# When is the Advancement of Religion Not a Charitable Purpose?

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*This article addresses the question of why religious groups receive charitable status in relation to religious activities by considering when the current law does not grant charitable status to purposes that advance religion. The jurisdictional focus is upon Australian law, with some reference to other jurisdictions whose law also derives from the English common law of charity. After an overview of the charity law landscape in Australia, this article explains and critically evaluates the grounds upon which charitable status may be refused to purposes that advance religion. This article then considers two issues that have emerged in twenty first century charity law and that are relevant to the charitable status of religious groups. These concern human rights, particularly the right to freedom of religion, and the use of charity law to regulate religious activity.*

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# I. Introduction

The charitable status of religious purposes has come under public scrutiny in the twenty-first century. Whilst some faith-motivated activities traditionally undertaken by religious groups, such as health care, aged care and welfare services, are of obvious benefit to society as a whole, why does the manifestation of religious faith through purely religious activity, such as worship, prayer and ritual (described in

charity law as the 'advancement of religion') also qualify for the valuable reputational, legal and fiscal privileges associated with charitable status? This question has been brought into sharper focus by radical changes to the law in some jurisdictions. In England and Wales, for example, all charitable purposes must now be of demonstrable 'public benefit'; this has placed the question of the public benefit of the advancement of religion particularly in the spotlight.[1] Changes in the public perception of religion are also a contributing factor. In Australia, for example, the public respect and deference traditionally accorded to religion appears to be waning. Public trust in institutional religion was shaken by the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse[2] and this has been exacerbated by the disjuncture between general public sentiment and conservative religious groups' vocal opposition to the same sex marriage reforms of the Commonwealth of Australia ("Commonwealth Government") in 2017.[3]

Eligibility for charitable status in relation to purely religious activities is of profound importance to religious groups, for whom the predominant sources of funding in common law countries such as Australia are the gifts of group members, investments and commercial activity.[4] The value of almost all of these sources of funding is boosted by the legal and fiscal privileges conferred by the state upon religious groups and religious purposes through the mechanism of charitable status.[5]

The question whether purposes for the advancement of religion are charitable is most often framed in terms of the public benefit element of charity law. Legal scholarship to date has focused upon clarifying the relevant law in this respect (is there a presumption of public benefit at common law in relation to the advancement of religion and what does public benefit entail in that doctrinal context?) or upon the public benefit rationale for conferring charitable status for the advancement

of religion.[6] The latter question has elicited philosophical, doctrinal and instrumentalist responses in favour of maintaining the charitable status of the advancement of religion.[7] My objective in this article is to contribute to the existing scholarship by exploring the legal question from a different perspective. The question that this article explores assumes that the purposes of the religious group constitute 'advancement' and that the beliefs and canons of conduct of the group constitute a 'religion' and asks: when will charitable status nevertheless be denied? In other words, when is the advancement of religion *not* a charitable purpose? Framing the question in this way encourages consideration of factors that are not necessarily framed in terms of public benefit and yet which may help clarify why charitable status is given or withheld.

The jurisdictional focus is upon Australian law, although some reference is made to jurisdictions whose law also derives from the English common law of charity, such as England itself, Ireland and Canada.[8] The jurisdictional comparisons are offered with caution; differences in the role and place of religion in each of those societies, the legislative schemes that have either replaced or overlaid the common law of charity, and their respective regulatory oversight of charities, make it difficult to generalise. Australian law provides a useful focus, however, because it retains the common law definition of charity for the purposes of trust law, but overlays this with statutory definitions of charity for various legislative purposes. It also has a dedicated charity and not-for-profit regulator. It thus embodies at least some elements of the charity law in each of the related jurisdictions referred to in the article. Hence, a study of Australian law may offer insights for lawyers in other jurisdictions.

After a brief overview of the sources of charity law and the regulatory landscape in Australia (Part II), the grounds upon which charitable status may be refused in relation to purposes for the advancement of religion are described and critically evaluated from an internal legal perspective as to whether they are coherent and defensible (Parts III to V). Parts VI and VII consider two more recent issues relevant to the conferral of charitable status for religious purposes. These concern the intersection of human rights law with charity law and the advantages to the state in securing regulatory power over religious groups in relation to their

religious activity.

## II. Overview Of The Law And Regulatory Landscape In Australia

In Australia, the common law of charity, rather than legislation, still determines the validity of a trust for religious purposes. Broadly speaking, pursuant to that body of equitable principles, the 'advancement of religion'[9] is a charitable purpose unless shown otherwise.[10] This means that public benefit (an essential feature of a charitable purpose) is assumed in relation to religious purposes, unless brought into question.[11]

The common law of charity is overlaid by state, territory and federal legislative schemes.[12] These generally accept the common law definition of charity, but then modify and/or expand upon it for the purposes of the particular statutory jurisdiction.[13] Of most significance for religious groups, for reasons of income tax exemption and regulatory oversight, is Australia's *Charities Act 2013*[14] which applies to all charitable entities and provides a definition of charity for the purposes of all Commonwealth legislation. This article will limit its consideration of charity legislation to the *Charities Act* because of its scope and practical significance. Although, the preamble of the *Charities Act* states that it will ensure continuity "by utilising familiar concepts from the common law", some changes are made to the charitable head of advancement of religion.[15]

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9. See Part III, below.
10. *Commissioners for Special Purposes of Income Tax v Pemsel*, [1891] AC 531 (HL (Eng)) at 583.
11. See Ridge, "Religious Charitable Status", *supra* note 6 (the relevant law evolved during the nineteenth century). The public benefit element of religious charitable purposes is discussed in Parts IV and V, below.
12. See Matthew Harding, "Recent Reforms to Australian Charity Law" in Ron Levy et al, eds, *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Canberra: Australian National University Press, 2017) 283.
13. *Ibid* (referring to "definitional proliferation" at 283).
14. *Charities Act 2013* (Cth), 2013/100 (Austl) [Austl *Charities Act*].
15. *Ibid*, preamble.

In brief, the *Charities Act*'s definition of "charity" encompasses not-for-profit entities pursuing purposes for the advancement of religion and for the public benefit so long as such purposes are not 'disqualifying purposes' within the meaning of the act.[16] Advancing religion is presumed to be of public benefit for the purposes of the act,[17] except where "the entity is a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the general public".[18] In the latter case there is no public benefit requirement.

Since December 2012, Australia has had a national regulator of charities and not-for-profit entities — the Australian Charities and Not-for-profits Commission ("ACNC") — and a comprehensive national regulatory scheme, the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ("*ACNC Act*").[19] Registration pursuant to the *ACNC Act* is a prerequisite for Commonwealth tax concessions[20] and is dependent on an entity providing financial reports[21] and meeting certain governance and external conduct standards.[22] However, there are substantial exemptions from regulatory compliance for 'basic religious charities' ("BRCs"): that is, those pursuing purposes for the advancement of religion (pursuant to the *Charities Act*) and who meet certain other criteria.[23] A charity's registration may be revoked by the Commissioner.[24]

In summary, the source and content of charity law in Australia differs according to whether a religious group seeks to ensure the validity of a trust for religious purposes, or to secure charitable status in relation

16. *Ibid*, s 5.
17. *Ibid*, s 7.
18. *Ibid*, s 10(2).
19. *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/168 [*ACNC Act*]. See generally Susan Pascoe, "A Regulator's View" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham: Edward Elgar Publishing Limited, 2018) 570 [Pascoe].
20. *ACNC Act*, *ibid*, part 2-1, s 20-5(2).
21. *Ibid*, part 3-2.
22. *Ibid*, part 2-1, ss 20-5(3), 35-10 (dealing with registration and revocation of registration), part 3-1 (governance and external conduct standards).
23. See below Part VI.B.
24. *ACNC Act*, *supra* note 19, part 2-1, ss 20-5(1), 35-1, 35-10.

to its religious activities for taxation or other purposes in relation to Commonwealth legislation, although there are common elements and overlap between the common law and legislation. The tenor of both the common law and the *Charities Act* is favourable towards purposes for the advancement of religion in that both assume that such purposes are charitable, unless proved otherwise. The *ACNC Act* provides comprehensive, national regulatory oversight of charities and not-for-profit entities, but exempts basic religious charities from some regulatory requirements. In the following Parts this brief overview is expanded upon by way of a discussion of the grounds upon which charitable status may exceptionally be refused.

