

Submission to Productivity Commission Draft Report on Philanthropy

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Executive Summary

The draft report recommends the removal of the Basic Religious Charity Exception within the ACNC regime, with the result that the ACNC Commissioner will be able to suspend, appoint and remove the leaders of religious institutions. This is a significant imposition on religious freedom under international law and the Australian Constitution. In particular, international human rights bodies have strongly contended that government interference in the leadership of religious organisations will breach human rights norms. Commonwealth legislation enabling such interference may be beyond the powers granted to the Parliament under the Constitution. Even if the legislation is within power, it is likely to be invalid on the basis of breaching the freedom of religion provision of the Constitution which imposes limits on Commonwealth legislative power.

Research Expertise - Deagon

My name is Dr Alex Deagon. I am an Associate Professor in the School of Law at the Queensland University of Technology. I am a leading authority on religious freedom in Australia. In regard to this issue I have published a scholarly monograph, peer-reviewed journal articles, presented at national and international conferences, and have written opinion pieces and provided expert commentary on religious freedom issues to the media and government inquiries. I am also the founding co-editor of the *Australian Journal of Law and*

Religion. Some relevant publications are listed below. My scholarly monograph on religious freedom and discrimination in Australia, the US and the UK, was published in February 2023 with Hart Publishing, Oxford, a legal publisher of international repute. I draw on this monograph, my below publications, and my previous submissions for this submission. For a full catalogue of my experience and publications in this area, please see <https://staff.qut.edu.au/staff/alex.deagon>.

- A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination, Hart Publishing, Oxford, UK; 2023.
- Circumventing Section 116 Through ‘Indirect or Devious Means’: Freedom of Religion and the Boundaries of Executive Power (2024) *Federal Law Review* (forthcoming). (with Benjamin Saunders)
- Creating Peaceful Coexistence through Virtue: A Theological Approach to Institutional Religious Freedom, Equality and the First Amendment (2024) 61 *Journal of Catholic Legal Studies* (forthcoming).
- Reconciling Freedom and Equality for Peaceful Coexistence: On the Need to Reframe the Exemptions in the Sex Discrimination Act (2023) 2 *Australian Journal of Law and Religion* 20-35.
- The Influence of Secularism on Free Exercise Jurisprudence: Contrasting US and Australian Interpretations (2022) 13 *International Journal of Religious Freedom* 123-137.
- The Religious Questions Doctrine: Addressing (Secular) Judicial Incompetence (2021) 47(1) *Monash University Law Review* 60-87.
- Religion and the Constitution: A Response to Luke Beck’s Safeguard Against Religious Intolerance Theory of Section 116 (2021) 44(4) *UNSW Law Journal* 1558-1583. (with Benjamin Saunders)
- State (non-)Neutrality and Conceptions of Religious Freedom in Jasper Doomen and Mirjam van Schaik (eds) *Religious Ideas in Liberal Democratic States* (Rowman & Littlefield, 2021) 65-85.
- Is Religious Liberty Loving in Principle? in Michael Quinlan (ed) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia* (Connor Court Publishing, 2021) 17-47.
- Principles, Pragmatism and Power: Another Look at the Historical Context of Section 116 (2020) 43(3) *Melbourne University Law Review* 1033-1068. (with Benjamin Saunders)
- Equal Voice Liberalism and Free Public Religion: Some Legal Implications in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Religious Freedom in Australia: A new Terra Nullius?* (Connor Court Publishing, 2019) 292-332.
- A Christian Framework for Religious Diversity in Political Discourse in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Religious Freedom in Australia: A new Terra Nullius?* (Connor Court Publishing, 2019) 130-162.
- Religious Schools, Religious Vendors and Refusing Services After Ruddock: Diversity or Discrimination? (2019) 93(9) *Australian Law Journal* 766-777.

