MONASH University

MONASH LAW

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Submission to the Productivity Commission's inquiry into philanthropy

Dear Productivity Commission

I am a Professor of Constitutional Law at Monash University. My principal expertise is in matters relating to religious freedom under the *Australian Constitution*. This submission addresses potential concerns that Recommendation 7.1, if enacted, would contravene section 116 of the *Australian Constitution*, which prohibits "any law … for prohibiting the free exercise of religion".

Concerns about the effect of Recommendation 7.1

Recommendation 7.1 is in the following terms:

> The Australian Government should amend the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) 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 understand from public commentary and other submissions that there is a concern that the practical effect of this recommendation might be contrary to section 116 of the *Australian Constitution*.

In policy terms, basic religious charities are a subset of the broader category of charities with the purpose of advancing religion. In simple terms, basic religious charities are faith congregations or groups (such as a church, mosque, synagogue, temple etc) that do not have an incorporated structure. Faith congregations or groups that have an incorporated structure do not count as basic religious charities and are therefore already subject to the full governance, transparency and regulatory enforcement regime currently applicable to all other charities.

There does not appear to have been religious freedom policy concerns raised in practice about incorporated faith congregations being treated like other charities, despite that regime being in operation for many years. It is not clear why there should be religious freedom policy

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concerns in practice about treating unincorporated faith groups in the same way as incorporated faith groups for the purposes of federal charity law.

I discuss the constitutional issue in more detail below.

There are legislative precedents for Recommendation 7.1

Some, but not all, ACNC-registered faith groups are already subject to both (i) the ordinary governance and transparency standards applicable to other charities and (ii) the ACNC's regulatory enforcement powers. The regulatory consequences for faith groups of Recommendation 7.1 are identical to the regulatory consequences for some faith groups of amendments enacted in 2020 and identical to the regulatory consequences for faith groups with certain organisational structures.

Faith groups with incorporated structures do not count as basic religious charities

As noted above, the definition of 'basic religious charity' excludes faith groups structured as companies limited by guarantee and faith groups incorporated under State associations incorporation legislation.[1] In enacting that definition, Parliament intended to deny some faith groups access to the exemptions it was conferring on other faith groups.

Faith groups that do not participate in the National Redress Scheme do not count as basic religious charities

The *Treasury Laws Amendment (2020 Measures No 6) Act 2020* amended the definition of 'basic religious charity' in the ACNC Act to disqualify an entity from that category if it chooses not to participate in the National Redress Scheme.

As the *Explanatory Memorandum* to the Treasury Laws Amendment (2020 Measures No 6) Bill explained (emphasis added):

> 3.34 [In circumstances where a basic religious charity joins the National Redress Scheme late] there would be a period of time where the entity would not be a basic religious charity. During this period, *the entity would be subject to additional obligations under the ACNC Act, including financial reporting requirements and the requirement to comply with the governance standards. These obligations currently apply more broadly to registered entities other than basic religious charities under the ACNC Act.*
>
> …
>
> 3.37 If a basic religious charity has been identified as being involved in the abuse of an applicant and does not join the Redress Scheme by the relevant day, the entity will lose its basic religious charity status.
>
> 3.38 Therefore, *the obligations set out in paragraph 3.34 would apply to the entity from the day the entity loses its basic religious charity status. Additionally, the entity would need to answer financial information questions in its annual information statement to the ACNC and for medium and large registered entities, provide reviewed or audited financial reports.*

[1] Organisations with these structures fall outside the definition of 'basis religious charity': see ACNC Act s 205.35(2).

> 3.39 The requirement to comply with the governance standards will include the new governance standard that is proposed to be made for the purposes of subsection 45-10(1) of the ACNC Act, once that standard commences.
>
> 3.40 It is proposed that the new governance standard will require registered entities to take reasonable steps to become a participating non-government institution in the Redress Scheme in specified circumstances. *Failure to comply with any of the governance standards means that a registered entity is not entitled to be registered under the ACNC Act, which could result in the ACNC Commissioner revoking the entity's registration or taking enforcement action under Chapter 4 of the ACNC Act.*

The accompanying Statement of Compatibility with Human Rights did not identify subjecting an additional cohort of faith groups to the ordinary governance and transparency standards applicable to other charities and to the ACNC's regulatory enforcement powers as implicating religious freedom rights protected by international human rights law.

Similarly, in its consideration of the Bill, the Senate Standing Committee for the Scrutiny of Bills (*Scrutiny Digest 2 of 2021*) did not identify subjecting an additional cohort of faith groups to the ordinary governance and transparency standards applicable to other charities and to the ACNC's regulatory enforcement powers as implicating religious freedom rights.

In other words, the regulatory consequences for faith groups of the effects of Recommendation 7.1 are not new. The effect of Recommendation 7.1 is to apply those regulatory consequences to all, rather than only some, ACNC-registered faith groups.

