

RELIGIOUS CHARITABLE STATUS AND PUBLIC BENEFIT IN AUSTRALIA

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[The Commonwealth government proposes to enact a statutory definition of religious charity. Whether religious groups should prove that they provide public benefit in return for charitable status is contentious and the current law is confused. Moreover, overseas reforms diverge on this issue. Identifying an appropriate model for determining public benefit is important because charity law is a significant means of state control over religion. This article proposes three criteria — evidence, human rights and cost — by which to judge a public benefit charity test, and identifies three models that could be adopted. The model that is most consistent with the proposed criteria broadly accords with the current common law position.]

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I INTRODUCTION

Fundamental reform of charity law is underway in Australia. As part of this reform the Commonwealth government has pledged to enact a statutory definition of charity by July 2013.¹ One of many issues raised by this development concerns the extent to which religious organisations will need to prove that they provide public benefit in return for charitable status under the statutory definition. Ascertaining public benefit from purely religious activities under the common law of charity has proved challenging in the past, although the difficulties were obscured by the application of a presumption of benefit with respect to most religious purposes. Removing the presumption of benefit would have significant implications for religious groups who rely upon charitable status to access a range of legal and fiscal privileges. Charity law is also a means by which the state regulates religious groups; the public benefit test, in its current and possible future manifestations, is at the heart of such regulation. Determining religion's public benefit through a defensible legal framework is thus an important check on state control over religious groups.

Although the Commonwealth reforms also pose fundamental policy questions concerning the worth of religion in Australian society,² this article is concerned with a preliminary legal question: what should a legal model for determining the charitable status of religious groups in relation to purely religious purposes look like when those purposes do not qualify as charitable on some other basis such as the relief of poverty or the advancement of education?

Most of the overseas jurisdictions who share Australia's charity law heritage have progressed more quickly with charity law reform and therefore offer useful comparators for Australia to consider. Two jurisdictions that offer strikingly different legal models in relation to public benefit and religious charitable status are England and Wales (hereinafter referred to as 'England'),³ and the Republic

¹ Commonwealth of Australia, *Budget Measures — Budget Paper No 2, 2011–12* (2011) 37. The government also committed to establish an independent regulator of not-for-profit and charitable groups by July 2012: at 322. An exposure draft of the Australian Charities and Not-for-Profits Commission Bill 2012 (Cth) was released on 9 December 2011. The start date for the Australian Charities and Not-for-Profits Commission has been extended to 1 October 2012: Mark Arbib, Assistant Treasurer, 'Gillard Government Listens to Sector on Not-for-Profit Reforms' (Media Release, No 011, 1 March 2012). Exposure draft legislation enacting a statutory definition of charity is expected to be released in mid 2012: The Treasury (Cth), *A Definition of Charity — Consultation Paper* (2011) 2 [15]. These reforms have come about after several reports recommended the establishment of an independent regulator, the enactment of a statutory definition of charity, and the streamlining and simplifying of tax concessions for not-for-profit bodies: see The Treasury (Cth), *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) 13–18; Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) 1–4; Review Panel, *Australia's Future Tax System: Report to the Treasurer — Part One: Overview* (2009) 88–9 ('Henry Review Report — Part One'); Productivity Commission (Cth), *Contribution of the Not-for-Profit Sector — Research Report* (2010) xli–liii.

² See Brian Lucas and Anne Robinson, 'Religion as a Head of Charity' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 187.

³ *Charities Act 2006* (UK) c 50. The Office for Civil Society is conducting a review of the 2006 legislative reforms and will report in mid 2012: Cabinet Office (UK), *Review of the Charities Act 2006 — Terms of Reference* (2011).

of Ireland.⁴ England has removed any presumption of public benefit for religious charitable status, so that public benefit must now be affirmatively proved, whereas the Republic of Ireland, in legislative reforms yet to commence, has continued to entrench the presumption of public benefit in relation to religious charitable purposes, although it will allow rebuttal in exceptional circumstances. These jurisdictions are particularly relevant in discussing Australia's reform options because Australian charity law derives from their pre-reform case law and because they have contributed significantly to Australia's religious heritage.

Before considering a defensible legal framework for public benefit and religious charitable status it is necessary to explain why charitable status is important for religious groups, and the state of the current law in Australia. It is also important to understand how charitable status is used as a means of controlling religion and to establish the legitimacy in principle of such control. With this background in mind, three criteria for a defensible framework to determine religious charitable status will be described and three reform models that would comply with such a framework will be identified.

II THE ATTRACTIONS OF CHARITABLE STATUS

The primary attraction of charitable status for religious groups is that it makes them eligible for the widest possible range of fiscal benefits.⁵ Whilst all 'religious institution[s]' in Australia are entitled to income tax exemption,⁶ religious groups are able to reduce, or even eliminate, fiscal expenses if they have charitable status.

Also important are non-fiscal legal privileges associated with charitable status, particularly those attached to the charitable trust for purposes.⁷ This allows for perpetual duration of the trust and flexibility as to adjustment of purpose, along with enforcement by the Attorney-General.⁸ The charitable trust is of less importance nowadays, given the ability of associations to incorporate,⁹ but remains significant with respect to validating gifts made on trust for religious purposes.