- Maintaining Religious Freedom for Religious Schools: Options for Legal Protection after the Ruddock Review (2019) 247(1) *St Mark's Review: A Journal of Christian Thought and Opinion* 40-61.
- Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse (2018) 41(3) *Harvard Journal of Law and Public Policy* 901-934.
- Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom (2018) 46(1) *Federal Law Review* 113-137.
- Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage (2017) 20 *International Trade and Business Law Review* 239-286.

I have also contributed significantly to religious freedom law and policy in Australia. My submissions have been cited in multiple Commonwealth Government reviews and inquiries. The Australian Law Reform Commission Freedoms Inquiry (2015) agreed with and adopted my submission that religious speech might be protected by both Section 116 and the implied freedom of political communication (p 134). The Australian Senate Select Committee Inquiry into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (2016) extensively quoted me and relied on my written submissions and expert evidence in relation to religious freedom (2.88, 2.90), which helped inform the national debate and government policy on religious freedom protections during the process of legalising same-sex marriage. I was also invited to give expert evidence on the legal foundations for religious freedom in Australia, and contemporary challenges, to the Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) Inquiry into the status of the human right to freedom of religion or belief (2017).

This Inquiry released an Interim Report in November 2017. The Report extensively cited and relied on my written and oral submissions in relation to interpretation of the free exercise clause in s 116 of the Constitution, and the tension between religious freedom and anti-discrimination law. For example, the Inquiry adopted my positive characterisation of the High Court's definition of religion and accepted that definition (p 16), agreed with my submission that the constitutional protection of free exercise extends to individuals (p 20), and relied on my submission as the leading view on how the free exercise clause has been interpreted narrowly (p 32). The Report further relied on my submission as the leading authority on the tension between religious freedom and anti-discrimination (p 76). The Report specifically relied on my submissions to clarify the nature and limits of any religious freedom protections, including draft proposals for legislation (pp 79, 86). Based on a written submission I was also invited to appear before the Ruddock Religious Freedom Review Panel (2018) to give expert oral evidence, one of only 21 academics around Australia to appear.

After the release of the Ruddock Review, Senator Penny Wong moved a bill to remove religious exemptions for religious schools in the Sex Discrimination Act, which gave rise to two Senate inquiries. First, I made a written submission to the Legal and Constitutional

Affairs References Committee Inquiry on Religious Exemptions for Religious Educational Institutions (2018). The Committee released their report on 26th November 2018, which consisted of a majority report (ALP/Greens) and a dissenting report (Coalition). I was cited by the majority report in relation to potential constitutional issues with any attempt to remove religious exemptions in Commonwealth legislation. In particular, the majority report noted my argument that removing religious exemptions in Commonwealth law would breach s 116 of the Constitution (p 26). I was cited extensively by the dissenting report on similar constitutional issues, as well as to support arguments regarding the need for the religious freedom of religious educational institutions to be maintained and substantively protected.

The dissenting report extensively quoted and relied on my arguments that the harm against religious educators is greater if the exemptions were removed than the harm against those discriminated against if they are retained (p 64), that international law requires legal protection for faith-based schools to positively select staff who uphold the ethos of the school (p 68), that religious freedom requires the protection of minority beliefs from the prevailing orthodoxy of uniform equality (pp 69-70), that removing exemptions actually promotes inequality by failing to take into account due accommodations for religious entities disproportionately targeted by equality legislation (pp 72-73), that removing religious exemptions in Commonwealth law for religious educational institutions would breach s 116 by prohibiting the free exercise of religion (pp 81-82), that withdrawing state support of religious educational institutions would limit pluralism and undermine democracy (p 83), and that religious educational institutions need legal protection to maintain the distinct and unique religious ethos which undergirds their approach to education (p 93). The dissenting report further quoted from two citations in my submission: The dissent in the Canadian Trinity Western University case (2018) which noted that the accommodation of difference serves the public interest (p 84), and a quote from Professor Nicholas Aroney expressing religious practice as broader than just belief and worship; it also includes social, cultural, commercial, educational, medical and charitable activities (p 92). I was also quoted by Government Minister Senator Zed Seselja during the Senate Debate on 3/12/18 on the need to maintain religious freedom for religious schools, which was used to justify proposed Government amendments to the bill (Senate Hansard, p 2).