## III. Definitional Barriers To Charitable Status

### A. Introduction

An obvious and immediate barrier to charitable status for purposes that advance religion is definitional. Definitional questions to do with the meaning of 'religion' are particularly difficult. Two challenges arise in formulating a legal definition of religion in the context of charity law. The first concerns legal neutrality. Religious pluralism is integral to the liberal democratic state[25] and this requires that there be neutrality towards religion, including in relation to definitions of religion. Formulating a neutral definition requires a judge to recognise, and then put to one side, personal religious acculturation.[26] An example of such acculturation occurred in English charity law where, prior to the enactment of the *Charities Act 2006*,[27] the charity law definition of religion reflected a

25. *Kokkinakis v Greece*, No 14307/88, [1993] ECHR 20 at para 31.
26. *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)*, (1983) 154 CLR 120 (HCA), Mason ACJ (as he was then) and Brennan J (as he was then) ("the acculturation of a judge in one religious environment [will] impede his understanding of others" at 133) [*Church of the New Faith*].
27. *Charities Act 2006* (UK), c 50.

Western religious paradigm of "belief in a god or gods".[28]

A second challenge with legal definitions is in distinguishing true definitional concerns to do with the meaning of terms from normative questions concerning whether a resulting claim or defence should be available. When does definition end and substantive consideration of the merits of a claim begin? Applying this to charity law, there is an important conceptual distinction between the definitional question of whether purposes fall within the meaning of 'advancement of religion' and the normative question of whether such purposes should be granted charitable status.[29] If the two questions are confused or conflated, transparency in legal decision-making is compromised. Accordingly, a definition of the advancement of religion should:

(i) so far as possible, be neutral as to religious world view; or

(ii) be confined to true definitional matters.

As will now be explained, these standards are not always met and the definition of 'advancement of religion' has been used in some jurisdictions to exclude (arguably) religious purposes from charitable status. However, Australian charity law provides a model for best practice and is discussed first.

## B. The Definition of 'Advancement of Religion' in Australian Charity Law

In Australia's common law of charity, 'advancement of religion' refers to the practice and propagation of religious belief itself; it does not

28. *In re South Place Ethical Society*, [1980] 1 WLR 1565 (Ch (Eng)) at 1572 (noting Buddhism as a possible exception at 1573). See UK *Charities Act*, *supra* note 1, s 3(2)(a). See also *R (Hodkin) v Registrar General of Births, Deaths and Marriages*, [2013] UKSC 77.

29. This does not mean that the legal context of the definition should be ignored. See *Church of the New Faith*, *supra* note 26, Mason ACJ and Brennan J ("[i]t is in truth an inquiry into legal policy" at 133). In addition, principles of statutory interpretation must be adhered to if the definitional context is legislation.

encompass faith-motivated conduct that is not itself religious,[30] or even purposes that are 'conducive to the good of religion'.[31] The purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it.[32]

This is despite the fact that, for some members of some religious groups, all aspects of life are a manifestation of their religious beliefs and would be described by them as religious purposes.[33]

For the purposes of the *Charities Act*, the relevant terminology is that of 'advancing' religion and 'advancing' is defined to include "protecting, maintaining, supporting, researching and improving".[34] This raises questions of statutory interpretation because 'researching' clearly goes beyond the common law meaning of advancement in the religious context. The issue is moot to the extent that researching religion may fall within the charitable purpose of advancement of education; but there may be pragmatic advantages to securing charitable status on the ground of religion (as a basic religious charity, for example) that mean the question may be tested.

The meaning of 'religion' for the purposes of Australian not-for-profit law, including charity, was determined by the High Court in 1983 in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*.[35] The agreed issue in that case was whether Scientology was a religion.[36] If so,

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30. *Roman Catholic Archbishop of Melbourne v Lawlor*, (1934) 51 CLR 1 (HCA) at 32 [*Roman Catholic Archbishop of Melbourne*].
31. *Dunne v Byrne*, [1912] 16 CLR 500 (HCA).
32. *Roman Catholic Archbishop of Melbourne*, *supra* note 30 (Dixon J (as he was then) paraphrasing *Keren Kayemeth Le Jisroel, Ltd v Commissioners of Inland Revenue*, (1931) 2 KB 465 ((CA) Eng) at 469, 477 (Lord Hanworth MR)). See also *Radmanovich v Nedeljkovic*, [2001] NSWSC 492l (Austl) at paras 147-51.
33. See generally *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*, [2014] VSCA 75 (Austl) at paras 559-62 [*Christian Youth Camps*].
34. Austl *Charities Act*, *supra* note 14, s 3(1) (definition of "advancing").
35. *Church of the New Faith*, *supra* note 26.
36. *Ibid*.

it was assumed by the parties that the Church of the New Faith would be a 'religious institution' within the meaning of the *Pay-roll Tax Act 1971*[37] and entitled to a pay-roll tax exemption.[38] The Court's approach reflects the suggested criteria for a legal definition given above, in that (i) it is explicitly neutral in its definitional objectives, and (ii) it puts aside issues of the legality of the religious activities in question as a matter for regulation, rather than definition. It is therefore solely definitional. In both of the joint judgments, as well as in Justice Murphy's single judgment, the definition is articulated in deliberately inclusive terms; if limitations on the practice of a religion are warranted, they are to be applied at a later stage of the analysis, but do not exclude a set of beliefs and practices from constituting a 'religion' per se.[39] Accordingly, Mason ACJ and Brennan J, listed two essential criteria that will assume varying importance, depending on the facts "first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief …".[40]

## C. The Definition of 'Religion' in English Charity Law

Conversely, the Charity Commission of England and Wales' definition of 'religion' for the purposes of the UK *Charities Act* conflates the meaning of 'religion' with questions concerning whether a religious group should qualify for charitable status.[41] The UK *Charities Act* states only that a religion may involve "belief in more than one god" and need not "involve belief in a god".[42] In its decision on the application for registration of the

37. *Pay-roll Tax Act 1971*, 1971/8154 (Austl).
38. *Church of the New Faith*, *supra* note 26 (Mason ACJ and Brennan J noted, at 128-29, that it did not necessarily follow from a finding that Scientology was a religion that the Church of the New Faith (a corporation) was a "religious institution"; see also Wilson J and Deane J at 165).
39. *Ibid*.
40. *Ibid* at 136 (Wilson and Deane JJ, at 173, preferred to list a set of non-exclusive "indicia or guidelines" as to the meaning of 'religion' that was based upon "empirical observation of accepted religions").
41. UK *Charities Act*, *supra* note 1, s 3(2)(a).
42. *Ibid*.