A third attraction of charitable status that should not be underestimated, although the empirical evidence is sparse, is the public credibility that such status confers. Charitable status signals society's endorsement of a religious group.¹⁰ If

⁴ *Charities Act 2009* (Ireland).

⁵ See G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 100–26.

⁶ *Income Tax Assessment Act 1997* (Cth) pt 2-15 div 50-5. The link between income tax exemption and charity has existed since the first income tax legislation in 1799: *Duties on Income Act 1799*, 39 Geo 3, c 13, s 5.

⁷ Dal Pont, above n 5, 129–42.

⁸ See J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 200–3 (the enforcement of charitable trusts), 204–16 (the effectuation of charitable trusts by means of schemes), 216–18 (the rule against perpetuities).

⁹ This ability is provided for in state and territory legislation: see, eg, *Associations Incorporation Act 1991* (ACT); *Associations Incorporation Act 1981* (Vic).

¹⁰ See, eg, Faith and Social Cohesion Unit, Charity Commission for England and Wales, *Faith in Focus — Issue 2* (2009) 4. The newsletter highlights the benefits received by the Dudley Mosque and Muslim Community Legal Centre after being registered as a charity. According to the

nothing else, this may be important in terms of soliciting financial support. Thus, it seems reasonable to assume that most religious groups desire charitable status, even if for some groups charitable status will be irrelevant and their only interaction with the state will be through the general law.

III THE CURRENT LAW

To be eligible for charitable status, Australian religious groups must show that their purposes come within one of the four common law categories of charitable purpose¹¹ and are for the public benefit. One category of charitable purpose is the ‘advancement of religion’. Particular faith-motivated purposes may also qualify under other categories of charitable purpose such as the advancement of education or the relief of poverty, but this article is concerned with religious purposes that do not come within any other category of charitable purpose.¹² Such religious purposes include prayer, worship, ritual and ceremonial practices, preaching, and evangelism. It is these purely religious purposes for which a public benefit requirement can be problematic.

A *The Public Aspect of Public Benefit*

Currently, the requirement of public benefit has two, overlapping, aspects.¹³ The first is in the nature of a restriction: the persons eligible to participate in the religious purposes must be an inclusive, public group, rather than an exclusive, private group.¹⁴ In the context of religious purposes, it does not matter how small the actual number of persons choosing to join the group is as long as, in principle, others can join.¹⁵ So, for example, a trust for the religious education of a man’s grandchildren would not be charitable because it is only able to be enjoyed by those who have the necessary familial relationship with the grandfather.¹⁶

secretary of the mosque: ‘Being a registered charity shows everyone that we’re open, transparent and accountable. We’ve also been able to apply for more funding since registering, and we’ve even put our charity number on our letterhead!’

¹¹ *Commissioners for Special Purposes of the Income Tax v Pemsell* [1891] AC 531, 583 (Lord Macnaghten).

¹² ‘To advance religion’ includes ‘to promote spiritual teaching in a wide sense, to spread its message, or to take positive steps to sustain and increase religious belief, via ways that can be described as pastoral or missionary’: Dal Pont, above n 5, 232. The High Court has defined ‘religion’ very broadly: see *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120. Further discussion of ‘advancement of religion’ is beyond the scope of this article.

¹³ Heydon and Leeming, above n 8, 146 n 53; Jeffrey Hackney, ‘Charities and Public Benefit’ (2008) 124 *Law Quarterly Review* 347. The Upper Tribunal of the Tax and Chancery Chamber has recently labelled these two aspects of the public benefit test ‘public benefit in the first sense’ and ‘public benefit in the second sense’, but this article switches the order of the two aspects of public benefit for the sake of clarity of the argument. Thus, public benefit in the Tribunal’s second sense is dealt with first in the text. For a description of these terms, see *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) (13 October 2011) [44] (Warren J and Judges McKenna and Ovey).

¹⁴ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

¹⁵ *Inland Revenue Commissioners v Baddeley* [1955] AC 572, 615 (Lord Somervell).

¹⁶ This example is given in *Coats v Gilmour* [1948] 1 Ch 340, 345 (Lord Greene MR). Contra *Re Michel’s Trust* (1860) 28 Beav 39; 54 ER 280.

This is so even if it could be proved that the religious education provided to those individuals caused them to make a beneficial contribution to society. Even religious practices that by their very nature are restricted to a familial group (such as Chinese ancestor worship) cannot be charitable for, it is claimed, they ‘can lead to no public advantage, and can benefit or solace only the family itself.’¹⁷

The ‘public’ aspect of the public benefit test is problematic because it rules out the wider benefits to society that might ensue from a private group’s religious purposes.¹⁸ These indirect benefits have sometimes been acknowledged by the courts, although not in cases involving familial religious groups. For example, in *Neville Estates Ltd v Madden*,¹⁹ Cross J was prepared to find a charitable trust in relation to the purposes of a Jewish synagogue that was not open to members of the general public. He did so on the basis that ‘some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens.’²⁰ The public aspect of the public benefit test is also troubling because in practice its operation tends to discriminate against non-Western and non-mainstream religion. Perhaps this is not coincidental, but stems from the fact that religious charity law strongly reflects its historical context and is grounded in a mainstream Protestant Christian paradigm. Despite these uncertainties in its application and function, the public aspect of the public benefit test has not reached the law reform agenda in Australia or other countries.²¹

B *The Benefit Aspect of Public Benefit*

The second, overlapping, aspect of the current public benefit requirement for religious charitable status is that the purposes must benefit society generally, in addition to any personal benefit conferred upon the religious group. It is this aspect of the public benefit test that is the subject of current law reform in Australia and is the primary focus of this article. In order to understand the current law, it is necessary to examine the history of religious charity law.