Second, I made a written submission to the Legal and Constitutional Affairs Legislation Committee on Religious Exemptions for Religious Educational Institutions (2018), and was invited to present expert oral evidence to the Committee in February 2019. The Committee released their Report on 14th February 2019. I was cited in support of a proposed Government amendment to the bill which would protect the ability of religious schools to teach in accordance with their religious doctrine (3.31), and in support of the fact that the bill was rushed, flawed and a more detailed consideration was needed (3.68). Consistent with my submissions the Committee recommended that the bill not be passed and the issue be referred to the Australian Law Reform Commission for further consideration (3.80-3.84). Consequently, the Senate did not pass the bill and the Government did refer the issue to the ALRC.

I also made submissions to the Attorney-General's Department on the first and second exposure drafts of the *Religious Discrimination Bill*. Four of my recommendations with respect to the first Exposure Draft were adopted in the second Exposure Draft: the extension of religious bodies to charities and hospitals, a more generous and consistent test for determining whether conduct is discriminatory, a clear definition of 'vilify', and the prevention of 'lawful religious activities' being prohibited by local council by-laws.

After a revised version of the *Religious Discrimination Bill 2021* (Cth) was introduced to Parliament in 2021, I made a written submission to Parliamentary Joint Committee on Human Rights. Consistent with my written submission the Committee recommended that the bills be passed (with minor amendments). I was cited 5 times: in support of empowering religious corporations as litigants (3.35), in support of parents having the right to educate in conformity with their convictions (5.45), in support of protection for statements of belief (6.3), and in support of overriding the Tasmanian law against offensive statements because it is too broad (6.23 and 6.25).

I also made a written submission to the Legal and Constitutional Affairs Legislation Committee considering the same bill, and was invited to give oral submissions to that Committee. Consistent with my written and oral submissions the Committee recommended that the bills be passed (with minor amendments). I was cited over 15 times: in support of the bills generally to protect against discrimination and fulfil our international obligations (2.28), that allowing religious schools to preference staff consistent with an ethos is a fundamental human right (2.40), that a unique religious discrimination package is needed because religion is unique as expressive and communal (2.52), in support of the statement of belief provisions because they are appropriately expressed to protect moderately expressed beliefs in a pluralist and democratic society (2.62), in support of overriding the Tasmanian law against offensive statements because it is too broad (2.69), in providing constitutional and international law support for empowering religious corporations as litigants (2.84 and 3.71), and that changes to the SDA should be left to the ALRC (3.77).

I provided a written submission to the Australian Law Reform Commission Inquiry into Religious Schools and Discrimination. The ALRC requested a copy of my 2023 *Reconciling Freedom and Discrimination* monograph before it was published to inform their recommendations, and I also had a private meeting with ALRC legal officers to provide expertise on freedom of religion issues. I was one of only 14 academics nationwide consulted directly by the ALRC and was cited 6 times in the 'What we Heard ADL2 Background Paper'. The foregoing demonstrates my considerable national and international expertise in religious freedom matters.

Research Expertise - Fowler

Dr Mark Fowler's specialist areas of advice include the law applying to schools, international aid organisations, retirement villages, aged care facilities and religious organisations. Mark also has a breadth of experience in property and commercial law, with a particular focus on the affordable, community and social housing sectors. Mark has advised many leading national and international charities across these fields.

