

**SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION
CONCERNING THE
REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW) UNLAWFUL
CONDUCT CONSULTATION PAPER (24 MAY 2025)**

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1. This submission is made to the New South Wales Law Reform Commission ('NSWLRC'). It is made in respect of the Commission's *Review of the Anti-Discrimination Act 1977 (NSW) Unlawful Conduct Consultation Paper* of 24 May 2025 ('the Paper'). It is made in my personal capacity. This submission focusses on the human rights implications of the various matters considered by the NSWLRC in the Paper and addresses the following matters:

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Protecting Religious Bodies from Discrimination

2. The NSWLRC proposes that religious belief and activity should receive protection from discrimination in New South Wales law. Under international law, jurisdictions should protect the ability of religious groups to be litigants, including corporations. The *International Covenant on Civil and Political Rights 1966*² (ICCPR) requires Australia to respect and to ensure to individuals the right to manifest their beliefs in community with others, and to ensure such communities are protected against discrimination on religious grounds. This requirement entails granting religious groups the ability to pursue legal measures to preserve the enjoyment of these rights by their member. Consistent with its recommendation in 1999, the NSWLRC should recommend that religious bodies should receive protection from religious discrimination.³ Associate Professor Alex Deagon and I have composed an analysis of the relevant human rights law that supports such a conclusion, available at: Mark Fowler and Alex Deagon, ‘Recognising Religious Groups as Litigants: An International Law Perspective’ (2024) *Laws* 13, 16, here: [Recognising Religious Groups as Litigants: An International Law Perspective](#)

Religious Schools

3. The NSWLRC devotes two paragraphs to the human rights law concerning freedom of religion or belief. Having set out the orthodox summary of Article 18 of the ICCPR, it concludes its comments with the forthright claim that ‘United Nations guidance explains that freedom of religion or belief should never be used to justify ends that are inconsistent with any human rights instruments.’⁴ For those unfamiliar with human rights law, this could convey the notion that religious freedom is obliged to submit in the face of any countervailing right. This quote, extracted out of context, omits Shaheed’s immediately following recognition of ‘the overlap between the right to freedom of religion or belief and

² *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976).

³ NSWLRC, *Review of the Anti-Discrimination Act 1977*, Report 92 (1999), citing section 15(2) of the Bill proposed by the NSWLRC as an annexure to that Report.

⁴ NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW) Unlawful Conduct Consultation Paper* (24 May 2025) (‘Paper’) 131 [7.12].

the right to non-discrimination in the context of gender'.⁵ Shaheed's point is simply an affirmation of long-standing human rights jurisprudence: religious freedom cannot undermine human rights instruments because it is itself a human right, and is exercised within the context of the indivisible and equal status of all rights, according to the strict mechanisms set out in those instruments for limitation of religious exercise when it comes into conflict with other human rights.

4. Turning the religious schools in particular, the Paper identifies the provisions contained in the Victorian *Equal Opportunity Act 2010* (Vic) (EOA) as a potential model for reform:

Private educational authorities can discriminate in work ... Some think these exceptions are too broad. They think they should either be removed or changed so they apply more narrowly. Some argue there should be safeguards in place before an exception can apply. For instance, the ADA could require duty holders to show the discrimination **is reasonable and proportionate**. ... some say it should only apply if the teaching, observance or practice of religion is an **inherent requirement** of the role or a genuine occupational requirement.⁶

The Victorian provisions do not accord with the relevant human rights law. My lengthy analysis establishing such may be found in Mark Fowler, 'The Position of Religious Schools Under International Human Rights Law' (2023) 2 *The Australian Journal of Law and Religion* 36, a copy of which may be found here: [Volume-2-Fowler.pdf](#)

5. By way of brief summary, the right to establish and maintain private religious schools is protected under various United Nations instruments. Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

⁵ A Shaheed, Report of the Special Rapporteur on Freedom of Religion or Belief: Gender-Based Violence and Discrimination in the Name of Religion or Belief, UN Doc A/HRC/43/48 (24 August 2020) [60].

⁶ NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW) Consultation Paper: Unlawful Conduct Community Summary* (24 May 2025) ('Summary Paper') 24.

Article 13(4) provides a guarantee that individuals and bodies may establish private educational institutions:

No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The *United Nations Universal Declaration of Human Rights* (UDHR) simply protects the prior right of parents to choose the kind of education that shall be given to their children.

6. Article 18(4) of the *International Covenant on Civil and Political Rights* (ICCPR), which has been ratified by Australia provides:

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.

This right also protects the right to establish private religious schools. In his commentary on the ICCPR Nowak concludes that '[w]ith respect to the express rule in Art.13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'⁷ As further discussed below, the jurisprudence of the European Court of Human Rights (ECHR), has confirmed that the right under Article 2 of the First Protocol to the *European Convention on Human Rights* (which is closely aligned to Article 18(4) establishes a human right to found and maintain private schools.

7. In *Delgado Páez v Colombia* the UNHRC considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment due to his advocacy of 'liberation theology'. The UNHRC stated:

With respect to Article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant,

⁷ Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 443.

allow the Church authorities to decide who may teach religion and in what manner it should be taught.⁸

Similarly, the UNHRC found no breach of Article 19. The Committee's view would support the assertion that religious institutional autonomy under Article 18 permits the exercise of discretion over staff and teaching by religious bodies in the context of education.

8. The *Convention on the Rights of the Child*, also ratified by Australia, requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents ...'.⁹ The right of the child to 'freedom of thought, conscience and religion' is explicitly protected in Article 14 of the Convention.¹⁰ Further, it requires States to respect the 'rights and duties of parents ... to provide direction to the child in the exercise of his or her right.'¹¹ This also includes in the substantive content of education the development of respect for the child's parents, and the child's own cultural identity, language, and values.¹²
9. It is therefore clear that international human rights law protects freedom of religion for both adults and children. The right to establish private schools is also protected by international human rights law that Australia has ratified. To deny the discretion of a private faith-based school to ensure that those persons appointed to its leadership, staff and volunteer roles also share its faith is to remove the ability to maintain the unique religious identity of that school. Such a proposal is thus a breach of the right to establish private religious schools.
10. Furthermore, in the context of faith-based schools, it is also relevant to note that the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom, 'to

⁸ *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990) [5.7].

⁹ *Convention on the Rights of the Child* (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2) ('CRC').

¹⁰ *Ibid* art 14(1).

¹¹ *Ibid* art 14(2). See also art 5, which contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents ... to provide ... appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.'

¹² Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 243.

establish and maintain appropriate charitable or humanitarian institutions'.¹³ The establishment and maintenance of such faith-based schools in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers. This instrument was declared “an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986*” by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993, thus enabling the making of a complaint alleging a breach of these principles to the Australian Human Rights Commission.

11. Former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has offered the following comments in relation to the community aspect of religious freedom and the right to determine appointments to critical roles:

57. Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.¹⁴

The Special Rapporteur has emphasised that these principles also apply to religious schools, noting that limitations on the ability to incorporate private religious schools:

¹³ 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.