It was not until the latter part of the 19th century that the English courts explicitly held that purposes for the advancement of religion must provide a public benefit. In 1871, in the Chancery case of *Cocks v Manners*,²² it was held that the purposes of an enclosed order of Roman Catholic nuns could not be charitable as

¹⁷ *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381, 396 (Lord Smith for Lords Colvile, Peacock, Smith and Collier). On Chinese religious practices generally, see Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, 2010) 120–4.

¹⁸ See Dal Pont, above n 5, 245.

¹⁹ [1962] 1 Ch 832.

²⁰ Ibid 853. See further Andrew Iwobi, ‘Out with the Old, In with the New: Religion, Charitable Status and the *Charities Act 2006*’ (2009) 29 *Legal Studies* 619, 635–6, citing Toby Haddock, ‘Charitable Trusts for the Advancement of Religion: Judicial Rejection of Metaphysical Benefits and the Emergence of Public Interaction’ (2001) 7 *Charity Law and Practice Review* 151, 156.

²¹ England and Wales have retained this aspect of the public benefit test: see Charity Commission for England and Wales, *Analysis of the Law Underpinning the Advancement of Religion for the Public Benefit* (2008) 18.

²² (1871) LR 12 Eq 574.

no benefit to those outside the order could be proved. The Vice-Chancellor, Sir John Wickens, stated:

It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public ...²³

Although this statement was inconsistent with earlier religious charity cases, it was the logical culmination of the reasoning in the leading charity law decision of *Morice v Bishop of Durham* ('*Morice*'),²⁴ decided at the turn of the century. The influential judgments of Sir William Grant MR at first instance²⁵ and Lord Eldon on appeal²⁶ in that case had tied the definition of all charitable purposes to the 'spirit and intendment' of the preamble to the *Statute of Charitable Uses 1601*.²⁷ The preamble listed particular purposes which its Elizabethan lawmakers had wished to encourage and that undeniably rested on public benefit.²⁸ It did not refer at all to purely religious purposes and was not intended to replace the existing charity jurisdiction with respect to trusts for religious purposes.²⁹ At the time of the *Statute of Charitable Uses*, religious charitable purposes rested on a separate, pre-Reformation, jurisdictional foundation that was not explicitly tied to public benefit. Religious purposes tended to be enforced on that distinct and separate jurisdictional basis up until the 19th century.³⁰ But after *Morice* more attention was paid to the preamble when determining charitable status. This focus upon the preamble, combined with non-legal factors such as the growth of religious toleration (so that a public consensus as to the value of all lawful religion could no longer be assumed)³¹ and prejudice concerning Roman Catholicism which was rife in 19th century England, led to suggestions that even religious purposes must demonstrate a public benefit.³² Although resisted by some judges,³³ in *Cocks v Manners* Sir John Wickens V-C, a respected equity

²³ Ibid 585.

²⁴ (1804) 9 Ves Jun 399; 32 ER 656, affd (1805) 10 Ves Jun 522; 32 ER 947.

²⁵ *Morice* (1804) 9 Ves Jun 399, 405; 32 ER 656, 659. Sir William Grant MR stated: 'Those purposes are considered charitable, which that *Statute* enumerates, or which by analogies are deemed within its spirit and intendment'.

²⁶ *Morice* (1805) 10 Ves Jun 522, 541; 32 ER 947, 954. Lord Eldon LC stated: 'such charitable purposes as are expressed in the Statute ... or to purposes having analogy to those'.

²⁷ 43 Eliz 1, c 4.

²⁸ See generally Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969).

²⁹ The only reference to religious purposes in the preamble is to the 'repair of churches'. On the distinction between the preamble purposes and religious charitable purposes, see *ibid*; Michael Blakeney, 'Sequestered Piety and Charity — A Comparative Analysis' (1981) 2 *Journal of Legal History* 207; F H Newark, 'Public Benefit and Religious Trusts' (1946) 62 *Law Quarterly Review* 234.

³⁰ See, eg, *Baker v Sutton* (1836) 1 Keen 224; 48 ER 294.

³¹ *Cocks v Manners* (1871) LR 12 Eq 574 was the first case involving gifts to convents after the enactment of the *Roman Catholic Charities Act 1832*, 2 & 3 Wm 4, c 115, which permitted gifts to female religious orders: Blakeney, above n 29, 207–26.

³² See, eg, *Baker v Sutton* (1836) 1 Keen 224, 227–32; 48 ER 294, 293–5 (Mr Kindersley) (during argument).