Prior to establishing Fowler Charity Law Pty Ltd in 2019, Mark was a Partner in leading national charity and not-for-profit law firms located in Sydney and Brisbane. He is an Appeals Panel member for the Australian Council for International Development (ACFID), the peak body for Australian non-government organisations (NGOs) involved in international development and humanitarian action. He is a member of the Australian Charities and Not-for-Profits Commission Professional Users Group and has served as a member of the Queensland Law Society's Human Rights Working Group. Mark is also an Adjunct Associate Professor at the University of Notre Dame, School of Law, Sydney, and an Adjunct Associate Professor in the Law School at his *alma mater*, the University of New England. He is also a Research Scholar at the Centre for Public, International and Comparative Law, University of Queensland. He holds a doctorate degree in law conferred by the University of Queensland in 2023.

Research publications

- Fowler, Mark, 'Charity Law and Critiques of Modernity: An Application of Philosophical and Theological Critiques of Liberalism to Four Fields of Charity Law and Regulation: Civic-Engagement, Anti-Discrimination Law, Critique of Government Policy and Tax Exemption' (PhD Thesis, University of Queensland, 2023).
- Fowler, Mark, 'Can a Faith-Based Public Benevolent Institution Have a Purpose of "Advancing Religion"?' (2023) 1 *Third Sector Review* 65.
- Fowler, Mark 'The Position of Religious Schools Under International Human Rights Law' (2023) 2 *The Australian Journal of Law and Religion* 36.
- Fowler, Mark 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).
- Fowler, Mark 'Attaining to Certainty: Does the Expert Panel's Proposal for Reform of the Charities Act Sufficiently Protect Religious Charities?' (2020) 2 *Third Sector Review*.

- Fowler, Mark, ‘Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law’ in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020)
- Fowler, Mark ‘The Courts and the Marriage Debate’ *Upholding the Australian Constitution, Proceedings of the Samuel Griffith Society August (Volume 27)* (2017)
- Fowler, Mark ‘Charitable Housing – Update and Future Trends’ in Myles McGregor-Lowndes (ed) *The Australian Nonprofit Sector Legal and Accounting Almanac 2014*, Working Paper No. ACPNS 64, (The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology Prints, 2015)
- Fowler, Mark ‘National Rental Affordability Scheme’ in Myles McGregor-Lowndes (ed), *The Australian Nonprofit Sector Legal Almanac 2009*, Working Paper No. CPNS 49, (The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, 2010)

Detailed Submissions

The draft report recommends the removal of the Basic Religious Charity Exception within the ACNC regime, with the result that the ACNC Commissioner will be able to suspend, appoint and remove the leaders of religious institutions (pp 222-225). Though this power has never been used (p 225), the fact it is being contemplated and may be passed as law reveals a disturbing ignorance of religious freedom norms. To grant to the state the ability to intervene in the governance of religious organisations through suspending, appointing and removing leaders of those organisations is a grave and fundamental breach of religious freedom and contains the hallmarks of authoritarian regimes rather than a pluralistic liberal democracy.

International Law and the appointment/removal of religious leaders

General Obligations under the ICCPR

Article 18 of the *International Covenant on Civil and Political Rights* (‘ICCPR’) ratified by Australia in 1980, which states:

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.¹

While freedom of religion as recognised under the ICCPR is a right exercised by individuals, Article 18(1) specifically protects the ability to act in community with others (including through unincorporated and incorporated vehicles) as a form of manifesting belief, both privately and publicly.² The only permissible restrictions on religious manifestation are those found in Article 18(3), namely those which are *necessary* (not merely reasonable) to protect public safety, order, health, morals or fundamental rights and freedoms of others. This is a high threshold which requires substantive proof before any legal limitation is appropriate.³

Article 18(1) of the ICCPR in its express terms protects the right to exercise the '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' (emphasis added). General Comment 22 further elaborates:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in *community with others*.⁴

As Evans notes, 'while human rights belong to individuals, the right to manifest religious freedom collectively means that it has an organisational dimension', whereby it 'is for the individual, rather than the state, to decide whether to exercise the right individually and/or collectively.'⁵

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² See Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153.