¹⁴ UN General Assembly, *Elimination of all Forms of Religious Intolerance*, 7 August 2013, A/68/290, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/421/91/PDF/N1342191.pdf?OpenElement>

may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions – a right explicitly enshrined in international human rights law as an integral part of freedom of religion or belief.¹⁵

The Receipt of Tax Exemption or Government Funding is Irrelevant to Exceptions in Anti-Discrimination Law

12. In its discussion on religious educational institutions the NSWLRC states: ‘There is also a view that religious schools should be subject to secular laws as they receive public funding and tax benefits.’¹⁶ This view is not supported by the case law and has been rejected in other jurisdictions considering comparable questions of religious liberty. A similar contention was recently put by the Productivity Commission in its Report on Philanthropy.¹⁷ Observing that ‘[r]egistration as a charity is not compulsory, although it may be a prerequisite for accessing certain benefits, such as an income tax exemption’ the Productivity Commission argued that ‘[i]n return for accessing such benefits, there is a reasonable requirement to comply with regulatory obligations.’¹⁸ As a result, the Commission recommended that it is reasonable to grant the Australian Charities and Not-for-profits Commissioner the power to suspend, remove and appoint religious leaders to registered charities. On this view, the only option available to a religious body who objected to such a power is to withdraw from the ACNC regime, and bear the concomitant loss of income tax exemption. A similar reasoning underpins the view recorded by the NSWLRC that ‘religious schools [and bodies] should be subject to secular laws as they receive public funding and tax benefits’,¹⁹ which in the case of the NSWLRC is a reference to prohibitions on discrimination. If a religious school objected to limitations on its ability to operate in accordance with its religious ethos, it may elect to withdraw from the provision of education. That is not a remote possibility, only last year

¹⁵ UN General Assembly, *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt*, 22 December 2011, A/HRC/19/60 [47].

¹⁶ NSWLRC Paper (n 4) 144, [7.77].

¹⁷ Productivity Commission, *Future Foundations for Giving* (Inquiry Report, Report no. 104, 10 May 2024) (‘Final Report’).

¹⁸ *Ibid* 239.

¹⁹ NSWLRC Paper (n 4) 144, [7.77].

the Catholic Archbishop raised the prospect of closing schools if exemptions for religious schools were to be removed.²⁰

13. The Productivity Commission set out a number of contentions in support of its claim that ‘[i]n return for accessing such benefits, there is a reasonable requirement to comply with regulatory obligations.’²¹ The consequences of the obligations to protect religious freedom arising under human rights law for contemporary taxation reform efforts are poorly understood. Governments are increasingly having to navigate competing claims as to the obligations that entail in the interface between these two domains. To assist the NSWLRC’s consideration, in this submission I adopt the Productivity Commission’s report as an applied case study in the implications of human rights religious freedom protections for taxation regimes. I explore these obligations by analysing the various claims made by submitters to the Productivity Commission and the contentions of the Productivity Commission offered in support of its recommendations.²²
14. In support of its argument, the Productivity Commission relied on the submissions of Luke Beck and Pauline Ridge.²³ Ridge contends that ‘[c]ourts 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.’²⁴ Contrary to Ridge’s submission, however, a close reading of the relevant authorities shows that judicial treatment of the issue is not so unqualified and that in certain circumstances the removal of tax exemption will indeed infringe the freedom of religion or belief. Further, the very notion that receiving a benefit (here the tax implications that precipitate recognition as a religious body) should entail a concomitant sacrifice of religious free exercise should and can be questioned. The issue

²⁰ Joe Kelly ‘“Crunch point” on religious freedom: Catholic schools and hospitals may close, warns Anthony Fisher’ *The Australian* (31 May 2024) <https://www.theaustralian.com.au/nation/politics/crunch-point-on-religious-freedom-catholic-schools-and-hospitals-may-close-warns-anthony-fisher/news-story/26716ce977b7c9ffef9034cedc02bd0f>

²¹ Productivity Commission, Final Report (n 17) 239.

²² The following discussion has benefitted from the comments of Nicholas Aroney, Joel Harrison and Nathan Campbell.

²³ Luke Beck Submission No 742 to Productivity Commission’s Inquiry into Philanthropy (23 February 2024) 3–4, 6; Pauline Ridge, Submission No 732 to Productivity Commission’s Inquiry into Philanthropy (23 February 2024) 4.

²⁴ Ridge (n 23) 3. The same claim is made in Pauline Ridge, ‘When is the Advancement of Religion Not a Charitable Purpose?’ (2020) 6 *Canadian Journal of Comparative and Contemporary Law* 360, 389.

of whether a reform that would deny financial resources to a religious body has human rights implications has salience for the proposals being considered by the NSWLRC. To illustrate, in 2023 the Australian Greens made the commitment to remove funding from faith-based schools that rely upon discrimination exemptions.²⁵ Could such a policy infringe human rights protections?

15. Ridge cites two authorities in support her contention: a decision of the Supreme Court of the United States (*Bob Jones University v United States*) and a decision of the Charity Commissioners for England and Wales.²⁶ In *Bob Jones University*, the Court considered whether revoking the tax exempt status of a religious college that was applying a racially discriminatory admissions policy was contrary to the free exercise clause of the First Amendment. Applying the then-longstanding First Amendment ‘compelling governmental interest’ test, the Court determined that the ‘overriding interest in eradicating racial discrimination in education’ was sufficient to justify the ‘burden’ on freedom of religion that a ‘denial of tax benefits’ placed on the religious claimant.²⁷ Essential to the Court’s reasoning was that the removal of the tax exemption placed a burden on free exercise. However, that burden did not outweigh the competing governmental interest of *compelling* import, namely the profound and long-standing policy of prohibiting racial segregation and discrimination in public education, such that there could be no doubt that ‘racial discrimination in education violates deeply and widely accepted views of elementary justice.’²⁸ The decision is thus a standard instance of what was then orthodox First Amendment jurisprudence. It purposely allows scope for other *non-compelling* governmental interests to be outweighed by the constitutional interest in protecting the right to the free exercise of religion, including in relation to the burden that would be imposed by the removal of a tax exemption. This is consistent with the earlier decision of the Supreme Court in *Walz v Tax Commission of City of New York* (*Walz*), which more directly concerned the question of tax exemptions under the First Amendment.²⁹ In that case, Burger CJ recognised that eliminating such exemptions could

²⁵ ‘Education’ *greens.org.au* (Web Page, undated) <https://greens.org.au/policies/education>

²⁶ *Bob Jones University v United States*, 461 US 574 (1983) and *Application For Registration as a Charity by the Church of Scientology: Decision of the Charity Commissioners for England and Wales* (17 November 1999).

²⁷ *Bob Jones University* (n 26) 603 (Burger CJ).

²⁸ *Ibid* 592.

²⁹ 397 US 664 (1970).

conflict with the demands of the free exercise clause.³⁰ The United States authorities thus provide no conclusive support for the proposition that a denial of tax benefits cannot infringe the free exercise clause of the First Amendment.