³³ See, eg, *ibid* 233; 295, where Lord Langdale MR rejected counsel's arguments and found that '[all] the cases, with one exception, go to support the proposition, that a religious purpose is a

judge, took the logical step of applying a public benefit, preamble-based methodology to religious charitable purposes.³⁴

The apparent inconsistency of *Cocks v Manners* with the traditional approach to religious purposes in which a public benefit requirement was never expressly stated had been rationalised by 1893. Gifts for religious purposes would be considered charitable unless shown otherwise: ‘the authorities shew that a bequest to a religious institution, or for a religious purpose, is prima facie a bequest for a ‘charitable’ purpose’.³⁵

The notion of a presumption of public benefit in relation to religious charitable purposes has continued,³⁶ but even so, it is not routinely mentioned³⁷ and it has continued to be controversial as to whether public benefit is an additional requirement for religious charitable status (generally satisfied through a presumption to that effect) or whether it can be taken for granted in this context.³⁸ Furthermore, where the presence of public benefit from religious purposes has been contested, it has proved very difficult to pin down exactly what will constitute the requisite benefit. The most problematic cases — those dealing with enclosed religious communities such as in *Cocks v Manners* — have involved purposes that contravene both aspects of the public benefit requirement because ‘any benefit by prayer or example is incapable of proof in the legal sense, and any element of edification is limited to a private, not public, class of those present’.³⁹ It is noteworthy that in a rare instance of Australian charity law reform, the Commonwealth government in 2004 provided that ‘a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public’ is for the public benefit for the purposes of Commonwealth legislation.⁴⁰

charitable purpose.’ Contra *Heath v Chapman* (1854) 2 Drewry 417, 426; 61 ER 781, 784, where Sir RT Kindersley V-C adhered to the view that he had argued unsuccessfully as counsel in *Baker v Sutton*.

³⁴ (1871) LR 12 Eq 574, 584–6.

³⁵ *Re White* [1893] 2 Ch 41, 52 (Lindley LJ).

³⁶ See eg, *Re Hetherington* [1990] 1 Ch 1, 12 (Browne-Wilkinson V-C).

³⁷ See, eg, the leading charity case of *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531; Hackney, above n 13, 347–50.

³⁸ See, eg, Newark, above n 29. Contra *Gilmour v Coats* [1949] AC 426. The confusion is compounded by the *Charities Act 2006* (UK) c 50, which purports to remove the ‘presumption’ of public benefit in relation to, inter alia, purposes for the advancement of religion. Commentators query whether there is any presumption to be removed: see, eg, Hackney, above n 13; Picarda, above n 17, 136, 138; Debra Morris, ‘Public Benefit: The Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or “Is Your Journey Really Necessary?”’ in Myles McGregor-Lowndes and Kerry O’Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 103, 112–13. Most recently, the issue was considered in *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) (13 October 2011) [58]–[61] (Warren J and Judges McKenna and Ovey). The Upper Tribunal of the Tax and Chancery Chamber did not accept the argument that public benefit could be taken for granted in relation to the first three heads of charitable purpose.

³⁹ *Re Hetherington* [1990] 1 Ch 1, 12 (Browne-Wilkinson V-C). See also *Gilmour v Coats* [1949] AC 426.

⁴⁰ *Extension of Charitable Purpose Act 2004* (Cth) s 5(1)(b).

To summarise the current law in Australia: purely religious purposes must be for the advancement of religion and for the public benefit. Participation cannot usually be restricted to a private group, especially if that group is characterised by a blood relationship, unless there is subsequent interaction with the public. Public benefit from religious purposes will be presumed unless shown otherwise, although this statement of law is contestable and originated in a misunderstanding as to the jurisdictional origins of religious charitable status. The case law on religion and public benefit is not at all consistent and can only properly be understood in its historical context. With this background in mind, it is possible to see how charity law can be used as a means of control over religious groups.

IV STATE CONTROL OF RELIGIOUS GROUPS THROUGH CHARITY LAW

The public benefit requirement is a means for the state to filter out and deny charitable status to religious groups whose purposes conflict with, or at least do not further, the state's interests. Of course, this is the case with respect to any charitable purpose to which the public benefit requirement applies, but the implications for religious groups are significant. So long as public benefit is presumed to flow from the advancement of religion, this regulatory function is muted. But the public benefit requirement has the potential to be a much more powerful regulatory mechanism if the presumption is removed.

The potential of the public benefit requirement to be a means of control has not been lost on legislators. This was illustrated in Australia in 2010 when Senator Xenophon of the Commonwealth Parliament sought to insert a positive public benefit test into income tax legislation.⁴¹ That is, for income tax purposes, the presumption of benefit was to be abolished. Although the legislation was to apply to all charitable purposes, Senator Xenophon's avowed intention was to ensure that the Church of Scientology would lose its tax exempt status.⁴² The Bill in question failed, but it has served as a catalyst for the current charity law reforms.⁴³

Concomitantly, the privileges of charitable status act as an incentive for a religious group to fashion its purposes so as to meet the legal definition of charity. This will be more so if the presumption of public benefit is removed, as is now the case in England. A good example of this incentive effect can be seen in the English Charity Commission's 2010 decision concerning the Druid Network's application for registration as a charity.⁴⁴

⁴¹ See Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth). The test was to be applied by the Commissioner of Taxation.

