



Productivity Commission

23 February 2024

Submission concerning Recommendation 7.1 *Future Foundations for Giving* (Draft Report): Basic Religious Charities

Introduction

I am a Professor at the Australian National University with research expertise in religious charity law and the legal regulation of religious financing. I have published widely on those topics in relation to the law in Australia and other jurisdictions with a common charity law heritage. I participated in the Commission's workshop on 6 February 2024 with members of the Charity Law Association of Australia and New Zealand (CLAANZ) concerning the implications for religious charities of the Commission's draft report. In this submission I comment on some aspects of the draft report that relate to basic religious charities (BRCs). In doing so, I am responding particularly to concerns raised at that workshop. This submission represents my own professional views.

Draft recommendation 7.1

This recommendation is that the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) be amended to 'remove the concept of 'basic religious charity' and associated exemptions, so all charities registered with the Australian Charities and Not-for-profits Commission have the same governance obligations and reporting requirements proportionate to their size.' I support this recommendation because I am not persuaded that there are principled grounds (eg human rights-related arguments) for the BRC category. I also consider that there are some pragmatic reasons why it should be adopted. My reasoning is as follows.

The arguments of principle in favour of the current BRC exemptions that I am aware of relate to protection of freedom of religion.¹ For example, at the CLAANZ workshop that I attended it was suggested that removal of the BRC-associated exemptions would infringe the right to freedom of religion of entities with the charitable

¹ See eg Commonwealth, The Treasury, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission: Legislation Review 2018* 64-70 (suggesting at 65 that respect for the right to freedom of religion may have motivated the BRC exemptions).

purpose of the advancement of religion. I have discussed the potential for human rights law to apply in the Australian religious charity law context in several publications and draw on that material here.² There are several reasons why it would be difficult to mount a human rights challenge regarding Draft Recommendation 7.1.

The first reason is jurisdictional: what is the source of jurisdiction for a freedom of religion-based challenge? Section 116 restricts the Commonwealth's law-making powers with respect to religion, but not in a way that necessarily precludes recommendation 7.1 (I leave to one side the question whether the Commonwealth has legislative power at all here, as I am not a constitutional lawyer). Section 116 does not preclude government funding of religious groups or the facilitation of religious activity through conferral of charitable status,³ but it has not always been effectual in protecting freedom of religion and it does not negate the Commonwealth's ability, through legislation, to refuse or restrict charitable status for purposes for the advancement of religion.⁴

Australia's international human rights obligations are likely to be more relevant to charity law, particularly the *International Covenant on Civil and Political Rights* ("ICCPR").⁵ Article 18(1) of the ICCPR protects the right "in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching". Religious groups may claim the protection of Article 18 and its equivalents on behalf of their members.⁶ The concept of manifestation of religion 'in community' encompasses the charity law concept of 'advancement of religion'.⁷ Thus, in principle, Article 18 applies to a religious group's claim that the refusal of (or, arguably, imposition of limitations on) charitable status and concomitant fiscal benefits interferes with the communal manifestation of religious beliefs by its members so as to breach their right to freedom of religion.

Nonetheless, such a claim seems unlikely to succeed. Implementation of the ICCPR into domestic legislation has been patchy and, so far as I am aware, does not allow for a direct claim by a religious entity against the

² See eg 'When is the Advancement of Religion Not a Charitable Purpose?' (2020) 6 *Canadian Journal of Comparative and Contemporary Law* 360; 'Not-for-Profit Law and Freedom of Religion' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law*, (Edward Elgar Publishing, 2018) 284; 'Religious Charitable Status and Public Benefit in Australia' (2011) 35 *Melbourne University Law Review* 1071.

³ *Attorney-General (Vic); ex rel Black v Commonwealth*, (1981) 146 CLR 559, 582, 616.

⁴ See e.g. *Adelaide Company of Jehovah's Witnesses Incorporation v The Commonwealth*, (1943) 67 CLR 116. See also Pauline Ridge, 'The Financing of Religion: Guidelines for Legal Regulation' (2009) 30 *Adelaide Law Review* 85, 91-95.

⁵ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, ratified by Australia 13 August 1980) [ICCPR].

⁶ *Ibid* art 18. See eg *Church of Jesus Christ of Latter-Day Saints* [2008] UKHL 56; [2008] 1 WLR 1852. I leave to one side the question whether religious groups *themselves* have religious freedom rights.

⁷ See UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience and Religion)*, HRC, 48th Sess, UN Doc CCPR/C/21/Rev.1/Add.4, 1993 (the Human Rights Committee has elaborated on the meaning of 'manifest' in the context of the right to manifest religion collectively "in worship, observance, practice and teaching" at para 4).

Commonwealth or the ACNC.⁸ Furthermore, Courts in various jurisdictions have found that the refusal of charitable status and associated tax privileges does not infringe the right to freedom of religion for the simple reason that lack of charitable status does not preclude group members from manifesting their religious beliefs, although it may make it more expensive to do so.⁹ Charitable status has a privileging, rather than legalising, function. This would also seem to apply where religious groups are subjected to more onerous governance and reporting obligations than was previously the case, pursuant to recommendation 7.1.

