religious organisations, along with a host of other community-serving organisations, could also be charities.

This set the tone for an expansive understanding of charity that has persisted around the English-speaking world, including Australia.

Should private schools have to pay tax?

Take private schools, for example. In a world in which educational opportunity is unjustly distributed, why should private schools be exempt from paying income tax?

There is an argument that we should tax them on their fee and investment income, then spend that revenue improving the public school system.

Some say this would be better than allowing schools that serve the top end of town to use income to fund lavish building projects and augment their endowments.

But, getting back to basics, there is a reason why charity law recognises advancing education as a type of charitable purpose.

Education is of public benefit in the sense that an educated society is one that is better for everyone in it.

Australia's school funding model provides high levels of public funding to private schools, while also allowing them to charge fees.

This proposition is the basis for a straightforward argument for recognising that private schools, like all not-for-profit public benefit organisations, are charities under the law.

Even so, questions of access and inclusion refuse to go away.

When a school charges fees that only the well-off can afford, is the public benefit of its educational mission outweighed by detriments associated with its exclusive character?

A 2011 tribunal decision in England and Wales ruled that private schools, if they are to enjoy charity status and the tax privileges that come with it, must include those unable to afford their fees — whether through means-tested bursary schemes, sharing facilities with the local community, or other strategies.

To date, Australian charity law has not followed a path similar to that taken in England and Wales.

Whether it should depends in part on how we weigh the public benefit of education against the detriments associated with private schools being exclusive.

Such an exercise is far from straightforward. It depends on empirical evidence of the social and economic effects of the private school system across society.

Part of the answer seems to depend on whose job it is to solve problems of injustice in the distribution of educational opportunity.

Put bluntly, is it the job of private schools to improve the educational opportunities of those whose families cannot afford their fees? Or is it the job of the state?

If it is the job of the state, perhaps the solution involves withdrawing the grant funding the state gives to private schools and investing more in the public education system.

But then why can't the state show its commitment to improving the public school system by withdrawing tax exemptions from private schools?

This might well be an appropriate move to make, but importantly, it does not necessarily entail taking away charity status from those schools.

Potential for reform

There's no reason why being a charity must lead to an entity being tax-exempt. And being a charity means much more than not paying tax.

For example, it means being endorsed and regulated by the state, and being exempt from the requirements of a range of laws, like anti-discrimination laws.

This same point about the lack of necessary connection may be made in respect of rules that enable the donor to a school building fund, for example, to claim a tax deduction.

These rules, which enable the rich to give tax-free gifts to wealthy private schools, could be repealed without interfering with the charity status of those schools.

They probably should be repealed as part of a broader program of tax reform — one in which deductions for charitable gifts are replaced with tax credits or another alternative.

The question of whether private schools and other fee-charging charities should in fact be charities is not quite the same as the question of whether they, or their supporters, should receive tax privileges.

Neither question is easy to answer.

But we must tackle both, as social and economic inequality in Australia grows more substantial, and more concerning, over time.

Professor Matthew Harding is Deputy Dean at Melbourne Law School. He has published widely on issues in moral and political philosophy, the theory and doctrines of equity, property law, judicial practice and precedent, and the law of charity.