⁴² Commonwealth, *Parliamentary Debates*, Senate, 13 May 2010, 2843 (Nicholas Xenophon).

⁴³ Senate Economics Legislation Committee, Parliament of Australia, *Tax Laws Amendment (Public Benefit Test) Bill 2010* (2010) 3.

⁴⁴ Charity Commission for England and Wales, 'Application for Registration of the Druid Network' (Decision, 21 September 2010). See also Charity Commission for England and Wales, 'Decision of the Charity Commissioners to Register Sacred Hands Spiritual Centre as a Charity' (Decision, 3 September 2003).

The objects of the Druid Network are ‘[t]o provide information on the principles and practice of Druidry for the benefit of all and to inspire and facilitate that practice for those who have committed themselves to this spiritual path.’⁴⁵ The Network’s constitution originally stated:

As is true of any mystical religious tradition, the deeper mysteries and practices that would be confusing or detrimental to the novice are retained in the privacy of personal practice and close relationships.⁴⁶

But the Commission expressed concern that this implied some Druidry practices were limited to a select group (thus contravening the ‘public’ aspect of the public benefit test). In response, the Druid Network amended its constitution to state that: ‘There are no occult, secret or hidden practices within Druidry; teachings are open to all.’⁴⁷

The Commission then agreed to register the Druid Network as a charity. This is an example of a new religious group fashioning its purposes so as to meet the charity definition. It demonstrates the power of the public benefit requirement as a means for the state to mould religious purposes to its own ends.⁴⁸

The degree of control exercised by the state over religious groups through charity law will wax and wane according to the relative strengths of the two parties to this symbiotic relationship.⁴⁹ This can be seen in the varying judicial treatment, over the last four decades, of rates exemptions for places of public religious worship. This case law is not directly concerned with charitable status but is sufficiently related, through the concept of public benefit, to be relevant.⁵⁰ In 1975, in the course of a rates exemption case, the New South Wales Court of Appeal had to consider whether the religious ceremonies of the Exclusive Brethren were for the public benefit given that public access to those ceremonies was limited.⁵¹ *Hutley JA*, with whom the other judges agreed, took a generous view:

Even if the ceremonies of the Exclusive Brethren in the hall can be regarded as a temporary withdrawal from the world, those ceremonies are a preparation for the assumption of their place in the world in which they will battle according to

⁴⁵ Charity Commission for England and Wales, ‘Application for Registration of the Druid Network’, above n 44, 1 [5]. The Network provided detailed evidence to the Commission to show how it benefited the community (eg through ‘the provision of public rituals and ceremonies’ and through ‘promoting the preservation of heritage and culture’): at 13 [61]. The Network also provided evidence to show why it did not cause any detriment or harm (eg it had child protection policies in place): at 14 [66].

⁴⁶ *Ibid* 15 [74].

⁴⁷ *Ibid* 15 [75].

⁴⁸ Julian Rivers, *The Law of Organized Religions — Between Establishment and Secularism* (Oxford University Press, 2010) 165.

⁴⁹ W S Holdsworth, ‘The State and Religious Nonconformity: An Historical Retrospect’ (1920) 36 *Law Quarterly Review* 339.

⁵⁰ But see Dal Pont, above n 5, 238.

⁵¹ *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744.

their religious views to raise the standards of the world by precept and example.⁵²

That is, sufficient public benefit could derive from the subsequent interaction of the religious group with the general public after private worship.

By contrast, the House of Lords in 2008, in *Gallagher v Church of Jesus Christ of Latter-Day Saints* ('*Gallagher's Case*')⁵³ took a much less benign view of restricted access to religious worship. Lord Scott, for example, opined:

states may ... recognise that, although religion may be beneficial both to individuals and to the community, it is capable also of being divisive and, sometimes, of becoming dangerously so. No one who lives in a country such as ours, with a community of diverse ethnic and racial origins and of diverse cultures and religions, can be unaware of this. Religion can bind communities together; but it can also emphasise their differences. In these circumstances secrecy in religious practices provides the soil in which suspicions and unfounded prejudices can take root and grow; openness in religious practices, on the other hand, can dispel suspicions and contradict prejudices.⁵⁴

Leaving aside their statutory contexts,⁵⁵ it may be that the contrasting judicial views in these cases reflect the mood of their times. In 2008 (post the 2005 London bombings), perceptions of religion's potential to threaten the security of the state had dramatically changed and so had the courts' willingness to encourage private religious group activity.

Nowadays, conferral of charitable status also means that a religious group comes under ongoing state control. This control will increase in Australia from October 2012 with the establishment of the Australian Charities and Not-for-Profits Commission as an independent regulator,⁵⁶ but the point can be illustrated by the English experience where government regulation of charity has existed for much longer.⁵⁷ For instance, the Charity Commission for England and Wales has increasingly taken on a counterterrorism role.⁵⁸ Such ongoing regulation is

⁵² Ibid 751 (Hutley JA). Hutley JA's approach is reminiscent of Cross J's approach in *Neville Estates Ltd v Madden* [1962] 1 Ch 832, 858. See also above nn 19–20 and accompanying text.

⁵³ [2008] 1 WLR 1852.