16. A similar conclusion was reached in Canada in *Canada Without Poverty v Attorney General Canada*.³¹ Canada Without Poverty appealed a Canada Revenue Agency (CRA) decision that its 'political activities' ran afoul of the requirement in s 149.1(6.2) of the *Income Tax Act*³² that a charity devote 'substantially all of its resources to charitable activities'. The CRA's interpretation of this requirement held that no greater than 10% of the overall activities of a charity must be devoted to 'political activities', regardless of whether those activities were ancillary to a charitable purpose.³³ The appellant challenged the decision in order to avoid deregistration as a charity, and loss of its income tax exempt status. In overturning the CRA decision, the Ontario Superior Court of Justice 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"'.³⁴ The burden on free exercise resulting from the cap imposed by the CRA limiting how much advocacy a group could undertake, which if exceeded would lead the group to lose its tax exemption, impermissibly breached the *Canadian Charter of Rights and Freedoms*. In so holding, the Court accepted that loss of tax exemption could give rise to a 'burden' for the purposes of its Charter analysis.
17. Ridge's second authority for her argument concerned a decision not to register a religious body as a charity.³⁵ Reviewing the then existing ECtHR jurisprudence the Charity Commissioners for England and Wales concluded that Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁶ (concerning freedom of thought, conscience and religion) 'is principally concerned with

³⁰ Ibid 669 (Burger CJ); Notes, 'Constitutionality of Tax Benefits Accorded Religion' (1949) 49 *Columbia Law Review* 968.

³¹ *Canada Without Poverty v Attorney General Canada* 2018 ONSC 4147.

³² *Income Tax Act* RSC 1985, c.1 (5th Supp.)

³³ Canada Revenue Agency *Policy Statement CPS-022*, Political Activities interpreting *Income Tax Act*, RSC 1985, c. 1 (5th Supp), s 149.1(6.2) read in conjunction with s 149.1(f).

³⁴ *Canada Without Poverty* (n 31) [44].

³⁵ *Application For Registration as a Charity by the Church of Scientology: Decision of the Charity Commissioners for England and Wales* (17 November 1999).

³⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

protecting the manifestation of a person's religion or belief. To recognise or not recognise charitable status by registration did not in the Commissioners [sic] view appear to interfere with the manifestation of a person's belief.³⁷ However, that decision was delivered prior to the implementation of the *Human Rights Act 1998* (UK), in circumstances where the European Convention was yet to apply domestically. Subsequent ECtHR decisions have placed the ongoing authority of the Commissioner's 1999 decision in serious question.

18. The ECtHR has held that a religious institution cannot assert Article 9 of the European Convention to secure a *new* special tax status.³⁸ However, this does not mean that the *revocation* of tax exempt status would not breach free exercise protections. In *The Church of Jesus Christ of Latter-Day Saints v the United Kingdom*, the ECtHR considered that 'in certain circumstances issues concerning the operation of religious buildings, including expenses incurred as a result of the taxation status of such buildings, are capable of having an impact on the exercise of the right of members of religious groups to manifest religious belief'.³⁹ This principle applies even where registration for the tax exemption is voluntary, as was the case under the relevant UK legislation.⁴⁰ In linked cases decided in 2013, the ECtHR also upheld the claim of three applicants that a law requiring them to pay tax on direct donations infringed their right to manifest and exercise their freedom of religion, contrary to Article 9. The ECtHR found a violation of Article 9 in all three cases, on the basis that direct donations were a major source of funding of religious bodies and that taxing them might have an impact on the ability of their members to conduct religious activities.⁴¹

³⁷ 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.

³⁸ *Association Sivananda de Yoga Vedanta v France* (European Court of Human Rights, Application No 30260/96 16 April 1997).

³⁹ *The Church of Jesus Christ of Latter-Day Saints v the United Kingdom* (European Court of Human Rights, Application No 7552/09 4 March 2014) [30] citing *Association Les Témoins de Jéhovah v France*, [2011] Eur Court HR 48-54. See also European Court of Human Rights Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion (31 August 2024) available at https://ks.echr.coe.int/documents/d/echr-ks/guide_art_9_eng

⁴⁰ The *Local Government Finance Act 1988* (UK) required the taxpayer to apply for exemption from the payment of rates.

⁴¹ *Église Évangélique Missionnaire and Salaûn v France* (2013) Eur Court HR; *Association Cultuelle du Temple Pyramide v France*, (European Court of Human Rights, Application No 50471/07 31 January 2013); *Association des Chevaliers du Lotus d'Or v France*, (European Court of Human Rights, Application no 50615/07 31 January 2013); Kerry O'Halloran, *State Neutrality: The Sacred, the Secular and Equality Law* (Cambridge University Press, 1st ed, 2021) 122, 338; Frank Cranmer '[Taxation and religious organisations](#):'

19. Turning to the United Nations' human rights framework, the specific question of whether a burden imposed by the removal of tax exemption or of other forms of tax endorsement is permissible under free exercise protections has not arisen within the jurisprudence of the United Nations Human Rights Committee. However, various United Nations organs have expressed views that are salient to the question of whether the imposition of taxation on a religious institution can be consistent with human rights. In *Waldman v Canada*, the UNHRC held that the grant of public funding by Ontario to Roman Catholic schools and refusal of such funding to schools of other religions amounted to differential treatment that was not reasonable and objective under Article 26 of the *International Covenant on Civil and Political Rights* and thus amounted to discrimination against the Jewish author of the complaint (and others).⁴² The UNHRC observed that the ICCPR 'does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.'⁴³ The decision stands for authority that where a State Party affords privileges to one religion, it contravenes the right to equality under Article 26 where it withholds equivalent benefits to other religious institutions. Appropriately, the United Nations Special Rapporteur on Freedom of Religion or Belief recently drew upon the decision to assert the importance of State Parties ensuring neutral non-discriminatory treatment between religions in the affording of tax exempt status.⁴⁴
20. The principle of non-discrimination between religious institutions in the grant of funding and in the recognition of income tax exemption also enlivens non-establishment principles. The 'complementary' relation between the free exercise and the establishment clauses has been much vaunted in US jurisprudence.⁴⁵ There the establishment clause has direct impact on the tax treatment of religious institutions. In

[three French cases at the ECtHR](https://lawandreligionuk.com/2013/02/06/taxation-and-religious-organisations-three-french-cases-at-the-ecthr/)' Law & Religion UK (Web Page, 06 February 2013)

<https://lawandreligionuk.com/2013/02/06/taxation-and-religious-organisations-three-french-cases-at-the-ecthr/>

⁴² Human Rights Committee, Merits: Communication No 169/1996 UN Doc CCPR/C/67/D/694/1996 (3 November 1999) [10.5]-[10.6] ('*Waldman v Canada*'), [10.5]-[10.6].

⁴³ *Ibid* [10.6].

⁴⁴ Nazila Ghanea, *Preliminary Observations and Recommendations of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/52/38 (17 October 2024) 3.

⁴⁵ *Kennedy v Bremerton School District* 597 US 507 citing *Everson v Board of Education of Ewing*, 330 U. S. 1, 13, 15 (1947).