Faith groups in the ACNC regulatory scheme

Those faith groups that meet the definition of a basic religious charity and that choose to register with the ACNC are exempt from: answering financial information questions in the Annual Information Statement, submitting annual financial reports (regardless of its size), and complying with the ACNC Governance Standards.

However, basic religious charities are not exempt from all other ongoing obligations of ACNC-registered charities including submitting an Annual Information Statement and complying with the External Conduct Standards.

Accordingly:

- Some faith groups are not registered with the ACNC and therefore not subject to the ordinary governance and transparency standards applicable to ACNC-registered charities and the ACNC's regulatory enforcement powers.
- Some faith groups that are ACNC-registered charities do not meet the definition of 'basic religious charity' due to their organisational structure or due to not participating in the National Redress Scheme and are therefore subject to the ordinary governance and transparency standards applicable to ACNC-registered charities and the ACNC's regulatory enforcement powers.
- Some faith groups that are ACNC-registered charities are 'basic religious charities' and are subject to limited governance and transparency standards and limited regulatory enforcement powers.

The free exercise clause of section 116 of the *Australian Constitution*

Section 116 of the *Constitution*, among other things, prohibits federal laws "for … prohibiting the free exercise of any religion". I refer to this as the free exercise clause.

The High Court's current interpretation of section 116, including the free exercise clause, holds that only a law with the express purpose of doing any of the things prohibited by the section will be invalid. A law with some other purpose that in fact prohibits the free exercise of religion (or in fact does any of the other things prohibited by the section) is not invalid.

On this basis, none of the original definition's effect, the 2020 amendments or Recommendation 7.1 could contravene section 116 because none of them have the express purpose of prohibiting the free exercise of any religion.

However, it is most unlikely that the High Court will maintain this interpretation if a case involving section 116 comes before it again.[2] More likely is that the High Court will adopt the same methodology it uses in respect of other constitutionally-protected freedoms like political communication and interstate trade and commerce. That methodology requires assessing whether the law in question burdens the relevant freedom and, if it does, assessing whether the law adopts a proportionate means of pursuing a legitimate purpose.

It can be acknowledged that Recommendation 7.1 has a legitimate purpose, in the sense of having a purpose that is not the purpose of prohibiting the free exercise of religion. That purpose is expressed in the terms of Recommendation 7.1 as being ensuring "all charities registered with the Australian Charities and Not-for-profits Commission have the same governance obligations and reporting requirements proportionate to their size." Levelling playing field has been accepted by the High Court as a legitimate purpose in respect of other constitutionally-protected freedoms.[3]

The consequence of Recommendation 7.1 for basic religious charities is that they will be placed on a level playing field with other ACNC-registered faith groups and non-religious ACNC-registered groups.

Specifically, there are two key practical impacts of Recommendation 7.1:

1. All, rather than only some, ACNC-registered faith groups are subject to the ordinary governance and transparency standards applicable to other charities, and
2. All, rather than only some, ACNC-registered faith groups are subject to the ACNC's regulatory enforcement powers, including the power to suspend or remove a charity leader.

Recommendation 7.1 has no impact for faith groups that choose not to register with the ACNC.

[2] Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Australian Constitution' (2016) 44(3) *Federal Law Review* 505.
[3] See, eg, *Unions NSW v New South Wales* (2019) 264 CLR 595.

Does subjecting all, rather than only some, ACNC-registered faith groups to the ordinary governance and transparency standards applicable to other charities contravene section 116 of the Constitution?

Justice Gageler (now Chief Justice) has explained that in determining whether a law burdens a constitutionally-protected freedom requires asking (substituting in the freedom in issue here):

> nothing more complicated than [whether] the effect of the law is to prohibit, or put some limitation on, the [exercise of any religion].
>
> The effect of a law on [the exercise of any religion] is in turn gauged by nothing more complicated than comparing: the practical ability of a person or persons to [exercise any religion] with the law; and the practical ability of that same person or those same persons to [exercise any religion] without the law.[4]

That methodology can be applied relatively straightforwardly here. Following on what from I noted above, faith groups fall within three categories under current legislative arrangements:

1. Faith groups with *no* ACNC obligations (because they not registered with the ACNC).
2. Faith groups with *minimal* ACNC obligations (because they are ACNC-registered charities that meet the definition of 'basic religious charity').
3. Faith groups with *full* ACNC obligations (because they are ACNC-registered charities but are excluded from the definition of 'basic religious charity').

There are multiple faith groups currently in each category: examples in the second and third categories can be seen by using the ACNC website's 'find a charity' search function.