⁵⁴ Ibid 1867 [51]. The matter has now been taken to the European Court of Human Rights: *Church of Jesus Christ of Latter-Day Saints v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 7552/09, 12 April 2011). But see *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145, 149 (Mason, Wilson, Brennan, Deane and Dawson JJ), where the High Court of Australia decided that to interpret 'place of public worship' in a council planning ordinance as requiring access by the general public would be inconsistent with 'currently accepted standards of religious equality and tolerance in this country.'

⁵⁵ Contra Dal Pont, above n 5, 238, who suggests that the context (rates legislation or general charity law) may explain the different approaches taken. See also *Jensen v Brisbane City Council* [2006] 2 Qd R 20.

⁵⁶ Commonwealth of Australia, above n 1, 37. The start date for the Australian Charities and Not-for-Profits Commission has been extended to 1 October 2012: see above n 1. An Exposure Draft of the Australian Charities and Not-for-Profits Commission Bill 2012 was released on 9 December 2011.

⁵⁷ Rivers, above n 48, 166–71. For the history and role of the Charity Commissioners for England and Wales prior to the creation of the Charity Commission of England and Wales, see Picarda, above n 17, 763–4.

⁵⁸ One example is the Commission's oversight of the North London Central Mosque Trust, which operated the Finsbury Park Mosque from 1998 to 2003. The Commission was concerned that the

not the focus of this article, but it adds weight to the argument that charity law, including the public benefit test, should not be underestimated as an increasingly important means of state control of religious bodies.

V THE LEGITIMACY OF STATE CONTROL OF RELIGIOUS GROUPS THROUGH CHARITY LAW

If the public benefit requirement of charity law can operate in practice as a means of state control over religious groups, is this legitimate in principle? Two arguments to support the legitimacy of state control can be made. The first argument focuses upon the rationale of charity law. The second, weaker, argument focuses upon the tax benefits received by religious charity.

A *The Rationale of Charity Law*

The public benefit requirement permeates charity law precisely because the function of charity law is, broadly speaking, to facilitate activities that are beneficial to society. The regulatory effects of the public benefit requirement on religious groups detailed above are simply a natural consequence of that function. Matthew Harding has argued, from a liberal perspective, that charity law is a means by which the state demonstrates its commitment to the value of individual autonomy by endorsing and facilitating purposes that produce autonomy-enhancing collective goods.⁵⁹ The state is therefore justified in not promoting 'religious beliefs and practices [that] are likely to undermine the conditions for autonomy' unless there are strong grounds other than autonomy enhancement for this.⁶⁰ According to his analysis, the state's power to control religion through a public benefit test is undoubted; the question becomes, rather, whether such power is being exercised in a legitimate fashion and to further the proper objectives of charity law.

B *A Quid Pro Quo for the Fiscal Benefits of Charitable Status*

The second argument to support the state's power to control religious groups through a public benefit test is less convincing, although prevalent.⁶¹ According to this argument, the legitimacy of state control of religion is strengthened by the

Trust had been taken over by Islamic extremists who were not adhering to the Trust's charitable purposes. The Commission froze the Trust's bank accounts, removed the radical cleric, Sheikh Abu Hamza Al-Masri, from his position within the Trust and closed down the mosque for a period. See Charity Commission for England and Wales, 'North London Central Mosque Trust' (Report, 1 July 2003) [33]. I am indebted to Professor Peter Edge for this example. The counter-terrorism function of charity regulation has also been a driver for reform in the Republic of Ireland and New Zealand: see Oonagh B Breen, 'Ireland: *Pemsel Plus*' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 74, 75, 95 n 6.

⁵⁹ Matthew Harding, 'What Is the Point of Charity Law?' (Paper presented at Private and Public Law — Intersections in Law and Method Conference, The University of Queensland, 21 July 2011).

⁶⁰ *Ibid* 34. See also at 28–9, 33–4.

⁶¹ Dal Pont, above n 5, 575–6.

strong link between charitable status and fiscal benefits.⁶² If certain groups in society are to receive fiscal exemptions, thereby potentially increasing the fiscal burden on other members of society, then, the argument goes, this can only be because the exempted purposes are perceived to convey some benefit to society that outweighs the forgone revenue. In other words, there is a quid pro quo required.⁶³

In relation to religious purposes in particular, there appears to be a strong public sentiment that taxpayers should not be required to support others' religious beliefs and practices through the taxation system.⁶⁴ Kirby J's strongly worded judgment in the High Court decision of *Federal Commissioner of Taxation v Word Investments Ltd* reflects this sentiment:

Charitable and religious institutions contribute to society in various ways. However, such institutions sometimes perform functions that are offensive to the beliefs, values and consciences of other taxpayers. This is especially so in the case of charitable institutions with religious purposes or religious institutions. These institutions can undertake activities that are offensive to many taxpayers who subscribe to different religious beliefs or who have no religious beliefs. Although the Parliament may provide specific exemptions, as a generally applicable principle it is important to spare general taxpayers from the obligation to pay income tax effectively to support or underwrite the activities of religious ... organisations with which they disagree.⁶⁵

His Honour's comments were directed to statutory interpretation, but they also strongly imply that tax exemptions in favour of religious groups should be supported by a convincing public benefit rationale.⁶⁶

Whilst such reasoning is plausible in relation to imposing a threshold test for charitable status that incorporates a public benefit requirement, it is not as convincing as a rationale for removing a presumption of public benefit and it is not convincing at all as a rationale for ongoing regulatory oversight of religious charities. Many individuals and groups receive fiscal privileges without being required to comply with regulatory standards, and without any suggestion that they become subject to public norms of conduct.⁶⁷ Nor are common assumptions as to the impact of such fiscal privileging always justified.⁶⁸ Therefore, the mere

⁶² In Ireland, this link has been removed: *Charities Act 2009* (Ireland) s 7.