Walz the Supreme Court ruled that neutral tax exemption between religious institutions ‘tends to complement and reinforce the desired separation insulating each from the other’.⁴⁶ Any favouring of one religious denomination over another would however be problematic. As Burger CJ stated: ‘Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.’⁴⁷ Within Australia this establishment principle finds its equivalence in the seminal decision of the High Court in the *DOGS Case*.⁴⁸

21. As the NSWLRC notes, many independent schools within NSW are not faith-based. All schools, whether faith-based or secular, seek to employ staff that are able to further their particular pedagogical approach. The Steiner system of schools seeks to employ teachers that share its particular educational vision. In a similar way, faith-based schools seek to employ staff that can contribute to the furtherance and maintenance of their particular ethos, which in their case assumes a religious expression. The removal of exemptions for religious schools in a manner that limits their ability to employ staff that manifest their religious beliefs could then amount to a form of religious discrimination, where similar limitations on the ability to employ staff are not imposed on similarly placed non-faith based institutions. Where sufficient evidence of that privileging can be marshalled, a litigant would be armed to assert that the removal of exemptions contravenes establishment principles by favouring certain schooling systems over religious schooling systems.
22. Comparative case law tends then to indicate that the loss of a tax status for a religion-based charity can have both free exercise and establishment implications. Given the above analysis of the implications of human rights law for the exemptions afforded to religious schools in discrimination law, religious schools should continue to be afforded the ability to manifest the religious beliefs of their associated adherents by preferring to employ persons who share and model their faith. In this way, the above analysis of the human rights implications of reforms that impact on tax treatment of religious bodies contests the claim recorded by the NSWLRC that ‘religious schools [and bodies] should

⁴⁶ *Walz v Tax Commission of City of New York*, 397 US 664, 676 (Burger CJ).

⁴⁷ *Ibid* 676-7 (Burger CJ).

⁴⁸ *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559.

be subject to secular laws as they receive public funding and tax benefits'.⁴⁹ The analysis of the Productivity Commission's comparable contention has served to illustrate one instance of the complementarity between free exercise and non-establishment principles. Retaining exceptions for religious schools would simultaneously acquit both principles.

Should Faith-Based Charities be Exempt for the Purposes of Anti-Discrimination Law?

23. This submission now turns to consider the question of whether limitations may be placed upon faith-based charities in their supply of goods to the public. The NSWLRC poses the following question:

Question 7.2: Other acts and practices of religious bodies

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

The Consultation Paper raises the prospect that a differing regime should apply to faith-based charities from that which applies to religious bodies:

Some people are particularly concerned that the exception could be accessed by **religious bodies that provide social services**. Religious organisations often provide essential services. Many receive public funding to deliver them. Some people think it's unfair to allow such organisations to discriminate and argue it denies equal access to services.

Others consider religious bodies need this exception so they can act according to their faith.

Some say there are ways to limit the exception's scope, while still respecting the freedom of religion. For example, some options could include:

- limiting the exception to certain attributes only, for instance, to only allow discrimination based on religious belief or activity, or other specific attributes

⁴⁹ NSWLRC Paper (n 4) 144, [7.77].

- limiting the exception to discrimination that is **reasonable or proportionate**, or
- replacing the wide exception with targeted exceptions that are appropriate to specific areas of public life.⁵⁰

24. This contemplates the application of the Victorian regime.⁵¹ A similar distinction is flagged for faith-based adoption services:

Some argue it's important for faith-based adoption agencies, because same sex adoption is incompatible with some religious views about child raising. Others argue that faith-based adoption services shouldn't be allowed to discriminate if they receive public funding to provide these services.⁵²

Is the NSWLRC Analysis of Human Rights Law Correct?

25. In the following section I set out the reasons why the NSWLRC's analysis fails to accurately state the relevant international human rights law. The NSWLRC makes the unadorned claim that '[t]he right to non-discrimination in international law includes the right to have equal access to public services'.⁵³ Immediately after this claim the NSWLRC states: 'some preliminary submissions suggested faith-based bodies should not be permitted to discriminate when providing public services or receiving public funding.'⁵⁴ The sole citation provided for the NSWLRC's claim is the *International Covenant on Civil and Political Rights* Article 25(c).⁵⁵ However, Article 25(c) concerns the right to *serve in the public (governmental) service*. It has no implications for any right to receive services from private entities. Article 25(c) states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ...

(c) To have access, on general terms of equality, to public service in his country.

⁵⁰ NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW) Consultation Paper: Unlawful Conduct Community Summary* (May 2025) ('Summary') 23.

⁵¹ *Equal Opportunity Act 2010* (Vic) s 82B.

⁵² NSWLRC Summary (n 50) 24.

⁵³ NSWLRC Paper (n 4) 138 [7.49].

⁵⁴ *Ibid.*

⁵⁵ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 25(c).

26. As the UNHRC has clarified: ‘Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions.’⁵⁶

Are Faith-based Charities Religious Bodies?

27. The next question that calls for consideration is whether a faith-based charity should be considered to be a religious body at law? Having considered this issue, I will then turn to the question of whether such bodies can refuse supplies to the public. I will then also consider the question of supplies made by individual businesses. Article 18(3) of the *International Covenant on Civil and Political Rights 1966*⁵⁷ provides that the ‘[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.’ Article 18 extends to both individuals and corporate bodies.⁵⁸ The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Religious Declaration)* provides that the freedoms protected by Article 18 include the right ‘to establish and maintain appropriate charitable or humanitarian institutions’.⁵⁹ In 2005 the UNHRC cited Article 6(b) in its finding that Sri Lanka had breached Article 18 by refusing the incorporation of an Order of Catholic nuns whose activities included providing ‘assistance to others’ as a ‘manifestation of religion and free expression’.⁶⁰ In its country reviews, the office of the United Nations Special Rapporteur on freedom of religion or belief has noted that Article 6(b) extends to ‘religious schools, seminaries, hospitals and orphanages’;⁶¹ ‘health or educational matters [and] cultural ... social and hospital functions’⁶² and ‘humanitarian

⁵⁶ Human Rights Committee, *General Comment CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* Adopted at the Fifty-seventh Session of the Human Rights Committee, on 12 July 1996, 2 CCPR/C/21/Rev.1/Add.7, General Comment No. 25 [23].

⁵⁷*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *ibid*.

⁵⁸ *Ibid*. See also Mark Fowler and Alex Deagon, ‘Recognising Religious Groups as Litigants: An International Law Perspective’ (2024) 13(2) *Laws* 16.

⁵⁹ 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.

⁶⁰ *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka v Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).

⁶¹ UN Doc, E/CN.1/1994/79 (1994) p. 113, para 79.