Temple of the Jedi Order as a charitable incorporated association, the Commission formulated a definition of 'religion', which begins:

> religion in charity law is characterised by belief in one or more gods or spiritual or non-secular principles or things, and a relationship between the adherents of the religion and the gods, principles or things which is expressed by worship, reverence and adoration, veneration, intercession or by some other religious rite or service.[43]

To this point, the definition reflects the essential criteria identified by Mason ACJ and Brennan J in *Church of the New Faith*, namely, beliefs and associated canons of conduct.[44] This should suffice to determine whether the purposes in question are for the advancement of 'religion'. However, the Commission continued "that it must be capable of providing moral and ethical value or edification to the public and characterised by a certain level of cogency, seriousness, cohesion and importance".[45]

These requirements go beyond definitional issues to the normative question of whether the religious purposes in question *should* qualify for charitable status. They are also difficult to apply in a neutral manner as they require a judgment on the merits of the beliefs in question.[46]

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43. *The Temple of the Jedi Order — Application for Registration: Decision of the Commission* (16 December 2016) at para 13, online (pdf): Charity Commission for England and Wales <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578931/Temple_of_the_Jedi_Order_FINAL_DECISION.pdf> [*Temple of the Jedi Order*]. The Temple of the Jedi Order's application was unsuccessful.
44. *Church of the New Faith*, *supra* note 26.
45. *Ibid* (footnotes omitted).
46. *Cf. Thornton v Howe*, (1862) 31 Beav 14 (Ch (Eng)) [*Thornton*]. On the sources for the Commission's definition, see Pauline Ridge, "Not-for-profit Law and Freedom of Religion" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2018) 284 ["Not-for-profit Law and Freedom of Religion"].

## D. The Definition of 'Advancement of Religion' in Irish Charity Law

An egregious example of a definitional barrier being used to exclude certain purposes from the advancement of religion comes from the Republic of Ireland. Section 3(10) of the *Charities Act 2009*[47] states:

> [f]or the purposes of this section, a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult—
>
> (*a*) the principal object of which is the making of profit, or
>
> (*b*) that employs oppressive psychological manipulation—
>
> (i) of its followers, or
>
> (ii) for the purpose of gaining new followers.[48]

The provision was the result of an amendment to the original Bill to "ensure dubious organisations that pose as religious but whose motive is making money or which use inappropriate psychological techniques in recruiting or retaining members will not attain charitable status".[49]

The provision is problematic for the same reasons as the *Temple of the Jedi Order* decision of the English Charity Commission: substantive questions concerning whether or not particular religious activities should be facilitated by the state are dealt with as a definitional matter.[50] It is also not clear that the provision will be straightforward to interpret and apply. Such concerns could instead have been dealt with by the provisions of the Irish *Charities Act* concerning exclusion from charitable status on

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47. *Charities Act 2009* (Ire) [Ire *Charities Act*].
48. *Ibid*, s.3(10), ("[i]t shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit" at s 3(4)). Section 3 came into force on 16 October 2014: *Charites Act 2009 (Commencement) Order 2014* (Ire).
49. Ireland, Seanad Éireann Deb (11 December 2008) vol 192, no 16 (Deputy John Curran), online: Tithe an Oireachtais Houses of the Oireachtas <www.oireachtas.ie/en/debates/debate/seanad/2008-12-11/5/#spk_126>.
50. *Temple of the Jedi Order*, *supra* note 43.

illegality and public policy grounds.[51]

In summary, the definitions of 'religion' and 'advancement of religion' should not be used to impose non-definitional barriers to charitable status. The question of what constitutes a religion is conceptually distinct from the question of whether the manifestation of a religion through religious purposes should qualify for charitable status. Keeping these two questions separate aids the clarity and transparency of legal reasoning as well as ensuring neutrality towards religion.

## IV. Disqualification Based Upon The 'Public' Element Of Charity

### A. Introduction

At common law, charitable purposes must be 'public' in nature. This entails that they benefit the public, or an inclusive section of the public, rather than an exclusive, private group.[52] Paragraph 6(1)(b) of Australia's *Charities Act* reflects the common law position:

> 6 [p]urposes for the public benefit
>
> (1) A purpose that an entity has is for the *public benefit* if: …
>
> (b) the purpose is directed to a benefit that is available to the members of:
>
> (i) the general public; or
>
> (ii) a sufficient section of the general public.[53]

This is the 'public' aspect of the requirement that charitable purposes be for the 'public benefit'. It is difficult to disentangle entirely from the

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51. See Ire *Charities Act*, *supra* note 47, s 2(1) (definition of "excluded body").
52. *Verge v Somerville*, [1924] UKPC 6 [*Verge*]; *Oppenheim v Tobacco Securities Trust Co Ltd*, [1950] UKHL 2 [*Oppenheim*]; *Thompson v Federal Commissioner of Taxation*, (1959) 102 CLR 315 (HCA) at 32122 [*Thompson*].
53. Austl *Charities Act*, *supra* note 14, s 6(1)(b) [emphasis added] (see also ss 6(3), 6(4)).

aspect of benefit. Purely religious purposes may be disqualified from charitable status on a number of overlapping grounds (discussed in the following parts) because they are not sufficiently 'public' in this sense. Not all of these grounds are consistent, and their rationales are not always clear. A recurring question concerns whether the communal religious activity of a private religious group may still convey sufficient indirect benefit to the wider public to justify charitable status or, in the words of the *Charities Act*, whether that activity conveys a benefit that is available to "the members of the general public".[54]

There is a further aspect of the 'public' nature of charity that is also discussed in this Part, namely that 'private advantage' must not accrue to entities other than those naturally benefitting from pursuit of the charitable purposes.[55]

## B. Restrictions on Public Access to Worship

The religious purposes of a religious group may not satisfy the public requirement of charity because of restrictions on public access to places of worship or to spaces within a place of worship. But this is not always the case and it is difficult to discern a consistent rationale in the case law.

It is clear that religious purposes concerning places of worship with no public right of access at all and where the exclusion of the public does not relate to the religious beliefs in question are not charitable.[56] The reason is that a benefit that could be publicly available (namely, the "edifying and improving effect" from participation in religious rites) is confined to a private group.[57]

The law is more difficult to state where the public are not as comprehensively excluded from the place of worship and/or where the exclusion is based upon the tenets of the religion in question. The

54. *Ibid*, s 6(3)(a).
55. *Thompson*, *supra* note 52 at 322 (Dixon CJ).
56. *Hoare v Hoare*, (1886) 56 LT 147 (Ch (Eng)) (private chapel in country house); *Power v Tabain*, [2006] WASC 59 (Austl) (family church on private land in Croatia).
57. *In re Hetherington Decd*, [1990] Ch 1 (Eng) at 12 (Sir Nicolas Browne-Wilkinson VC) [*Hetherington*].

difficulty is due in part to charity law sometimes being confused with the separate jurisprudence concerning a common and long-standing legislative exemption from property rates for religious groups in relation to places of 'public worship'. In the latter English jurisprudence, 'place of public religious worship' has been defined narrowly for reasons of history and public policy.[58] However, the same approach is not taken when determining charitable status — where courts are more willing to accept some limits on public access to worship spaces.

An example of the disjuncture is the House of Lords decision in *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-Day Saints*.[59] The respondent Church, a charitable entity, failed to gain a complete rate exemption on its Preston Temple because the innermost section of the Temple was closed to all but a small group of Mormons holding a 'recommend' and hence did not fall within the meaning given to place of 'public religious worship' in the *Local Government Finance Act* 1988.[60] The House of Lords based its decision on both statutory interpretation principles (Parliament had not amended the UK *Local Government Finance Act* to change this interpretation when it had the opportunity to do so) and, in response to a human rights claim, on public policy. Publicly visible religious worship, it was said by Lord Scott, helped dispel prejudice and suspicion towards religion and contributed to a healthy, religiously plural society.[61] Interestingly, the Australian case law on rates exemptions for places of public worship relies on a different policy rationale (the need to uphold freedom of religion) in order to support a much wider application of the exemption.[62]

58. See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) at 14758.
59. [2008] UKHL 56 [*Gallagher*]. The Church appealed unsuccessfully to the European Court of Human Rights: *Church of Jesus Christ of Latter-Day Saints v United Kingdom*, No 7552/09, [2014] ECHR 227 [*Church of Jesus Christ of Latter-Day Saints*].
60. *Gallagher*, *ibid*; *Local Government Financial Act 1988* (UK) [UK *Local Government Finance Act*].
61. *Gallagher*, *ibid* at para 51.
62. *Canterbury Municipal Council v Moslem Alawy Society Ltd*, (1987) 162 CLR 145 (HCA).