⁶³ See Evelyn Brody and John Tyler, 'Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?' (2010) 85 *Chicago-Kent Law Review* 571, 599.

⁶⁴ See, eg, the findings in Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (2011) 25, 38–9, 55.

⁶⁵ (2008) 236 CLR 204, 248 [110]. See also at 249–50 [112]–[116].

⁶⁶ See also Commonwealth, *Parliamentary Debates*, Senate, 13 May 2010, 2843–4 (Nicholas Xenophon), where Senator Xenophon commented: 'when the Government is effectively making donations on our behalf through tax exemptions, we just have to take the organisation's word that they're working in the public good.'

⁶⁷ Lucas and Robinson, above n 2, 201–2. See also, in the North American context, Brody and Tyler, above n 63, 598–613.

⁶⁸ For example, a common concern is that if religious groups were entitled to income tax exemptions for commercial, non-religious activity, this would give an unfair competitive advantage. But the Henry Review concluded that competitive neutrality is not infringed because in practice religious groups seek to maximise their profits: Review Panel, *Australia's Future Tax System: Report to the Treasurer — Part Two: Detailed Analysis* (2009) vol 1, 205–13.

receipt of fiscal benefits does not provide an unequivocal justification for a public benefit test in relation to religious charitable status.

Thus, charity law is one means by which the state manages its coexistence with religious groups. The state cedes privileges to those religious groups that it determines to be beneficial to society. In return, religious groups who determine the privileges worthwhile are prepared to mould their purposes, as necessary, to comply with public benefit requirements. Such control is legitimate in principle because it accords with the rationale of charity law, which is to facilitate activities that the state determines are beneficial to society as a whole.

VI THE CRITERIA FOR A DEFENSIBLE PUBLIC BENEFIT TEST

The current law on religious charitable status and the public benefit is a product of the historical context in which the law developed. The Commonwealth's proposed law reforms present an ideal opportunity to reflect upon the desirable features of a test for religious charitable status in the 21st century. The importance — fiscal, practical and symbolic — of charitable status to religious groups requires that there be clarity as to why such status is given or withheld. Furthermore, the potential for the state to control religious groups through a public benefit requirement for charitable status means that any statutory test must be carefully thought through. With this in mind, it is suggested that a legal framework for determining public benefit in relation to religious purposes must satisfy three criteria:

- 1 it must have a sound evidential scheme;
- 2 it must be consistent with human rights norms; and
- 3 it must be cost-effective.

A Sound Evidential Scheme

Evidential questions lie at the heart of the difficulties concerning public benefit and religion for, whilst it may be legitimate to require some quid pro quo in return for charitable privileges, the problem for law reformers is how to identify that quid pro quo to a standard acceptable in a court of law.⁶⁹ The current law obviates that problem to a large extent by treating purposes for the advancement of religion as being charitable unless the presence of public benefit is challenged.

Any consideration of proof of public benefit from the advancement of religion must begin with a fundamental principle. A decision as to whether public benefit flows from religious purposes should not be confused with a decision as to the intrinsic merits of the religious beliefs in question. That is, the benefits to society from persons pursuing purely religious purposes have no necessary correlation to the credibility or otherwise of their religious beliefs.⁷⁰ This has sometimes

⁶⁹ See generally Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159.

⁷⁰ *Gilmour v Coats* [1949] AC 426, 459 (Lord Reid).

caused confusion,⁷¹ but to find otherwise would contravene the entrenched legal principle of neutrality towards religion.⁷² Thus any exercise in determining whether public benefit flows from the exercise of certain religious beliefs does not entail an examination of the merits of those beliefs.

The second issue in considering proof of public benefit concerns whether evidence of what a religious group believes to be of public benefit, but which is not capable of conclusive proof,⁷³ should be accepted as evidence of benefit. The answer to this question is important because often the benefit from purely religious purposes will be intangible and depend upon the beliefs of the individuals involved. There are at least two ways in which such beliefs might prove public benefit. First, the beliefs themselves might be accepted as true; but this is impermissible in a liberal society where judicial reasoning must be based upon evidence that is generally acceptable.⁷⁴ Second, evidence of what a religious group believes might be accepted as proof of benefit to that (public) group. To take a simple, non-religious example: a parent may accept that his or her child derives benefit from believing in Santa Claus, without also believing in Santa Claus.⁷⁵ Why should such an evidentiary function not suffice in relation to a religious group's beliefs? This view has not found favour in the English courts, but it has in Ireland and Australia.⁷⁶ Thus, for example, in the Victorian case of *Crowther v Brophy* Gobbo J suggested that in finding public benefit from the practice of intercessory prayer, one should look not to 'the success of intercessory prayer', but to 'the enhancement in the life, both religious and otherwise, of those who found comfort and peace of mind in their resort to intercessory prayer'.⁷⁷

This is not to suggest that all religious beliefs should be taken to confer benefits on the public group who adhere to them. A parent probably would not accept that his or her child derived benefit from a belief in 'monsters' if such belief had a deleterious impact upon the child's sleep and caused separation anxiety. In the

⁷¹ See, eg, the judicial and academic treatment of *Thornton v Howe* (1862) 31 Beav 14; 54 ER 1042, discussed in Pauline Ridge, 'Legal Neutrality, Public Benefit and Religious Charitable Purposes: Making Sense of *Thornton v Howe*' (2010) 31 *Journal of Legal History* 177.