⁶² UN Doc, E/CN.4/1999/58/Add.2 (1998) p. 28-30, paras. 115-117 (Viet Nam).

activities’,⁶³ asserting that countries that do not authorise ‘religious minorities ... to extend their religious activities into social, health or educational matters’ breach of international law.⁶⁴

28. As I have previously argued, similarly the European Court of Human Rights ‘has not seen fit to drive a wedge between religious bodies and their other charitable emanations.’⁶⁵ In *Rommelfanger v Germany*⁶⁶ a faith-based hospital was permitted to sanction staff that made public statements on abortion contrary to its beliefs. In *Siebenhaar v Germany*⁶⁷ a day-care centre run by the German Protestant church could act lawfully in dismissing a member of a differing religious body in order to maintain the credibility of the church in the eyes of the general public and parents and to avoid the risk that children would be influenced. In eschewing the distinction between secular and religious roles when determining whether an employee may be subject to a heightened degree of loyalty,⁶⁸ the Court has instead conducted a proportionality analysis that looks to the specific roles assigned to an employee, and the proximity between the applicant’s activity and the proclamatory mission of the religious body.⁶⁹ The few occasions in which the Court has not upheld institutional autonomy include a church organist who was not able to locate employment elsewhere⁷⁰ and where there had been a failure of fundamental natural justice.⁷¹

29. A similar refusal to distinguish between religious bodies and faith-based charities in discrimination law pervades the jurisprudence of the Supreme Court of the United States. Although its recent decision in *Catholic Charities Bureau Inc v Wisconsin Labor and*

⁶³ UN Doc, E/CN.4/1988/45 (1988) p. 5, para. 15 (Islamic Republic of Iran).

⁶⁴ UN Doc, A/65/207 (2010) p. 12-13, paras. 35-36; see also UN Doc, E/CN.4/1987/35 (1986) p. 16, para. 51. See also Paul M Taylor, *Freedom of Religion UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 248-250.

⁶⁵ Mark Fowler, 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Rochow, Neville G, Brett G Scharffs and Paul T Babie (eds), *Freedom of Religion or Belief* (Edward Elgar Publishing Limited, 2020) 212.

⁶⁶ *Rommelfanger v Federal Republic of Germany* (1989) ECHR 27; *ibid.*

⁶⁷ *Siebenhaar v Germany* (2011) ECtHR, App. No. 18136/02.

⁶⁸ *Case of Fernández Martínez v Spain* (2014) ECHR 615 (European Court of Human Rights); *ibid.*

⁶⁹ *Schuth v Germany* (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010). *Obst v Germany* (2010) ECtHR, App. No. 425/03.

⁷⁰ *Schuth v Germany* (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010). *Case of Fernández Martínez v Spain* (2014) ECHR 615 (European Court of Human Rights). *Obst v Germany* (ECtHR, App. No. 425/03, §§ 12-19, 23 September 2010).

⁷¹ *Lombardi Vallauri v Italy* 230.

*Industry Review Commission*⁷² (*Catholic Charities Bureau Inc*) is a standard application of US First Amendment non-establishment jurisprudence, it is notable that the Court overturned the finding of the Wisconsin Supreme Court that the appellant’s faith-based charitable ‘services to the poor and disadvantaged’ and disabled are “secular in nature”, not religious.⁷³ This understanding is consistent with the Supreme Court’s recognition that activities by faith-based institutions are to be regarded as religious activities, including when determining First Amendment protections, as expressed in prior decisions such as *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v Amos*⁷⁴ and *Fulton v Philadelphia*.⁷⁵ This can be seen as an expression of the Court’s long-running counsel against courts engaging in ‘any subjective inquiry with respect to religious truth’ (*United States v Dykema*⁷⁶) and its recognition that ‘it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious’⁷⁷ (*Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v Amos*).

30. *Catholic Charities Bureau Inc* was an appeal of the Wisconsin Supreme Court’s (‘WSC’) interpretation that the not-for-profit appellants providing ‘services to the poor and disadvantaged’ and disabled as ‘an effective sign of the charity of Christ’⁷⁸ were not ‘operated primarily for religious purposes’ because they ‘neither engage in proselytization nor serve only Catholics in their charitable work’⁷⁹ and were therefore liable to pay tax into the State’s unemployment compensation scheme. The Court held that the Wisconsin Supreme Court’s interpretation violated the establishment clause of the First Amendment, imposing a ‘denominational preference by differentiating between religions based on theological lines.’⁸⁰ The Court held that ‘[a] law that differentiates between

⁷² *Catholic Charities Bureau, Inc. v Wisconsin Labor and Industry Review Commission*, 605 U.S. ____ (2025) (*Catholic Charities Bureau Inc*’).

⁷³ 406 Wis. 2d 586, 987 N.W.2d 778 (2023) (*Wisconsin Supreme Court Decision*’).

⁷⁴ *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v Amos*, 483 US 327 (1987) (*Amos*’).

⁷⁵ *Fulton v City of Philadelphia*, 593 U.S. 522 (2021) (*Fulton v Philadelphia*’).

⁷⁶ 666 F.2d 1096 (1981) [2].

⁷⁷ *Amos* (n 74) 336.

⁷⁸ *Wisconsin Supreme Court Decision* (n 73) [8].

⁷⁹ *Catholic Charities Bureau Inc* (n 72) 1.

⁸⁰ *Ibid* 2.

religions along theological lines is textbook denominational discrimination.⁸¹ The effect of the WSC's interpretation was that '[p]ut simply, petitioners could qualify for the exemption while providing their current charitable services if they engaged in proselytization or limited their services to fellow Catholics.'⁸² As a result 'Wisconsin's exemption, as interpreted by its Supreme Court, thus grants a denominational preference by explicitly differentiating between religions based on theological practices. Indeed, petitioners' eligibility for the exemption ultimately turns on inherently religious choices.'⁸³ '[A]n exemption that requires proselytization or exclusive service of co-religionists establishes a preference for certain religions based on the commands of their religious doctrine.'⁸⁴ 'Decisions about whether to "express and inculcate religious doctrine" through worship, proselytization, or religious education when performing charitable work are, again, fundamentally theological choices driven by the content of different religious doctrines. A statute that excludes religious organizations from an accommodation on such grounds facially favors some denominations over others.'⁸⁵

31. The *Catholic Charities Bureau Inc* decision is consistent with *Spencer v World Vision, Inc*⁸⁶ ('*Spencer*'), where the Ninth Circuit Court of Appeals held that an ecumenical 'non-profit Christian humanitarian organisation' whose mission included 'serving the poor as a demonstration of God's love for all people' satisfied the *Civil Rights Act 1964* Title VII exemption.⁸⁷ In *Spencer* Scannlain J offered a striking reconciliation of the 'sincerity' doctrine and United States First Amendment jurisprudence by applying a similar willingness to countenance religious self-conceptions to the question of employment discrimination by FBCs. His Honour noted that according to the Court's prior authority:

the Free Exercise Clause 'clearly' protects 'organizations less pervasively religious than churches.' (explaining that even absent the exemption for religious organizations, 'the First Amendment would limit Title VII's ability to regulate the employment relationships within churches and similar organizations'). Moreover, the Employees' reading also potentially runs afoul of the Establishment Clause's

⁸¹ Ibid 9.

⁸² Ibid 10.

⁸³ Ibid.

⁸⁴ Ibid 11.

⁸⁵ Ibid 12-13.

⁸⁶ *Spencer v World Vision, Inc* 633 F 3d 723 (9th Cir, 2011) ('*Spencer*').