What is of interest here however is why the Church in *Gallagher* was still entitled to *charitable* status (and, consequently, an 80% rates exemption). That question was not at issue in the litigation.[63] The public aspect of public benefit as it applies to scenarios of restricted access to places of worship was alluded to by Cross J in the influential case of *Neville Estates Ltd v Madden*.[64] The case concerned a Jewish synagogue in London; members of the public had no right to enter the synagogue, although in practice entry would not be refused.[65] Justice Cross appeared to accept that the members of the synagogue were a private group, but held nonetheless that a trust for its purposes was charitable, suggesting that there were historical and political reasons why the law was not as strict in relation to the 'public' requirement for religious trusts.[66] Another possible justification for charitable status in *Gallagher* is that Mormons holding a 'recommend' constitute a sufficient section of the public which any member of the public can aspire to join, rather than a closed and exclusive group. However, religions may place conditions on who may enter particularly sacred spaces that are less amenable to this approach.[67] A justification that would avoid this problem is to accept that the subsequent interaction of members of a religious group with members of the general public conveys sufficient public (albeit indirect) benefit.[68]

63. *Gallagher*, *supra* note 59.
64. [1962] Ch 832 (Eng) [*Neville Estates*].
65. *Ibid*.
66. *Ibid* at 853-54. See also *Joyce v Ashfield Municipal Council*, [1975] 1 NSWLR 744 (Austl) at 751-53 [*Joyce*].
67. Such as gender-based restrictions.
68. *Cf.* the reasoning of Hutley JA in *Joyce*, *supra* note 66. *Preston Down Trust: Application for Registration of the Preston Down Trust Decision of the Commission* (3 January 2014), online: Charity Commission for England and Wales <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336112/preston_down_trust_full_decision.pdf> (the public aspect of public benefit in relation to public access to worship services was raised in discontinued test litigation by the Charity Commission of England and Wales against the Plymouth Brethren Christian Church in 2012; the Commission refused to register the trust of a Brethren meeting hall for reasons that included limited public access to the hall) [*Preston Down Trust*].

## C. Members Linked by Blood or Other Private Association

Religious purposes will contravene the public requirement for charity where they are limited to a private, exclusive group of persons.[69] This is particularly so where the excluding factor bears little relationship to the purposes in question.[70] Thus, a trust for the religious education of a man's grandchildren is invalid because of the requisite blood relationship.[71] As with the example of religious purposes relating to a private place of worship, the rationale for exclusion from charitable status is clear.

But the justification for exclusion is not as self-evident in relation to the purposes of religious groups connected by familial ties due to the precepts of their religion and hence that necessarily exclude the public at large. Such purposes appear to involve a private and exclusive group, rather than a section of the public, but the disqualification is problematic due to its potentially discriminatory impact upon religious groups, particularly those of Indigenous and/or Asian origin.

The *Charities Act* does not deal explicitly with this scenario and case law authority is sparse. The Privy Council in an 1875 appeal from the Straits Settlement in *Yeap Cheah Neo v Ong Cheng Neo*[72] held that a testamentary trust for a building in which to perform "religious ceremonies [of ancestor veneration] to my late husband and myself" was not charitable because it would only benefit the testatrix's family.[73] An analogy was drawn with trusts for the saying of masses for souls of the departed, but such (formerly superstitious) trusts can be charitable under modern English law[74] and were always viewed more favourably in Australia.[75] The issue was considered in Hong Kong in 1990 in relation

69. *Verge*, *supra* note 52; *Oppenheim*, *supra* note 52; *Thompson*, *supra* note 52.
70. See *e.g. Davies v Perpetual Trustee Co (Ltd)*, [1959] AC 439 (PC (UK)) at 456 (trust for religious education of the children of the descendants of Presbyterian from Northern Ireland who settled in New South Wales).
71. *In re Coats' Trusts*, [1948] 1 Ch 340 (Eng) at 345.
72. (1875) LR 6 PC 381 (UK) at 383 [*Yeap Cheah Neo*].
73. *Ibid*.
74. *Hetherington*, *supra* note 57.
75. *Nelan v Downes*, (1917) 23 CLR 546 (HCA) [*Nelan*].

to trusts for purposes supporting the ancestor worship of a testator's clan in China, founded in the fifteenth century.[76] Despite the much larger size of the religious group who would be involved in such worship, compared to that in the 1875 case, the Hong Kong Court of Appeal followed *Yeap Cheah Neo v Ong Cheng Neo* and found that the trusts contravened the public requirement.[77] A different view appears to be taken in Singapore.[78]

The Commonwealth of Australia in its *Charities Act*[79] could have followed the example set by New Zealand in its legislative definition of charitable purpose in the *Charities Act 2005*:[80]

> the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.[81]

When applied to religious purposes, the New Zealand approach shifts the inquiry to whether there is an indirect public benefit from such religious activities. An argument could be made (similar to that with respect to restrictions on access to worship) that members of an exclusive religious group provide benefit to society through their subsequent interactions with the public at large (or simply that religious pluralism is of public benefit in and of itself).

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76. *Ip Cheung Kwok v Sin Hua Bank Trustee Ltd*, [1990] 2 HKLR 499 (CA).
77. *Ibid* (the court did not accept that there was a legally significant distinction between Chinese lineage ancestral worship, which may go back centuries, and essentially private ancestral worship of an immediate testator).
78. See GE Dal Pont, *Law of Charity*, 2d (Chatswood: LexisNexis Butterworths, 2017) at para 3.12 note 75 [GE Dal Pont]; *Cheang Tew Muey v Cheang Lean Neo*, [1930] SSLR 58 (SC (SG)); *Attorney-General v Lim Poh Neo* [1974-1976] 1 SLR(R) (SGHC) 782.
79. Austl *Charities Act*, *supra* note 14.
80. *Charities Act 2005*, 2005/39 (NZ).
81. *Ibid*, s 5(2)(a) (the wording of the New Zealand provision is not limited to religious (or indigenous) groups and appears to have the radical effect of overruling *Oppenheim*, *supra* note 52; but see GE Dal Pont, *supra* note 78 at para 3.13 (public benefit must still be present)).

## D. Private Profit

Finally, the public nature of charity is reflected in its not-for-profit character. Individual members of the religious group (or others) cannot receive a personal gain from the implementation of the religious purposes that is not available to the general public.[82] The generation of profit by the group itself, whether or not in furtherance of the advancement of religion, is not problematic in Australian law so long as all such profit is expended on the charitable purposes of the religious group.[83] And reasonable remuneration for services undertaken in implementing those charitable purposes is allowed.

Whilst it is clear as a matter of principle that personal wealth generation by a religious leader is incompatible with charitable status, there is ambiguity as to when the line will be crossed in this respect. In Ireland, the religious purposes of groups or leaders whose 'principal object' is the 'making of profit' are not eligible for charitable status.[84] Conversely perhaps, the High Court of Australia has noted that religious activity is not inconsistent with commercialism and "the amassing of wealth" from which religious leaders may benefit financially.[85] Would the leader of a Christian group espousing prosperity theology who maintained an expensive lifestyle, consistent with the group's religious beliefs, contravene the not-for-profit element of charity? It would seem so, however there are no reported instances of the denial of charitable

82. *Cf.* Austl *Charities Act*, *supra* note 14, s 6(3).
83. *Federal Commissioner of Taxation v Word Investments Ltd*, [2008] HCA 55.
84. Ire *Charities Act*, *supra* note 47. See also United Kingdom, Charity Commission for England and Wales, *The Advancement of Religion for the Public Benefit* (December 2008, as amended 1 December 2011), online (pdf): Government of the United Kingdom <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358531/advancement-of-religion-for-the-public-benefit.pdf> ("[i]f the purpose of an organisation is to enhance the wealth of the leader or leaders of a religion, this would not be charitable" at 16).
85. *Church of the New Faith*, supra note 26 at 16061 (Murphy J).