³ In accordance with the Siracusa Principles, any restriction must be necessary to achieve one of the objects listed, and must be proportionate to that object in the sense that it is the least restrictive means to achieve that object: 'Siracusa Principles on the Limitation and Derogation of Provisions' in the *International Covenant on Civil and Political Rights Annex*, UN Doc E/CN.4/1984/4 (1984), accessed February 19, 2019, <https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf>.

⁴ *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)*).

⁵ Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 35.

Article 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981 Declaration), proclaimed by the General Assembly, recognises a range of rights that are by their nature necessarily expressed through corporate vehicles.⁶ These include the right ‘to establish and maintain appropriate charitable or humanitarian institutions’, the maintenance of places of worship, and the observance of ceremonies and holidays.⁷ The Declaration has been utilised by the United Nations Human Rights Committee in interpreting the scope of Article 18’s protections. The 1981 Religion Declaration also states that the right to freedom of religion includes freedom to appoint appropriate leaders of charitable institutions consistent with the requirements and standards of the religion.⁸ It follows that there is a close connection between Article 18 and other fundamental human rights including freedom of association (Article 22). Freedom of religion in conjunction with freedom of association under the ICCPR thus protects the right to found an association based on a common purpose, the right of that association to be recognised as and function as a distinct legal person, and the right of such an association to select and regulate leaders and members of the association in accordance with the common interest of the association, including expulsion of those who breach the terms of the association.⁹

European Convention of Human Rights Article 9: Freedom of thought, conscience and religion

Although the ECHR is not binding on Australia, it reaffirms and supports the same principles as the ICCPR on this point. Article 9 in the Convention is partly an absolute right and partly a qualified right. It is an absolute right in the sense that the internal dimension, freedom to believe or change belief, is inviolable and not subject to limitation. It is a qualified right in the sense that the external dimension, manifestation of that belief, is subject to the limitations indicated in Article 9 itself. Any limitation must be ‘necessary in a democratic society’, which requires a test of ‘proportionality’: the Court considers whether the purpose of the limitation of the right is ‘legitimate’, whether the limitation is ‘necessary for attaining that purpose’, and

⁶ *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka v Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005) [7.2].

⁷ UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.

⁸ 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.

⁹ Aroney (n 8) 712; Manfred Nowak, *CCPR Commentary* (Engel, Kehl am Rhein, 1993) 386-389; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 34-38.

whether the measure strikes the proper balance between that purpose and the right being restricted.¹⁰ Article 9 states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In regard to the autonomy of religious communities specifically, there are some emerging themes in Article 9 jurisprudence. These recognise that associations can themselves bear rights, including the right to structure themselves in accordance with religious precepts. Religious communities have the autonomy to determine their own leadership and membership structure, and standards for those leaders and members to follow, as long as those members of the community also have the freedom to leave the organisation.¹¹

The European Court of Human Rights (ECtHR) has recognised that religious organisations have legal personality and distinct rights. 'The importance of the collective dimension to religious freedom has emerged as an important theme in Convention jurisprudence'.¹² Harrison notes that the autonomy of these groups is linked with their ability to privately maintain their traditions and publicly express their beliefs. There is a 'distinct line of jurisprudence that emphasises the importance of religious associations to a vital civil society'.¹³ For example, in the foundational case of *Kokkinakis v Greece*, the Court states:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a democratic society... it is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conceptions of life... The pluralism indissociable from a democratic society... depends on it.¹⁴

The collective dimension of Article 9, the freedom to manifest in community with others, contributes to the common good, pluralism and peaceful coexistence of different communities in a democratic society. Protecting 'the autonomy of the religious institution' in

¹⁰ Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press, 2018) 64-65.

¹¹ Julian Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 57-58, 70-71.

¹² Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020) 138.

¹³ *Ibid* 174-175.