⁸⁷ *Civil Rights Act 1964* 42 USC § 2000e (2005).

core command of neutrality among religious groups. ([The] clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.) ... interpreting the statute such that it requires an organization to be a 'church' to qualify for the exemption would discriminate against religious institutions which 'are organized for a religious purpose and have *sincerely held religious tenets*, but are not houses of worship.' It would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs.⁸⁸

Justice Scannlain 'reject[ed the] constitutionally questionable' 'cramped reading of the exemption' argued by the plaintiff which 'raise[d] serious questions under both the Free Exercise Clause and the Establishment Clause.'⁸⁹ A clear thread runs through this body of law: faith-based charities are to be recognised as religious institutions.

Supplies to the Public

32. It being clear that faith-based charities are to be regarded as religious bodies, I turn to the application of that principle to supplies made by faith-based charities to the public. In *Fulton v Philadelphia* the Supreme Court of the United States held that Philadelphia impermissibly burdened the rights of Catholic Care Services (CSS) protected by the free exercise clause of the First Amendment in refusing to grant an exemption from a requirement that it supply fostering services to same-sex couples. Taking notice of the service of the Church to 'the needy children of Philadelphia for over two centuries',⁹⁰ the Court recognised the direct conflict of rights presented to it: 'the City's actions have burdened CSS' religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its religious beliefs.'⁹¹ This is the same choice the NSWLRC now contemplates imposing on faith-based charities in NSW. Noting that First Amendment jurisprudence holds that 'so long as the government can achieve its interests in a manner that does not burden religion, it must do so',⁹² the Court considered that 'including CSS in the program seems likely to increase, not reduce, the number of

⁸⁸ Ibid 728-9 (emphasis added).

⁸⁹ Ibid 729.

⁹⁰ *Fulton v City of Philadelphia* (n 75) 1.

⁹¹ Ibid 5.

⁹² Ibid 13.

available parents.⁹³ The Court did not see its prior statement in *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission* that '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth',⁹⁴ as precluding 'an accommodation that will allow [CSS] to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else.'⁹⁵ Importantly, the Court dismissed the argument that differing imperatives apply to 'internal governmental affairs', such as the conferral of contracts for the supply of public services: 'We have never suggested that the government may discriminate against religion when acting in its managerial capacity.'⁹⁶ The Court's analysis presents a balancing of the competing interests at stake, defying the request to extinguish the rights of one group so to favour another.

33. A similar approach has been adopted for the purposes of charity law in Scotland. *St Margaret's Children and Family Care Society* ('*St Margaret's*') concerned a direction by the Office of the Scottish Charity Regulator ('OSCR') to a Catholic adoption agency to cease refusing services to same-sex couples. On overturning the direction of the OSCR on appeal the Scottish Charity Appeal Panel recognised that if the entity 'was not carrying out the adoption service, then there would be no Catholic Adoption Agency providing an adoption service for Catholic Children who in terms of the Adoption Act are entitled to be brought up in the Catholic faith'.⁹⁷ The Appeal Panel reasoned that: 'the charity's entire public benefit (which went beyond the "tangible" benefit of placing adopted children, to the "intangible" benefit of the propagation of religion to society) had not been taken into account when weighing up the balance of benefit and disbenefit.'⁹⁸ As the Ontario Divisional Court put it, matters concerning a conscientious religious refusal to supply a service can 'risk the replacement of one set of predominant orthodox views with another', meaning that a 'careful balancing exercise is required.'⁹⁹ Again, a balancing of the rights of both parties maximised the availability of supplies overall. Finally, as the NSWLRC

⁹³ Ibid 14

⁹⁴ *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission*, 584 U.S. 617 (2018) 9.

⁹⁵ *Fulton v Philadelphia* (n 75) 15.

⁹⁶ Ibid 8.

⁹⁷ *St Margaret's Children and Family Care Society v Office of the Scottish Charity Regulator* [App 02/13, 31 January 2014] 8 ('*St Margaret's*') 1621–1625.

⁹⁸ Debra Morris, Anne Morris and Jennifer Sigafos, 'Adopting (In)equality in the UK' (2016) 38(1) *Journal of Social Welfare and Family Law* 14, 30.

⁹⁹ *Ontario Human Rights Commission v Brockie* (2002) 22 DLR (4th) 174.

recognises, in *OW & OV v Members of the Board of the Wesley Mission Council*¹⁰⁰ the religious freedom rights of faith-based charities in the context of fostering supplies to the public were affirmed by the New South Wales Court of Appeal.

34. The right to religious freedom is not limited just to religious institutions or individuals. It is also apposite to note that the religious freedom rights of entities in the context of the provision of public services, including even commercial entities, have received recognition across a range of jurisdictions:

- a. In *Commissioner of Taxation v Word Investments*¹⁰¹ the High Court held that an entity undertaking purely commercial operations which directed its surpluses to religious purposes was a body advancing religion. The decision demonstrates that religious freedom and commercial activity are not incompatible, and that indeed religious imperatives are to be recognised in the commercial context.
- b. The 2014 decision of the Supreme Court of the United States in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al*, where the Court held that closely held corporations can assert religious freedom rights, acknowledging that “[f]urthering their religious freedom also ‘furthers individual religious freedom’”.¹⁰²
- c. The decision the European Court of Human Rights in *Pichon and Sajous v France*,¹⁰³ which concerned the religious freedom assertions of a pharmacist who wished to refuse to supply contraceptives. In denying the claim the Court placed equal regard on both the nature of permissible religious manifestation and also the availability of alternative services. The Court ultimately found that the religious freedom claim would not prevail, including on the basis of the remoteness of the town in which the services were sought, in which the pharmacy was the sole provider.
- d. The decision of the Supreme Court of the United States in *303 Creative LLC v Elenis*¹⁰⁴ recognises that a commercial business may refuse to create works that

¹⁰⁰ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

¹⁰¹ (2008) 236 CLR 204.

¹⁰² *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* (10th Cir, 2014) 573 U.S.

¹⁰³ *Pichon and Sajous v France*, no. 49853/99, ECHR, 2 October 2001.

¹⁰⁴ *303 Creative LLC v Aubrey Elenis*, 600 U.S. 570 (2023) 1.

‘force an individual to “utter what is not in [her] mind” about a question of political and religious significance.’¹⁰⁵

35. In addition, limitations upon the personal autonomy of religious recipient and faith-based supplier may both amount to ‘discrimination’. A law that adversely impacts those who have chosen to manifest their religious beliefs through a faith-based charity in a manner disproportionate to its impact on those associated with other non-religious groups may violate the right to equality of the faith-based charity’s members and associates.¹⁰⁶ Similarly, beneficiaries who seek a faith-based supply in their locale will be detrimentally impacted by the withdrawal of the services supplied by the faith-based charity. While the refusal of the faith-based charity to supply a service on the basis of a protected attribute is a form of exclusionary harm, the refusal to permit a religious believer to receive a service that is sensitive to their worldview is also a form of exclusionary harm. As Benson argues, to the extent religious freedom encompasses an equality right, the conflict is ‘actually within equality, not between equality and something else.’¹⁰⁷ So understood the placing of limitations on the manifestation of religious belief through charitable service supply by equality law presents a dichotomous choice between *a priori* presuppositions as to ‘what constitutes the good and proper life’.¹⁰⁸ It thus begs a measure to determine the prevalence of one form of exclusionary ‘harm’ over another.