status on this basis.[86]

Another question in this area concerns religious groups with an internal economy pursuant to which all personal property is relinquished to the group and members' worldly needs are met from income generated by the group as a whole.[87] In economic terms, such arrangements may significantly advantage group members over members of the general public engaged in similar income-generating pursuits.[88] Do such arrangements contravene the not-for-profit nature of charitable purposes? A New Zealand High Court decision found that benefits comprising accommodation, food, clothing and payment of NZ $1 per week to members of a religious community who lived and worked together were merely incidental to, and in furtherance of, the trust's primary purpose of advancement of religion.[89] It was relevant that the members had relinquished all personal property to the group; hence, the personal benefits received through board and lodging were necessary and incidental to the religious purposes of the group.[90]

# V. Disqualification Due To Public Detriment

## A. Introduction

The religious purposes discussed in Part IV are not necessarily detrimental to the public; they simply do not confer sufficient, or exclusively, public benefit. In principle, religious purposes may be disqualified from charitable

86. *Cf.* UK Charity Commission, *The Advancement of Religion for the Public Benefit*, *supra* note 84 at 17 (examples of where private benefits to a religious leader would not be considered incidental to executing the charitable purposes, including where a private jet is provided for travel).
87. See *e.g. Centrepoint Community Growth Trust v Commissioner of Inland Revenue*, [1985] 1 NZLR 673 [*Centrepoint Community Growth Trust*]. See further GE Dal Pont, *supra* note 78 at para 3.29.
88. See *e.g.* Alvin J Esau, *Courts and the Colonies: Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004) at 910 (describing the communal economies and related prosperity of Canadian Hutterite communities).
89. *Centrepoint Community Growth Trust*, *supra* note 87 at 700.
90. *Ibid.*

status because, broadly speaking, they cause, or have the potential to cause, detriment to the public. Although the alleged detriment caused by particular religious groups is the issue that generates most heat in public discourse, in practice, and subject to one qualification, it is highly unlikely that religious purposes would be disqualified from charitable status on this basis unless the religious group itself, its purposes or its activities are unlawful. The qualification relates to a line of English cases involving (Roman Catholic) enclosed religious orders, in which the courts became mired in evidential questions concerning how one demonstrates to a secular court that religious purposes are beneficial. The question whether lawful purposes for the advancement of religion should ever be denied charitable status on the basis of public detriment is difficult.

## B. Unlawful Purposes

At common law and pursuant to the Australian *Charities Act*, if a religious group, its purposes or activities are illegal, then charitable status, in relation to those purposes, is refused.[91] There are many instances in the history of trusts law of illegal (superstitious) purposes either being denied charitable status altogether or of the trust fund being diverted to lawful religious purposes.[92] Twentieth century examples of unlawful religious groups in Australia include Jehovah's Witnesses and Scientology.[93] In this century it is more likely to be the case that a religious group is proscribed pursuant to anti-terrorism legislation or regulations. Alternatively, a religious group's religious purposes and/or activities may fall foul of the general law; as would be the case, for example, with a religious group whose central act of worship involved taking an illegal drug.

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91. Austl *Charities Act*, *supra* note 14, s 11(a).
92. In relation to superstitious (that is, 'false' and unlawful) uses, the courts might still find a general charitable intent and order a cy-près scheme. See further Gareth Jones, *History of the Law of Charity, 1532-1827* (Cambridge, UK: Cambridge University Press, 1969) at 11, 143; Harding, "Trusts for Religious Purposes", *supra* note 6 at 161-62.
93. See Renae Barker, *State and Religion: the Australian Story* (Abingdon: Routledge, 2019) at 195-201.

## C. Evidential Questions

Two questions arise in relation to proving public detriment in relation to religious purposes. The first concerns how courts and regulators are to balance possible detriment against benefit in scenarios in which the public benefit of a religious group's purposes is called into question and therefore can no longer be assumed. For example, how should evidence of psychological harm to members or ex-members of a religious group be balanced against benefits to the general public provided by the group's worship facilities? That question remains unresolved, but is far from a moot point.[94] And when considering possible detriment, should the decision maker rely only upon the doctrines and teachings of the group (whether or not universally adhered to) or upon empirical evidence of group members' actual practice?

The second evidential question concerns how decision makers are to treat religious beliefs in determining benefit or detriment. The English courts have not accorded charitable status to the religious purposes of enclosed religious orders on the ground that any perceived public benefit (through intercessory prayer, for instance) depends upon one's religious belief and is thus incapable of proof in a secular court.[95] Thus, in the leading English decision a trust for the purposes of a Carmelite Priory whose members engaged in intercessory prayer for the public, but did not physically interact with the public, was held not charitable.[96] The Commonwealth of Australia has put the matter beyond doubt for its legislative purposes by removing the public benefit requirement altogether in relation to purposes of an entity that is "a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the general public".[97]

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94. See *Preston Down Trust*, supra note 68 (similar issues arose in the Preston Down litigation commenced by the Charity Commission of England and Wales and subsequently settled). See generally GE Dal Pont, *supra* note 78 at para 10.41.
95. *Gilmour v Coats*, [1949] AC 426 (HL (Eng)).
96. *Ibid*.
97. Austl *Charities Act*, *supra* note 14, s 10(2).

The legislative intervention was probably unnecessary given that the High Court of Australia has long accepted the value of Roman Catholic religious practices.[98] Given the prominent Irish-Catholic strand in Australian history, it is likely that, should the particular issue arise in the common law of charity, Australia will follow the Irish courts' endorsement of the public benefit of such purposes.[99] In any event, if public benefit is conceptualised at a more general level of abstraction such as the benefit to society of flourishing religious pluralism — as is the likely direction of the law in this area — rather than focusing upon the specific beliefs in question, then the issue becomes redundant.[100]

## D. Can Lawful Religious Purposes be Disqualified on Public Detriment Grounds?

The leading common law statement on public detriment that will disqualify religious purposes from charitable status is that of Sir John Romilly in the 1862 case of *Thornton v Howe*.[101] The statement appears after an affirmation of the law's neutrality towards religion and general acceptance of religious purposes as charitable.[102] Sir John Romilly continued:

> [i]t may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void…But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests.[103]

98. See *e.g. Nelan*, *supra* note 75.
99. In Ireland, see *e.g. Re Howley*, [1940] IR 109 (HC (Ire)). In Australia, see *Crowther v Brophy*, [1992] 2 VR 97 (VSC (Austl)).
100. See further Harding, "Trusts for Religious Purposes", *supra* note 6; Ridge, "Religious Charitable Status", *supra* note 6.
101. *Thornton*, *supra* note 46 at 1920. See further Pauline Ridge, "Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of *Thornton v Howe*" (2010) 31:2 Journal of Legal History 177.
102. *Thornton*, *ibid*.
103. *Ibid* at 20.

It is difficult to envisage purposes that could meet this extreme description yet still be lawful; furthermore, determining whether this was the case would involve a court in challenging normative questions.

Moving to legislative conceptions of detriment, the concept finds expression in two ways in the Australian *Charities Act*. The first is 'public detriment'. In relation to the requirement that a charitable entity's purposes must be for the public benefit, there is reference in section 6(2) to:

> (b) any possible, identifiable detriment from the achievement of the purpose to the members of:
>
> (i) the general public; or
>
> (ii) a section of the general public.[104]

The meaning of 'detriment' in this context is not elaborated upon (and raises the problem of balancing benefit with detriment alluded to above). The second expression of detriment in the *Charities Act* is 'disqualifying purpose'. An entity will not be charitable if it has a "disqualifying purpose" and this is defined in section 11 to include:

> (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy.[105]

The 'contrary to public policy' disqualification in section 11 of the *Charities Act* goes further than the common law as expressed in *Thornton*.[106] Examples of public policy are given in section 11(a):

> Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.
>
> Note: Activities are not contrary to public policy merely because they are contrary to government policy.[107]

These examples concern fundamental matters going to the democratic nature and existence of the secular state; however, the language of

104. Austl *Charities Act*, *supra* note 14, s 6(2)(b).
105. *Ibid*, s 11.
106. *Ibid*; *Thornton*, *supra* note 46.
107. Austl *Charities Act*, *ibid*.