There is no evidence to suggest that being subject to no, minimal or full ACNC obligations has any impact, or puts any limitation, on the ability of faith groups or individuals to freely exercise any religion. In 2018, the Treasury's *Strengthening for Purpose: Australian Charities and Not-for-Profits Commission Legislation Review 2018* said: "it is noted that religious registered entities which are not BRCs (for example, incorporated congregations) have seemingly been able to meet their compliance obligations under the governance standards without facing an onerous or unnecessary burden." Indeed, if there had be problems in practice it is likely that a legal challenge would have eventuated and that has not happened.

Accordingly, it is difficult to see how removing the minimal obligations category, which would be the practical effect of Recommendation 7.1, would have any practical impact on the ability of faith groups or individuals to freely exercise any religion.

Accordingly, I do not think this impact of Recommendation 7.1 is problematic in terms of the free exercise clause of section 116 of the Constitution.

[4] *Brown v Tasmania* (2017) 261 CLR 328, [180]-[181].

Does subjecting all, rather than only some, ACNC-registered faith groups to the ACNC's regulatory enforcement powers, including the power to suspend or remove a charity leader contravene section 116 of the Constitution?

In respect of the ACNC's regulatory power to suspend or remove a member of the leadership of an ACNC-registered charity, there are two categories of faith group under current legislative arrangements:

1. Faith groups not subject to this power (because either they are not ACNC-registered charities or they are a basic religious charity).
2. Faith groups subject to this power (because they are ACNC-registered charities that are excluded from the definition of basic religious charity).

Recommendation 7.1 would have the practical effect of putting more faith groups into the second category.

Faith groups currently subject to this power do not seem to have experienced any problems. It appears from my internet searches that the power to suspend or remove a charity leader has never been exercised in respect of a faith group (possibly because an occasion for the exercise of that power has never arisen).

However, it needs to be emphasised that whereas the governance and transparency obligation considered above is active, ongoing and *experienced in practice* by faith groups (enabling the easy comparative exercise), the suspension and removal power does not appear to have been experienced in practice by a faith group currently subject to it.

The comparison exercise therefore must, at least in part, be undertaken at the level of principle. There is at least a theoretical limitation on the exercise of religion here: choosing faith leaders is undoubtedly a core part of the exercise of religion. For faith groups in one category, a government agency can in narrow circumstances suspend or remove a certain kind of organisation leader. For faith groups in the other category, that is not possible.

But the extent of the burden or limitation is not great. First, the power to suspend or remove is exercisable only in very narrow circumstances. Secondly, the power can be circumvented (and the leader thereby retained) if a faith group chooses not to be registered with the ACNC. Thirdly, the power appears to be not unique to the ACNC system:[5] a similar (but not identical) power to remove a faith group leader is vested in ASIC under the Corporations Act. ASIC has power to disqualify a person from managing a company limited by guarantee, which is a form of organisational structure adopted by some faith groups.

The question then arises whether this narrow burden or limitation is proportionate to the pursuit of Recommendation 7.1's legitimate purpose. On one view: the existing power to suspend or remove has never posed a problem in practice and therefore extending the power to apply to all, rather than only some, ACNC-registered faith groups could be seen as being a proportionate means of pursuing a legitimate purpose. On another view: a potentially less restrictive means of achieving the legitimate purpose might be to exclude faith groups

[5] The High Court has emphasised that the effect of a law on a constitutionally-protected freedom must be understood in the broader context of other laws operating on the same subject-matter: see *Farm Transparency International v New South Wales* [2022] HCA 23.

from the leader suspension and removal power (but in all other respects subject them to the ordinary ACNC obligations and regulatory powers); but this would require weakening the existing legislative regime about which there appears to be no problems in practice even though it applies to some faith groups.

I do not think this question requires resolution for the purposes of the Productivity Commission's Recommendation 7.1.

Significantly, whatever might be the real or hypothetical problems with the removal and suspension power they are not a problem created by or arising from Recommendation 7.1. The issue arises already under the current legislative regime in respect of some ACNC-registered faith groups. For this reason, I do not think this issue should be seen as an obstacle to proceeding with Recommendation 7.1.

There is a further reason I do not think this issue should be seen as an obstacle. If there is a constitutional problem here the consequence would not be to invalidate the whole of the relevant section of the ACNC Act. The practical consequence would likely be only that the suspension and removal power would be found not to apply to faith groups (a process the High Court sometimes refers to as 'disapplication').

Conclusion

I do not think that constitutional religious freedom concerns provide a basis for abandoning Recommendation 7.1.

The effect of Recommendation 7.1 is to apply the ordinary governance and transparency standards applicable to other charities and the ACNC's regulatory enforcement powers to all ACNC-registered faith groups rather than to only some ACNC-registered faith groups as is the situation today.

I would suggest that your final report should emphasise that many faith groups are already subject to what is proposed for many years and have not experienced any problems in practice.

I trust this submission is of assistance.

Yours sincerely

Professor Luke Beck