¹⁴ *Kokkinakis v Greece* (1993) 17 EHRR397 [31].

this way is essential for preserving ‘the pluralism indissociable from a democratic society’.¹⁵ As McCrudden emphasises, ‘the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords... Were the organisational life of the community not protected by Article 9... all other aspects of... freedom of religion would become vulnerable.’¹⁶ The most powerful cases demonstrate this principle through protecting the autonomy of religious organisations in selecting their leaders.¹⁷

Hence religious communities have the right to determine their own structure, membership, policy, objectives and so on. ‘Selection of leaders is one of the very core aspects of religious association autonomy... religious bodies have the right to reject candidates for ministry or discipline or expel an existing pastoral minister even if the grounds for doing so appear to liberals (and others) to be archaic, illiberal or bigoted. The grounds for selection and dismissal are matters within the province of the religious community, and it alone, to decide’, including on the basis of race (for example a Jewish community), sex (ordination of men and not women), and sexual orientation (not appointing a gay man to a leadership position).¹⁸ These decisions are coherent with, and give substantive effect to, the principles articulated by the ECtHR in *Hasan & Chuash v Bulgaria*: ‘religious communities traditionally and universally exist in the form of organised structures’ necessitating the recognition that ‘participation in the life of [such communities] is a manifestation of one’s religion.’¹⁹ Similarly the Court has recognised that ‘[w]ere the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.’²⁰

Thus, state intervention would be invasive and destructive to religious freedom and, indeed, the separation of church and state and democracy itself; state-determined appointment or dismissal of religious leaders, and/or penalties for non-compliance, are hallmarks of authoritarian and religiously repressive regimes.²¹ In short, ‘the right of religious communities to select their own religious leaders is borne out by the European Convention case law. The European Court of Human Rights has made it abundantly clear that attempts by a state to interfere in the selection of leaders will not be tolerated.’²²

¹⁵ McCrudden, *Litigating Religions* (n 10) 68-70.

¹⁶ *Ibid* 139.

¹⁷ *Ibid* 68-70.

¹⁸ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2011 2nd ed) 395.

¹⁹ (2002) 34(6) EHRR 1339 [62].

²⁰ *Fernández Martínez v Spain* (2014) European Court of Human Rights, Grand Chamber, no 56030/07, [127] (*Fernández Martínez v Spain*).

²¹ Ahdar and Leigh (n 18) 395.

²² *Ibid* 396-399.

Constitutional Law and the appointment/removal of religious leaders

Commonwealth Powers

Here I defer to the seminal work of Nicholas Aroney, Professor of Constitutional Law at the University of Queensland. In two articles Aroney has argued that the Commonwealth does not have legislative power under the Constitution to regulate the charities and non-profit sector as such. Rather, the Commonwealth relies on a combination of the taxation, communications, corporations, external affairs and territories powers. There are strong arguments to suggest these powers do not support the relevant legislation.²³

In particular, to the extent the legislation relies on the external affairs power, it will be invalid. The external affairs power enables the Commonwealth to make laws for the purpose of implementing rights and obligations arising from international treaties ratified by Australia.²⁴ In the leading *Victoria v Commonwealth (Industrial Relations)* case, the High Court outlined the applicable test: the law ‘must be reasonably capable of being considered appropriate and adapted to implementing the treaty’, and the law ‘must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states’.²⁵ The first aspect (conformity) entails a proportionality analysis which considers the purpose of the treaty and which recognises that ‘it is for the legislature to choose the means by which it carries into or gives effect to the treaty’.²⁶ The second aspect (specificity) requires that the treaty embodies precise obligations, rather than mere aspirations which are ‘broad objectives’ permitting ‘widely divergent policies’.²⁷

As explained above, the ICCPR and associated instruments prescribe a clear right to freedom of religion which includes freedom to manifest religion in in community with others. Manifesting religion in community with others entails the creation and continuance of incorporated and unincorporated religious associations which function as distinct legal persons for a common purpose. Article 18 recognises the ability of persons to form and incorporate religious associations such as charitable institutions as a function of exercising

²³ See 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.

²⁴ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. See Cheryl Saunders, ‘Articles of Faith or Lucky Breaks? The Constitutional Law of International Agreements in Australia’ (1995) 17(2) *Sydney Law Review* 150, 159.