'includes' suggests that less fundamental clashes with public policy may also be disqualifying. But again, it is difficult to envisage what will suffice, absent illegality.

The uncertain scope of the 'disqualifying purpose' provision came to the fore in the wake of legalisation of same-sex marriage by the Commonwealth of Australia in 2017. Religious groups advocating a 'traditional' view of marriage (restricted to heterosexual couples) were concerned that they would lose charitable status. This seemed unlikely given that section 11 specifies that activities contrary to government policy are not necessarily contrary to public policy for its purposes.[108] Nevertheless, the Commonwealth Government agreed to amend the *Charities Act* to allay such concerns.[109]

The judgments of the US Supreme Court in *Bob Jones University v United States*,[110] albeit written in a very different constitutional context, are illustrative of the problematic nature of a public policy justification for refusing charitable status. The majority judgment, delivered by Burger CJ, held that the federal taxation authority was justified in refusing charitable (and thereby tax exemption) status to Bob Jones University because its racially discriminatory admission policies, although not unlawful at the time, contravened a fundamental national policy against racism.[111] This was justified by the majority in terms of balancing public detriment and benefit stating "[t]he institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit

108. *Ibid*.

109. See Austl, Commonwealth, Attorney-General's Department, *Australian Government Response to the Religious Freedom Review* (Canberra: Attorney-General's Department, December 2018) at 9-10, online (pdf): Attorney-General's Department <www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf> (accepting Recommendation 4 of the Expert Panel's *Religious Freedom Review*) [*Australian Government Response to the Religious Freedom Review*]. See further *Religious Freedom Review*, *supra* note 3 at paras 1.18-71, 1.200. See *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 149(1)(f) (Canadian charity law is to the same effect).

110. (1983) 103 S Ct 2017 (USSC) [*Bob Jones University*].

111. *Ibid*.

that might otherwise be conferred".[112]

But Powell J, although concurring in the outcome, strongly disagreed with this rationale, finding that it ignored the "important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints".[113] In other words, a public policy restraint on lawful charitable purposes risks imposing majoritarian views on minority groups. A concern that is evident in all three judgments is that Congress had not legislated against racially discriminatory education at the time; that is, the University's conduct was not illegal.[114] Justice Reinquist (as he was then) dissented for this reason.[115]

The Australian *Charities Act* definition of 'disqualifying purpose' goes some way towards meeting such concerns by giving as examples of public policy concerns "the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security".[116] But the definition is inclusive; hence other, possibly less fundamental, public policy concerns might disqualify religious purposes from charitable status. Furthermore, it is difficult to envisage scenarios where a religious group or its purposes were contrary to "the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public [or] national security" and yet not illegal.[117] For all these reasons, it is suggested that only purposes for the advancement of religion that are unlawful should be denied charitable status.

So far, the discussion in Parts II to V has concerned doctrinal and legislative grounds upon which purposes for the advancement of religion might be refused charitable status. The following two Parts consider the effect of two recent developments in charity. The first concerns the application of human rights jurisprudence to charity law and the second concerns state regulation of the charity sector.

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112. *Ibid* at 2029.
113. *Ibid* at 2038.
114. *Ibid* at 2030-32, 2036, 2039.
115. *Ibid* at 2039, 2043.
116. Austl *Charities Act*, *supra* note 14, s 11(a).
117. *Ibid*.

# VI. Human Rights Considerations

## A. Introduction

A relatively untested consideration in deciding when the advancement of religion will not be charitable concerns human rights law. Section 116 of the Australian *Constitution*[118] has not proved significant in this respect.[119] It does not preclude government funding of religious groups or the facilitation of religious activity through conferral of charitable status,[120] but it has not always been effectual in protecting freedom of religion[121] and it does not constrain the Commonwealth's ability, through legislation, to refuse charitable status for the advancement of religion. Australia's international human rights obligations are likely to be of greater significance to charity law.

Australia is a signatory to the *International Covenant on Civil and Political Rights* ("*ICCPR*").[122] Comprehensive implementation of its provisions in domestic law has been patchy,[123] although Commonwealth legislation making it "unlawful to discriminate on the basis of a person's

118. *Commonwealth of Australia Constitution Act*, 1900, s 9.
119. *Ibid* ("[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth", s 9(116)).
120. *Attorney-General (Vic); ex rel Black v Commonwealth*, (1981) 146 CLR 559 (HCA) at 582 (Barwick CJ); at 616 (Mason J).
121. See *e.g. Adelaide Company of Jehovah's Witnesses Incorporation v The Commonwealth*, (1943) 67 CLR 116 (HCA).
122. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, ratified by Australia 13 August 1980) [*ICCPR*].
123. The Australian Capital Territory, Victoria and Queensland have implemented the *ICCPR* provisions relating to freedom of religion: *Human Rights Act 2004* (ACT), 2004/5 (Austl); *Charter of Human Rights and Responsibilities Act 2006* (Vic), 2006/43 (Austl); *Human Rights Act 2019* (Qld), 2019/05 (Austl). See also *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), 2011/186 (Austl).

'religious belief or activity'" is imminent at the time of writing.[124] Other common law countries with a shared charity law heritage tend to have more comprehensive human rights protection and a maturing jurisprudence, although direct comparison can be difficult.[125] Bearing this in mind, some general observations follow on how human rights considerations may affect a claim for charitable status based on the advancement of religion, with Australian and English law as the focus. England's *Human Rights Act 1998*,[126] implemented the *European Convention on Human Rights*[127] ("*Convention*") and requires that domestic legislation be interpreted so as to be compatible with *Convention* rights[128] and that a public authority (such as the Charity Commission) not act incompatibly with *Convention* rights.[129] The jurisprudence most relevant to English charity law, apart from that of the English courts, and which must be taken into account by

124. See *Australian Government Response to the Religious Freedom Review*, *supra* note 109 at 17 (accepting Recommendation 15 of the *Religious Freedom Review*, *supra* note 3).
125. See *Christian Youth Camps*, *supra* note 33 at para 411. See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (Canada has constitutionally entrenched human rights protections in this *Charter* and there is a growing body of case law on *Charter* claims relevant to religion). See *e.g. Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.
126. *Human Rights Act 1998* (UK) [UK *Human Rights Act*].
127. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*Convention*].
128. UK *Human Rights Act*, *supra* note 126, s 3.
129. *Ibid*, s 6 (see also s 13 requiring courts to have particular regard to the right to freedom of religion). See generally Ridge, "Not-for-profit Law and Freedom of Religion", *supra* note 46 (on the right to freedom of religion in England not-for-profit law).

them,[130] is that emanating from the European Court of Human Rights.[131] The provisions of the *ICCPR* will be used in the following discussion (the *Convention* rights relevant to religion are broadly similar). The *ICCPR* provisions most relevant to religious charitable status concern the right to freedom of religion (Article 18),[132] the right to freedom of association (Article 22)[133] and the right not to be discriminated against on the ground of, inter alia, religion (Articles 2(1) and 26).[134]

Human rights are a two-edged sword for religious groups claiming charitable status. Whilst a state *may* be in breach of the right to freedom of religion and/or associated rights if it withholds charitable status from a religious group, it has also been suggested that religious groups should forfeit charitable status if they contravene the human rights of others. These two perspectives are now discussed.

## B. Reliance on Human Rights by Religious Groups in Relation to Advancement of Religion

Article 18(1) of the *ICCPR* protects the right "in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching".[135] Religious groups may claim the

130. UK *Human Rights Act*, *ibid*, s 2(1)(a).

131. The European Court of Human Rights' decisions should be treated with caution when relied upon in non-*Convention* States such as Australia because the Court allows a wide margin of appreciation to member States in determining whether restrictions on human rights are permissible; in addition, it is not a court of common law.