36. The decisions outlined above demonstrate that the overall level of exclusionary harm is minimised where the law permits persons of religious faith to provide and receive services that are sensitive to their needs, while also permitting persons who do not want a faith-based supply to also receive the same form of service, without attention to pastoral or religious concerns, from non-religious charities. Noting the claim made in the Paper that religious bodies ‘should be subject to secular laws as they receive public funding and tax benefits’,¹⁰⁹ the same principles apply to the conferral of funding. To make

¹⁰⁵ Ibid 19.

¹⁰⁶ Greg Walsh, ‘Same-Sex Marriage and Religious Liberty’ (2016) 35(2) *University of Tasmania Law Review* 106, 133; *Cha’are Shalom Ve Tsedek v France* (2000) European Court of Human Rights, Grand Chamber, Application No 27417/95; *Sherwin Manor Nursing Ctr Inc v McAuliffe* (1994) 37 F 3d 1216 (7th Cir, 1994).

¹⁰⁷ Iain Benson, ‘Should There be a Legal Presumption in Favour of Diversity?’ in Iain T Benson and Barry W Bussey (eds), *Religion, Liberty and the Jurisdictional Limits of Law* (LexisNexis, 2017), 14 n 27, quoted in Nicholas Aroney and Patrick Parkinson, ‘Associational Freedom, Anti-Discrimination Law and the New Multiculturalism’ (2019) 44 *Australasian Journal of Legal Philosophy* 1, 6.

¹⁰⁸ *Christian Education South Africa v Minister of Education* [2000] 4 SA 757, [37].

¹⁰⁹ NSWLRC Paper (n 4) 144, [7.77].

receipt of government funding a condition of access to exemptions is to reduce autonomy – individuals who want a faith-based service are denied that service. Retaining the exemptions enable autonomy with both faith-based and secular services being available to beneficiaries. Under the *International Covenant on Civil and Political Rights* a policy that purports to limit religious freedom must, amongst other factors, be shown to be a proportionate means to fulfil the aim. A proportionate approach to the resolution of the boundary of competing rights requires investigation of means to accommodate competing rights without unduly burdening the right to religious freedom. That principle should be enshrined in NSW law through the retention of the existing position under the *Anti-Discrimination Act 1977*.

‘Proportionality’

The Requirements of the Proportionality Test

37. The NSWLRC directs attention to the Victorian *Equal Opportunity Act 2010* and the recommendations of the LRCWA and the QHRC that religious bodies be required to prove that their actions are ‘reasonable and proportionate’.¹¹⁰ Under such a proposal, where it is alleged that a religious body or school has engaged in direct or indirect discrimination, a court must be satisfied that the impugned action was ‘reasonable’ and ‘proportionate’. Notwithstanding the proposal that section 56(a) and (b) concerning the appointment and training of religious personnel will remain,¹¹¹ the NSWLRC is considering an option whereby the ‘reasonable’ and ‘proportionate’ test will apply to the ongoing employment of any person by a religious body or school, regardless of seniority.¹¹² The NSWLRC also contemplates that it would also apply to any supplies that religious bodies make to members of the public.¹¹³ Thus, for example, a Christian Church would need to establish that a refusal to supply communion on the basis of an attribute protected under the Act was reasonable and proportionate.
38. ‘Proportionality’ is a component of the ‘necessary’ limitations requirement under both Article 18(3) of the ICCPR and Article 9 of the European Convention on Human Rights. Interpreting the application of the ‘proportionality’ test in UK law Lucy Vickers writes ‘[t]his

¹¹⁰ NSWLRC Paper (n 4) 137 [7.46]-[7.47].

¹¹¹ NSWLRC Paper (n 4) 132 [7.16].

¹¹² NSWLRC Paper (n 4) 134 [7.26]; NSWLRC Summary (n 50) 24.

¹¹³ NSWLRC Paper (n 4) 137 [7.46]-[7.47].

means that exceptions that apply to Churches are subject to review by courts to ensure that they are objective and reasonable.’¹¹⁴ For the purposes of United Kingdom law the ‘proportionality’ test was more comprehensively summarised by Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)*:

it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.¹¹⁵

In *R (on the application of SB) v Denbigh High School Governors*, Lord Bingham stated that the judge’s task in applying the proportionality test is to:

make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 62–67. Proportionality must be judged objectively, by the court: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 para 51. ... it is in my view clear that the court must confront these questions, however difficult. ...¹¹⁶

Concerns with the Application of Proportionality Test in General Contexts

39. The general application of the proportionality test to institutions (both secular and religious) has been subject to strident critique on account of the subjective and opaque discretion it confers upon judicial decision makers, and its resulting impacts on

¹¹⁴ Lucy Vickers, ‘Law, Religion and the Workplace’ in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge, 2015) 281.

¹¹⁵ [2014] AC 700, [74] (Lord Reed JSC), summarising *R v Oakes* [1986] 1 SCR 103 (Dickson CJ).

¹¹⁶ *R (on the application of SB) v Denbigh High School Governors* [2007] 1 AC 100 (Lord Bingham) [30].

parliamentary sovereignty and the wider public's confidence in the rule of law.¹¹⁷ Urbina offers a summary of the main contentions underpinning that analysis:

- 1) Proportionality avoids engaging with moral reasons, and instead is committed to assess only technical consideration.
- 2) Proportionality requires judges to do something that cannot be done: rationally commensurate the incommensurable.
- 3) Proportionality is reductionist, in that its method is committed to filtering out as irrelevant moral considerations that are in fact relevant—particularly, the special force of rights.
- 4) Proportionality fails to filter out considerations regarding the protection or promotion of illegitimate interests or aims, and treats them in the same way as considerations regarding the protection or promotion of legitimate interests or aims, the public good, or even rights.
- 5) Proportionality analysis is deceptive. It claims to be doing something that in fact it is not doing. It claims to be performing an objective and neutral analysis, while in fact judges are engaging in controversial moral reasoning.
- 6) Proportionality is opaque. Particularly when courts apply the balancing prong of the test, it is often the case that the reasons for the court's decision are not clear. Whether a measure satisfies this prong of the test is regularly "asserted rather than demonstrated."
- 7) Proportionality analysis gets moral questions wrong, in that courts typically purport to be considering all the interests of the parties and all the relevant moral considerations, while in fact they typically ignore some of these interests and considerations, and apply the test to the one or two more manageable ones. This objection is distinct from 3) and 4) in its target. It does not criticize a method, but a deficiency in the practice of courts. The latter could be an effect of adopting the former. But not necessarily so ...¹¹⁸

¹¹⁷ See for eg, Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can JL & Jur 179, 179. See also Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 Int'l J Const L 468.

¹¹⁸ Franciso Urbina 'Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning' (2014) 27(1) *Canadian Journal of Law & Jurisprudence*, 167, 167-8.