²⁵ *Industrial Relations* (1996) 187 CLR 416, 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

²⁶ *Ibid* 487.

²⁷ *Ibid* 486. Though the ‘absence of precision does not... mean any absence of international obligation.’ See *Tasmanian Dams* (1983) 158 CLR 1, 261-2 (Deane J).

their rights of freedom of religion and association, including the selection of leaders. If legislation permits interference with these rights, it is clearly not implementing international obligations with respect to religious freedom and therefore will be invalid.

Limits on Commonwealth Powers

Section 116 of the Australian Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.²⁸

Section 116 is subject to a number of limitations.²⁹ First, s 116 only applies to laws (including laws which authorise executive acts amounting to a breach) rather than general executive or personal action.³⁰ This means s 116 is not an individual right but a limit on legislative power.³¹ Second, s 116 only applies to Commonwealth laws and does not apply to the states.³² In regard to the scope of religious freedom, Chief Justice Latham in the *Jehovah's Witnesses* case argues that since the 'free exercise' of religion is protected, this includes but extends beyond religious belief or the mere holding of religious opinion; the protection 'from the operation of any Commonwealth laws' covers 'acts which are done in the exercise of religion' or 'acts done in pursuance of religious belief as part of religion'.³³ However, subsequent cases noted these acts must be religious conduct, or 'conduct in which a person engages in giving effect to his [sic] faith in the supernatural'.³⁴ Religious conduct protected by s 116 extends to 'faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion'.³⁵ Furthermore, not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom.³⁶ At a minimum, the High Court has stated that the narrowest limitations on free exercise of religion are appropriate – that required for the 'maintenance of civil government' or 'the continued existence of the community'.³⁷

²⁸ For a recent detailed examination of the provision, see Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018).

²⁹ See Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153, 155-156.

³⁰ *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373.

³¹ *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 605 (Stephen J).

³² *Grace Bible Church v Reedman* (1984) 36 SASR 376

³³ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124-125.

³⁴ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

³⁵ *Ibid* 135-136.

³⁶ *Jehovah's Witnesses* (1943) 67 CLR 116.

³⁷ *Ibid* 126, 131, 155.

Aroney argues that s 116 protects religious freedom as an associational right as a function of its text, clear acknowledgement in the case law, and the nature of Australian religious practice as communal in the late 19th century. This means s 116 protects religious organisations and communities, including religious charities.³⁸ The text of s 116 operates as a limit on Commonwealth power, which means persons (whether natural or artificial – including corporations and associations) are protected from laws which breach s 116. For example, since the free exercise of any religion includes ‘conducting religious services, disseminating religious teachings, determining religious doctrines, establishing standards of religious conduct, identifying conditions of membership, appointing officers [leaders], ordaining religious leaders and engaging employees,’ these practices are all protected regardless of whether they are engaged in by individuals or associations.³⁹

In *Jehovah’s Witnesses*, the impugned regulations prohibited the advocacy of doctrines which were prejudicial to the prosecution of the war in which the Commonwealth was engaged. It provided for the dissolution of associations propagating such doctrines and vested their property in the Commonwealth. The Jehovah’s Witnesses challenged the constitutional validity of these regulations. The Court found that the regulations exceeded the purported head of power and were therefore invalid, but, following the narrow approach in *Krygger*, they held that the regulations did not breach s 116 because freedom of religion is not absolute.⁴⁰ This means they did not directly decide whether religious groups are protected by s 116, though a majority held that the Witnesses were competent to bring the action as an incorporated organisation – which implies the majority assumed the protection granted to s 116 extends to groups.⁴¹

Thus any attempt to pass legislation which enables state interference in the leadership of religious organisations may breach the free exercise clause of s 116 of the Constitution and consequently be invalid. As discussed above, free exercise includes religious conduct such as ‘faith and worship’, ‘the teaching and propagation of religion’, and ‘the practices and observances of religion’.⁴² The creation and governance of religious organisations, including leadership decisions, clearly comes within the ambit of free exercise.