132. *ICCPR*, *supra* note 122 ("[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching", art 18(1)). *Convention*, *supra* note 127 (the equivalent provision is art 9).

133. *ICCPR*, *ibid*, art 22.

134. *Ibid*, arts 2(1), 26 (see also art 24 (children) and art 27 (ethnic, religious or linguistic minorities)).

135. *Ibid*, art 18(1).

protection of Article 18 and its equivalents on behalf of their members.[136] The concept of manifestation of religion 'in community' encompasses the charity law concept of 'advancement of religion'.[137] Thus, in principle, Article 18 applies to a religious group's claim that the refusal of charitable status and concomitant fiscal benefits interferes with the communal manifestation of religious beliefs by its members so as to breach their right to freedom of religion.

Nonetheless, such a claim seems unlikely to succeed. Courts in various jurisdictions have found that the refusal of charitable status and associated tax privileges does not infringe the right to freedom of religion for the simple reason that lack of charitable status does not preclude group members from manifesting their religious beliefs, although it may make it more expensive to do so.[138] Charitable status has a privileging, rather than legalising, function.

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136. *Ibid*, art 18. See *e.g. Church of Jesus Christ of Latter-Day Saints*, *supra* note 59.

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

138. *Application For Registration as a Charity by the Church of Scientology: Decision of the Charity Commissioners for England and Wales* (17 November 1999) at 10, online (pdf): Charity Commission of England and Wales <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324212/cosfulldoc.pdf>; *Bob Jones University*, *supra* note 110 at 2035. *Cf. Canada Without Poverty v Attorney General Canada*, 2018 ONSC 4147 (Morgan J accepting the claimant's argument that it could not continue to operate without the tax benefits associated with its charitable status and that this 'cost burden' infringed its right to freedom of expression under s 2(b) of the Canadian *Charter*; see especially "[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'" at para 44).

A more promising argument is that refusal of charitable status may infringe the right not to be discriminated against on the ground of one's religion (for example, where other religious groups are not similarly affected).[139] However, there is then a further hurdle that must be overcome given that the right to manifest one's religious beliefs is never unqualified. Hence, Article 18(3) states:

> [f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[140]

That is, the right to manifest religious beliefs through purposes for the advancement of religion may be qualified by the state, even where this is discriminatory, in the same way that the assumed charitable status of such purposes may be removed by a "disqualifying factor" as defined in section 11 of the *Charities Act*.[141] The most analogous case to date is *Gallagher*, discussed above, concerning the refusal to grant a full rates exemption to a Mormon temple because of public access restrictions.[142] Only Lord Scott in the House of Lords found that there was an element of discrimination on the facts, but he held that this was justified on national security grounds because of the need for openness in religious practices in a pluralist society.[143] The European Court of Human Rights dismissed the Church's appeal, referring to the "wide margin of appreciation" accorded to states in this jurisprudence.[144]

Interesting questions arise in the Australian context if Article 18 of the *ICCPR* is implemented at the Commonwealth level so as to apply directly to Commonwealth legislation. Could the definition of

139. See *e.g. Gallagher*, *supra* note 59 at paras 49-50; *Church of Jesus Christ of Latter-Day Saints*, *supra* note 59 ("if a State sets up a system for granting tax exemptions on religious groups, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner" at para 29 [footnote omitted]).
140. *ICCPR*, *supra* note 122, art 18(3).
141. Austl *Charities Act*, *supra* note 14, s 11.
142. *Gallagher*, *supra* note 59. See Part IV.B, above.
143. *Ibid* at para 51.
144. *Church of Jesus Christ of Latter-Day Saints*, *supra* note 59 at para 18.

'disqualifying purposes' in section 11 of the Australian *Charities Act*, discussed above,[145] particularly the inclusive definition of public policy for the purposes of establishing public detriment, be challenged as being wider than the permissible qualifications on the right to manifest religion stated in Article 18(3),[146] for example? Absent the margin of appreciation accorded to European states by the European Court of Human Rights, would a *Gallagher*-style claim succeed in Australia? And would the 'public' aspect of the public benefit requirement in its application to members of a religious group connected by familial ties due to the precepts of their religion withstand a human rights challenge based on discrimination and freedom of religion?[147] Such questions suggest that the growing human rights discourse concerning freedom of religion in Australia, if it has any impact on charity law at all, will make it more, rather than less, difficult to deny charitable status to purposes that advance religion.

## C. Should the Advancement of Religion be Subject to Human Rights Standards?

Religious groups are not subject to international human rights obligations; such obligations are imposed on states and the organs of government. However, they may become subject to such obligations through domestic legislation. Kathryn Chan has documented a trend in English charity law towards making the charitable status of faith-based charities dependent upon compliance with human rights standards, particularly anti-discrimination norms.[148] The issue has arisen in the context of religious groups with faith-motivated purposes that fall under heads of charitable

145. See Austl *Charities Act*, *supra* note 14, discussed in Part V.D, above.

146. *ICCPR*, *supra* note 122, art 18(3).

147. See Part IV.C, above.

148. See *e.g.* Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) at 6670. See also Charity Commission for England and Wales, "Equality Act: Guidance for Charities" (22 February 2013), online: Charity Commission for England and Wales <www.gov.uk/government/publications/equality-act-guidance-for-charities/equality-act-guidance-for-charities> [Charity Commission, "Equality Act: Guidance for Charities"].

purpose other than the advancement of religion. Conversely, under English law, religious groups whose purposes concern the advancement of religion are exempted from anti-discrimination obligations 'on the basis of religion or belief or sexual orientation'.[149] In all other respects, however, a religious charity for the advancement of religion in England must justify prohibited discrimination. A failure to do so will be viewed as undermining its public benefit.[150]

The imposition of human rights obligations upon religious groups in relation to their *religious* activity, other than where such activity is unlawful under the general law, raises similar concerns to those relating to the public policy-based exclusions from charitable status discussed above in Part V and should not be countenanced:

> [h]uman rights do not exist to decontaminate religions, nor to cleanse society of religion. They exist to serve, by effective guarantees, those who believe – no matter *what* they believe – and to regulate only the excesses of religious practice on the basis of necessity and in accordance with the objective standards of a democratic society.[151]

## VII. Charitable Status As A Means Of Securing Regulatory Control Over Religious Groups

A feature of twenty-first century charity law is the increasing regulation of charities, generally by means of a statutory regulator and comprehensive regulatory scheme.[152] In Australia, this commenced in 2013 with the

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149. See *e.g. Equality Act 2010* (UK), Schedule 23, para 2. See further Charity Commission, "Equality Act: Guidance for Charities", *ibid* at para 8.5.
150. Charity Commission, "Equality Act: Guidance for Charities", *ibid*, at para 7.2.
151. Paul M Taylor, "Controversial Doctrine: The Relevance of Religious Content in the Supervisory Role of International Human Rights Bodies" in Rex Ahdar, ed, *Research Handbook on Law and Religion* (Cheltenham: Edward Elgar Publishing Limited, 2018) 309 at 330 [emphasis in original].
152. See generally Oonagh B Breen, "Redefining the Measure of Success: A Historical and Comparative Look at Charity Regulation" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham: Edward Elgar Publishing Limited, 2018) 549.

establishment of the ACNC.