40. Webber critiques the proportionality test for enabling decision-makers to avoid rigorous and transparent judicial analysis: ‘The discourse of balancing and proportionality camouflages much of the scholar’s and the court’s thinking underlying rights.’¹¹⁹ These factors mean that ‘[u]nder the cult of constitutional rights scholarship and jurisprudence, rights have become merely one reason among others in a process of proportionality reasoning. The result is perhaps nothing short of a loss of rights.’¹²⁰ In the Supreme Court of the United States, Justice Brennan has called proportionality analysis ‘doctrinally destructive nihilism’, no more than ‘a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.’¹²¹ Those critiques apply equally, or perhaps with even greater force, to the ‘reasonableness’ test.

Concerns with the Application of Proportionality Test in Religious Contexts

41. The preceding concerns have been fashioned with regard to the application of the proportionality test to secular institutions. Many of those concerns are exacerbated when the test is applied to religious institutions. Because both the reasonableness and proportionality tests are notoriously imprecise and fact-specific, they confer upon judges an extraordinary granular discretion over the affairs of religious institutions. Moreover, this power operates over matters of religious practice, where personal judicial convictions as to what is ‘proportionate’ and ‘reasonable’ may well admit of significant variation. Indeed, owing to its ill-defined nature, both former Australian Chief Justices Gleeson and French have separately recognised that what is ‘reasonable’ is something upon which judicial minds may ‘differ’.¹²² This does not provide a sure footing for religious bodies or schools, or their employees, or the beneficiaries whom they serve.

¹¹⁹ Webber (n 117) 179. See also Tsakyrakis (n 114).

¹²⁰ Webber (n 117) 202.

¹²¹ *New Jersey v TLO* 469 US 325 (1985) 369-71 (Brennan J).

¹²² *Bropho v Human Rights & Equal Opportunity Commission* HCA Transcript 9 (4 February 2005) (Gleeson CJ); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004) [76] (French J).

The Proportionality Test Should be ‘Identified in’ the Provisions Themselves

42. Rather than directly incorporating considerations of proportionality into the express text of the legislation, it is entirely consistent with international human rights law that the ‘proportionality’ test be understood as being satisfied at the level of the legislation itself, rather than at the level of the individual circumstances of a complaint. That is, in substance, the approach adopted by Justice Derrington in her former proposed model, cited by the NSWLRC. I summarised, but modified, her Honour’s model in my submission to the ALRC at paragraphs 26-30, page 14-17 in respect of staff and at paragraph 33(b) on pages 22-23 in respect of students, a copy of which is available here: [201.-Assoc-Prof-M-Fowler-ADL-submission.pdf](#). (As I understand it, the Australian Catholic Bishop’s Conference, the National Catholic Education Commission, the Executive Council of Australian Jewry, and the Anglican Church Diocese of Sydney have endorsed either Derrington J’s model, or her Honour’s model with my proposed additions.) That is to say, if a religious school satisfies the specific conditions of that model, which includes a requirement to act in good faith, it would be acting in a way that is ‘proportionate’. Justice Derrington offered her model as one that is consistent with international law.¹²³ In substance that comprised an assertion that the requirements of international law can be satisfied where limitations ‘prescribed by law’ are themselves proportionate. There is no need to import a specific ‘proportionality’ test into legislation, as does the Victorian legislation. In my particular formulation of Derrington J’s model, a ‘good faith’ test is employed as a means to ensure that that proposed legislative framework satisfies the ‘proportionality test’.
43. In addition to Derrington J’s *ex curia* comments, there is clear judicial authority for the proposition that the requirements of international law may be met by legislative exceptions that, by their own terms, balance rights in a proportionate manner, rather than expressly incorporating ‘proportionality’ in as a separate legislative test to be satisfied by a respondent religious institution. Referring to the preceding United Kingdom Regulations

¹²³ Sarah Derrington, ‘Of Shields and Swords – Let the Jousting Begin!’ Speech, Freedom19 Conference, 4 September 2019, <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>.

applying to ‘organised religions’ now consolidated in Schedule 9 of the *Equality Act 2010*, in *Amicus*¹²⁴ Richards J stated:

Regulation 7(2) simply sets out criteria of general application [the GOR] and leaves it to the courts and tribunals to determine in individual cases if those criteria are met. This was not done in relation to employment for purposes of an organised religion in regulation 7(3), because the Government was concerned it would lead to litigation in tribunals about the extent to which requirements dictated by doctrine or the religious convictions of followers could legitimately limit working for an organised religion, and to what extent those requirements, and by extension, the doctrine or convictions giving rise to them, could be said to be reasonable or proportionate ... The Government took the view that it is not appropriate for courts or tribunals to make such judgments, and that *the balance should be identified in the Regulations themselves*.¹²⁵

44. The reference to ‘balance’ here adopts a common description of the proportionality test. Justice Richards characterisation of the ‘organised religion’ exception as identifying ‘the balance ... in the Regulations themselves’ is what Derrington J proposes. In *Amicus* Lord Sainsbury of Turville similarly said ‘nor do we believe it appropriate that doctrine should be the subject of civil litigation in the courts.’¹²⁶ It is not clear how the concession that courts should not wade into determining matters of doctrine could logically be applied to ‘organised religions’ but be withheld from religious ‘ethos’ based institutions. In practice, the litigation arising in respect of faith-based institutions has shown that precisely such an outcome ensues. As *Leprosy Mission* demonstrates, faith-based bodies assert their interpretation of doctrine as the basis for their employment selection criteria. That is the basis on which Australian religious schools seek to exercise a preference for employees who share their belief. All of the same substantive issues also apply to the recommendation of the ACT Law Reform Advisory Council that the religious body employment exception only apply where ‘reasonably justified’,¹²⁷ to which the NSWLRC also points.

¹²⁴ *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) (*Amicus*).

¹²⁵ *Ibid* [90] (emphasis added).

¹²⁶ *Ibid*.

¹²⁷ NSWLRC Paper (n 4) 135 [7.31].

Reliance on ALRC Report on Religious Educational Institutions

45. At various points throughout the Paper the NSWLRC cites the Australian Law Reform Commission's Report *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* as authority. I provided an analysis of the ALRC's account of the relevant human rights law in a more fulsome fashion in Annexure A to my submission to the ALRC, which is available here: [201.-Assoc-Prof-M-Fowler-ADL-submission.pdf](#). This analysis will be of assistance to the extent that the NSWLRC Paper relies upon the ALRC's erroneous analysis. To illustrate that analysis, the proposal to restrict the ability of religious schools to discriminate only on the basis of the religious belief and activity of a person stated by the NSWLRC in the Paper accords with the position under the European Council Directive 2000/78, as implemented in the UK, whereby discrimination is only permitted on the ground of religious belief and not any other ground. However, for the reasons I state in my submission to the ALRC, reliance on the Directive (and the UK law giving effect to the Directive) in interpreting Australia's human rights obligations is misplaced, for the primary reason that the Directive and the jurisprudence that has developed around it (including in the UK) directly departs from the standards concerning religious institutional autonomy that have developed under the United Nations framework to which Australia is a signatory.