Furthermore, as discussed above, not every interference with religion is a breach of s 116, but only those which ‘unduly infringe’ upon religious freedom.⁴³ Free exercise should only be

³⁸ Aroney (n 29) 154-155. See 169-171, 176-178 for the history.

³⁹ Ibid 156-157.

⁴⁰ *Jehovah’s Witnesses* (1943) 67 CLR 116, 149-150.

⁴¹ Aroney, ‘Freedom of Religion’ (n 29) 159-161, 166. This is further reflected in *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, where it was ‘taken for granted’ that the LMA could bring the action as a group to protect its right to select its religious leaders.

⁴² *Church of the New Faith* 135–36 (Mason ACJ and Brennan J).

⁴³ See generally *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

limited where it is required for the maintenance of civil government or the continued existence of the community.⁴⁴ More precisely, freedom of religion should extend to protect all external actions which are not dangerous to society or democracy, even if those views or actions are deemed unpopular according to community values.⁴⁵ As Latham CJ observes, ‘section 116 is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities’.⁴⁶ Since religious charitable institutions are not dangerous to society or democracy, this supports the argument that religious charities are protected by s 116 and interference with them would be an undue infringement of their religious freedom.

Even on the narrow interpretation in *Kruger*, any proposal to render religious organisations subject to state interference directly targets these organisations and restricts their free exercise in its terms by preventing them from self-governance.⁴⁷ Section 116 extends to protect acts done in the practice of religion by religious bodies, and this includes the purposes of charitable organisations.⁴⁸ Section 116 was designed precisely to prevent the direct targeting of religious practice by religious entities through Commonwealth laws, and since the selection of leaders by a religious institution is an exercise of religion in accordance with religious convictions, and any removal of the BRC exemption would directly prohibit that practice in accordance with those convictions, it follows that the removal of the exemption would be likely to breach the free exercise clause. (Technically, it would be the executive application of the legislation removing the BRC exception by the ACNC Commissioner to interfere with the leadership of a religious charity which would breach the free exercise clause. The legislation removing the BRC exception would be a law which authorises executive action which amounts to a breach, as noted above. But such a law is still a breach of s 116 under existing High Court jurisprudence.⁴⁹) Aroney also engages in a detailed analysis of the s 116 question and also reaches the conclusion that legislation which permits government interference with the leaders of religious organisations would be invalid.⁵⁰

More generally, it should be noted that even the ACNC Act as it is already causes problems under s 116 because it allows the ACNC Commissioner to replace religious leaders of incorporated entities. The BRC does not apply if an entity is incorporated.⁵¹ Hence, applying the same principles, the existing provisions of the ACNC Act which allow the Commissioner to appoint, suspend or remove the religious leaders of incorporated religious entities is a

⁴⁴ Ibid 126, 131 (Latham CJ), 155 (Starke J).

⁴⁵ Ibid 149–50 (Rich J).

⁴⁶ Ibid 124 (Latham CJ).

⁴⁷ *Kruger* (1997) 190 CLR 1, 40, 161.

⁴⁸ See *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116; Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153.

⁴⁹ See eg *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 581 (Barwick CJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 86 (Toohey J), 131 (Gaudron J).

⁵⁰ See Aroney and Turnour (n 23) 481–487.

⁵¹ See Nicholas Aroney and Mark Fowler, ‘Freedom of Association in Australia’ (September 28, 2023). Available at SSRN: <https://ssrn.com/abstract=4587217> or <http://dx.doi.org/10.2139/ssrn.4587217>.

significant and undue interference with free exercise of religion which would breach the free exercise clause. This power should not be further extended by removing the BRC.

Conclusion

Therefore, the removal of the BRC exception is an egregious and severe interference with religious freedom in Australia. It is contrary to international law and likely to be unconstitutional for multiple reasons. The proposal should be abandoned.

Thank you for your consideration.