The *ACNC Act* gives the ACNC and its Commissioner extensive information-gathering and monitoring powers in relation to registered entities[153] and enforcement powers.[154] The Commissioner may also suspend[155] or remove[156] the 'responsible entity' (including company directors and trustees)[157] of a registered entity in certain circumstances and appoint entities to act in their stead.[158] The *ACNC Act* provides for a public register of information (including financial records and governance information) pertaining to registered entities to be maintained by the Commissioner.[159] It has been observed that "the practical effect of the *ACNC Act* has been to transform the charity sector from being one of the least regulated to one of the most highly regulated sectors in Australian society".[160]

The *ACNC Act* deals with 'basic religious charities' differently to other registered entities.[161] A BRC must be an unincorporated[162] registered

153. *ACNC Act*, *supra* note 19, part 41. A registered entity is a charity.
154. *Ibid*, part 42.
155. *Ibid*, s 10010.
156. *Ibid*, s 10015.
157. *Ibid*, s 20530 (defining 'responsible entity').
158. *Ibid*, s 10030 (the Commissioner may also determine the terms and conditions of such appointment, s 10040). See Austl, Commonwealth, The Treasury, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission: Legislation Review 2018* (Canberra: the Treasury, 2018) at 12, online (pdf): Australian Government the Treasury <treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf> (a review of the *ACNC Act* has recommended that this power be removed, recommendation 5) [*Strengthening for Purpose*].
159. *ACNC Act*, *ibid*, s 405.
160. Nicholas Aroney and Matthew Turnour, "Charities are the New Constitutional Law Frontier" (2017) 41:2 Melbourne University Law Review 446 at 457.
161. See further *Strengthening for Purpose*, *supra* note 158 at 64-70 (suggesting at 65 that respect for the right to freedom of religion may have motivated the BRC exemptions).
162. See *ibid* at 67 (this has been criticised for discriminating against incorporated religious groups, see also at n 166).

entity with the charitable purpose of advancing religion, not a deductible gift recipient (except in some circumstances) and not in receipt of more than a minimum level of government funding.[163] At the time of writing, BRCs are exempted completely from compliance with the financial reporting[164] and governance standards[165] of the *ACNC Act*.[166] Nor does the Commissioner have power to remove and replace the responsible entity of a BRC.[167] A 2018 review of the operation of the *ACNC Act* by Treasury recommended that the exemptions for BRCs could be removed, but that this be subject to other recommended reforms that limit the ACNC's overall powers.[168]

Although religious groups with purposes for the advancement of religion are not obliged to register as charities, the Commonwealth tax incentives and enhanced reputational status that charity registration brings suggest that most will do so. Commonwealth tax exemptions are predicated on registration with the ACNC. Through registration by the ACNC, the state secures regulatory control over the activities of charities for the advancement of religion. Such control brings with it the potential for the state, through the regulator, to mould the operation, purposes and activities of religious groups to align with public goals and values. This has always been the function of charity law, of course, most obviously through the public benefit requirement of charity. Furthermore, in Australia, the regulator is an independent statutory body. Hence the state's increase in control over religion should not be exaggerated (particularly whilst the BRC exemptions from regulatory intervention remain). Nevertheless, the presence of a regulator exercising ongoing oversight over the operation of religious charities and with the power to intervene in their affairs greatly enhances this controlling aspect of charity law. This brings with it clear risks regarding religious freedom and the separation of religion

163. *ACNC Act*, *supra* note 19, s 205-35.
164. *Ibid*, s 60-60.
165. *Ibid*, s 45-10(5).
166. *Strengthening for Purpose*, *supra* note 158 at 65.
167. *ACNC Act*, *supra* note 19, s 10-05(3).
168. *Strengthening for Purpose*, *supra* note 158 at 70 (Recommendation 16).

and state.[169]

An obvious context in which the ACNC's powers can be used to control religious activity is counter-terrorism, particularly the prevention of financing or incitement of religiously motivated terrorist activity.[170] The English Charity Commission's counter-terrorism interventions in Islamic religious charities in this respect are well-documented and have included removing trustees.[171] Another factual context in which the English Charity Commission has intervened regularly concerns sexual abuse within religious groups.[172] The recommendations of Australia's Royal Commission into Institutional Responses to Child Sexual Abuse emphasised that Australian religious charities be subject to greater scrutiny in this respect; it has been suggested that the ACNC should have a role here.[173]

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169. See Aroney and Turnour, *supra* note 160; Peter W Edge, "Hard Law and Soft Power: Counter-Terrorism, the Power of Sacred Places, and the Establishment of an Anglican Islam" (2010) 12:2 Rutgers Journal of Law and Religion 358 (arguing, at 359, that after 7/7, the Charity Commission was used by the British Government to exercise "soft power, in particular financial power, to effect theological change in Islamic religious communities").
170. See Pascoe, *supra* note 19 at 581-82. Breen, *supra* note 152 at 550 (suggests that this has been one of the prime motivators for increased charity regulation).
171. See Edge, *supra* note 169 at 363-68.
172. See *e.g.* Charity Commission for England and Wales, Press Release, "Charity Commission Disqualifies Trustee from Rigpa Fellowship" (13 June 2019), online: Charity Commission for England and Wales <www.gov.uk/government/news/charity-commission-disqualifies-trustee-from-rigpa-fellowship>; Charity Commission for England and Wales, "Decision: Manchester New Moston Congregation of Jehovah's Witnesses" (26 July 2017), online: Charity Commission for England and Wales <www.gov.uk/government/publications/manchester-new-moston-congregation-of-jehovahs-witnesses-inquiry-report/manchester-new-moston-congregation-of-jehovahs-witnesses> (Charity Commission's statutory inquiries with respect to safeguarding concerns in charities for the advancement of religion).
173. *Strengthening for Purpose*, *supra* note 158 at 65.

Minds will differ on the relative merits and dangers of increasing regulatory power over religious activity through charity law. The argument being made here, however, is simply that the potential for such regulatory oversight and control increases the attractions to the state of conferring charitable status upon groups advancing religion. That is, charitable status for the advancement of religion is an effective vehicle for greater state scrutiny, regulation and, ultimately, control of religious activity. There is thus a clear incentive for the state to encourage and support religious groups to acquire charitable status for their religious purposes and this makes it even more likely that charitable status will be conferred.

## VIII. Conclusion

An analysis of charity doctrine and legislation suggests that it is rare for purposes for the advancement of religion not to be granted charitable status. Furthermore, several instances where charitable status could be refused are highly questionable and unlikely to withstand legal challenge, particularly on human rights grounds. For example, the use of the definition of religion to exclude certain groups at the threshold stage of a charity inquiry, as is the case in Ireland and England, is unprincipled and obfuscates the otherwise legitimate inquiry into whether such purposes should be excluded on substantive grounds. The exclusion from charitable status of religious groups whose members are necessarily linked by familial ties due to their religious precepts, or who restrict public access to sacred spaces on religious grounds, clearly raises concerns regarding equality of treatment. Of most concern, however, is the issue of whether a religious group can be denied charitable status on public policy grounds for its lawful religious activities. In principle, this is possible both at common law and under the Australian charities legislation. But for a court or regulator to do so surely raises highly problematic evidential questions as well as undermining the very pluralism and diversity of viewpoints that charity law generally promotes. Parliament seems a more appropriate forum for the determination of such questions. Indeed, the sorts of public policy concerns could generate such refusal are so severe as inevitably to render illegal the purposes in question. The

communal aspects of the right to freedom of religion coupled with the right not to be discriminated against on the ground of religion have the potential to remove some of the restrictions on religious activities just outlined. Given Australia's increasing domestic protection of the right to freedom of religion, it is therefore even more likely that the advancement of religion will secure charitable status in the future. Finally, an analysis of the availability of charitable status for the advancement of religion highlights the important regulatory function of charity law in mediating the relationship between state and religion. There is a clear incentive for the state, through law, to facilitate the conferral of charitable status on purposes that advance religion. How that regulatory role is to be managed, including what checks and balances are necessary in order to protect religious groups from undue state interference, remains to be seen (and minds will differ on this question); however, it seems clear that human rights law will have a part to play. The ability — in principle, at least — of religious groups to choose not to seek charitable status and hence forgo the benefits on offer will also act as a constraint on such regulation.