A Canadian lower court case to the opposite effect is *Canada Without Poverty v Attorney General Canada* where Morgan J accepted the claimant's argument that it could not continue to operate without the tax benefits associated with its charitable status and that this 'cost burden' infringed its right to freedom of expression under s 2(b) of the Canadian *Charter*.¹⁰ It was held that '[a]ny burden, including a cost burden, imposed by government on the exercise of a fundamental freedom such as religion or expression can qualify as an infringement of that freedom if it is not 'trivial or insubstantial''.¹¹ There are obstacles to reliance on this case in the Australian legal context. Most obviously, we do not have anything comparable to the Canadian Charter (such as a Bill of Rights). Furthermore, the Canadian case was at first instance and the facts are not analogous.¹² For instance, the cost burdens of removing financial reporting exemptions for BRCs could be argued to be 'trivial or insubstantial'.

The ICCPR also includes the right not to be discriminated against on the ground of one's religion (for example, where other religious groups are not similarly affected). However, this is not in issue in relation to recommendation 7.1 which seeks to apply the same regulatory requirements to *all* charities, including those for the advancement of religion.

It can also be noted that the right to manifest one's religious beliefs is not unqualified. Hence, Article 18(3) states: [f]reedom 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". This would apply where, for instance, the ACNC interfered with a religious charity due to terrorism concerns (see below).

⁸ See eg *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld). See also *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

⁹ See eg *Application For Registration as a Charity by the Church of Scientology: Decision of the Charity Commissioners for England and Wales* (17 November 1999) at 10, online (pdf): *Charity Commission of England and Wales*

<assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324212/cosfu_lldoc.pdf>; *Bob Jones University v United States* (1983) 103 S Ct 2017, 2035.

¹⁰ 2018 ONSC 4147.

¹¹ *Ibid* [44].

¹² The constraint complained of was that political advocacy work could constitute only 10% of the charity's work. It was held that this effectively precluded the charity from fulfilling its charitable purpose of the relief of poverty.

Religious entities could rely on a fundamental legal norm of freedom of religion that is embedded in our common law and that has expressive, rather than legal, force.¹³ However, the same objections discussed above will apply; most significantly, that introducing greater governance obligations and regulatory oversight on BRCs do not likely prevent an entity's freedom or the members' freedom to manifest religion.

I do not wish to downplay the concerns of BRCs in relation to Recommendation 7.1, particularly in relation to the potential for the ACNC to remove and replace the responsible entity of a BRC. Although religious groups with purposes for the advancement of religion are not obliged to register as charities, the Commonwealth tax incentives and enhanced reputational status that charity registration brings suggest that most will do so. Through registration by the ACNC, the state secures regulatory control over the activities of charities for the advancement of religion. Such control brings with it the potential for the state, through the regulator, to mould the operation, purposes, and activities of religious groups to align with public goals and values. This has always been the function of charity law, of course, most obviously through the public benefit requirement of charity. Furthermore, in Australia, the regulator is an independent statutory body. Hence the state's increase in control over religion should not be exaggerated. Nevertheless, the presence of a regulator exercising ongoing oversight over the operation of religious charities and with the power to intervene in their affairs enhances this controlling aspect of charity law. This brings with it clear risks regarding religious freedom and the separation of religion and state.¹⁴ An obvious context in which the ACNC's powers can be used to control religious activity is counterterrorism, particularly the prevention of financing or incitement of religiously motivated terrorist activity.¹⁵ The English Charity Commission's counter-terrorism interventions in Islamic religious charities in this respect are well-documented and have included removing trustees.¹⁶

Minds will differ on the relative merits and dangers of increasing regulatory power over religious activity through charity law. My argument here is simply that the potential for such regulatory oversight and control increases the attractions to the state of conferring charitable status (and associated benefits) upon groups advancing religion and that there is a corresponding benefit, as well as risks, to religious groups in seeking

¹³ See eg *Evans v New South Wales* (2008) 168 FCR 576, 596 [79]; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130.

¹⁴ See Nicholas Aroney and Matthew Turnour, "Charities are the New Constitutional Law Frontier" (2017) 41 *Melbourne University Law Review* 446; Peter W Edge, "Hard Law and Soft Power: Counter-Terrorism, the Power of Sacred Places, and the Establishment of an Anglican Islam" (2010) 12 *Rutgers Journal of Law and Religion* 358 (arguing, at 359, that after 7/7, the Charity Commission was used by the British Government to exercise "soft power, in particular financial power, to effect theological change in Islamic religious communities").

¹⁵ See Susan Pascoe, "A Regulator's View" in Matthew Harding (ed), *Research Handbook on Not-For-Profit Law* (Edward Elgar Publishing Limited, 2018) 570, 581-82.

¹⁶ Peter W Edge, "Hard Law and Soft Power: Counter-Terrorism, the Power of Sacred Places, and the Establishment of an Anglican Islam" (2010) 12 *Rutgers Journal of Law and Religion* 358, 363-68.

charitable status. It is up to current BRCs to decide whether the risks of greater regulation outweigh the benefits to them of registered charitable status.

Finally, I note a pragmatic argument in support of Recommendation 7.1. Some of the criticism of the recommendation at the CLAAANZ workshop that I attended assumed that BRCs are related to larger religious entities and hence already subject to other regulatory controls and protections through the 'parent' body. Imagine, however, a small, newly formed religious entity that does not have links to an established religion and whose existence may have been generated by a charismatic religious leader. It may also be generating significant revenue from its members. There is an argument that greater regulatory oversight and obligations are valuable in such situations as a relatively soft means to protect potentially vulnerable group members.