⁷² *Gilmour v Coats* [1949] AC 426, 458–9 (Lord Reid). See also the cases listed in Dal Pont, above n 5, 215 n 16. For a somewhat cynical expression of this principle, see *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 150 (Murphy J): 'The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail.'

⁷³ For example, intercessory prayer.

⁷⁴ Harding, 'Trusts for Religious Purposes', above n 69, 171–7. Harding calls this evidential technique 'deference' and notes its use by the Irish courts.

⁷⁵ The example is intended to simplify the legal question and is not intended to trivialise religious belief.

⁷⁶ See, eg, *O'Hanlon v Logue [No 2]* [1906] 1 IR 247; *Maguire v A-G* [1943] IR 238; *Nelan v Downes* (1917) 23 CLR 546. The latter case concerned the charitable status of a testamentary gift for masses to be said for the souls of the testatrix and her husband. Isaacs J held at 571 that the effect of the gift

was to provide for a religious act that involves the utmost piety towards the Supreme Being on behalf of an indefinite number of His creatures, and the object of which is to bring to them spiritual assistance, consolation and comfort, vastly surpassing the mere physical assuagement of pain or suffering that would incontestably be admitted to rank as an ordinary charity.

⁷⁷ [1992] 2 VR 97, 100.

same way, it would be possible for evidence to be accepted by a court that specific religious beliefs were detrimental to a religious group member's physical or mental health (and hence contributed no public benefit) even though the individual found comfort in those beliefs. That is, evidence of enhancement of the quality of life generated by specific religious benefits (and hence public benefit) may be outweighed by evidence as to the detrimental effects of those religious beliefs upon the members of the public who adhere to them.

A third evidential issue concerns the level of abstraction of the inquiry into public benefit. Should courts consider at all whether there is proof of direct benefit from particular religious purposes or can they look for a higher level of benefit derived from the practice of religion in general? The higher the level of abstraction of the benefit, the simpler it becomes to find objective, neutral evidence of public benefit from purely religious purposes. For example, one can conceive of neutral⁷⁸ evidence from bodies such as the Productivity Commission⁷⁹ and experts such as psychologists, social workers and scientists as to the social and psychological benefits to individuals, and hence to society, of pursuing purely religious purposes. Equally, one can envisage such neutral evidence being offered as to any disadvantages to the individuals concerned and consequently to society.

Is it possible, however, to go to an even higher level of abstraction in considering the public benefit of religion and thus avoid completely the difficulties of putting each religious group to proof? For example, could it be argued that religious pluralism and purely religious activity contribute to a healthy, flourishing society and, as such, the advancement of religion is a collective good in and of itself? On this approach, there is no need for proof of benefit from specific religious purposes to be shown.

The evidential technique of constructing public benefit at a higher level of abstraction was used by the High Court in *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*').⁸⁰ The issue in that case was whether the purposes of a group that engaged in political activity (lobbying) in order to improve government overseas aid could be charitable. A question for the Court, given that it did not wish to evaluate the merits of the specific measures advocated for by the group, was where was public benefit to be found? The majority answered this by finding public benefit at a higher level of abstraction. It held that the constitutional foundations of Australia's system of government required there to be open and free communication between the 'electors', the legislature and the executive. Lobbying activities of the sort undertaken by the appellant were an integral part of these constitutional processes and thus contributed to 'the public welfare'. It was not necessary to decide upon the merits of any

⁷⁸ Cf Harding, 'Trusts for Religious Purposes', above n, 69, 170, who criticises the use of religious experts who lack independence.

⁷⁹ See, eg, Productivity Commission, above n 1, 37–8.

⁸⁰ (2010) 241 CLR 539, 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See generally Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 *Melbourne University Law Review* 353.

particular changes advocated for by the appellant: benefit could be assumed at the higher level of abstraction.

Using the approach of the High Court in the *Aid/Watch* case, one could argue that there is public benefit in the promotion of religious pluralism through charity law in Australian society.⁸¹ For example, international human rights bodies have emphasised the indispensability of freedom of religion to a democratic society. It is

one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.⁸²

This approach to public benefit supports the current common law position of assuming public benefit from the advancement of religion unless proved otherwise. It depends, of course, upon whether a convincing public policy case can be made, either on moral or empirical grounds, or both, that purposes for the advancement of religion generally do contribute positively to a healthy society.⁸³

Drawing together the discussion so far: a sound evidential scheme for determining public benefit will not evaluate the merits of particular religious beliefs. It may take into account evidence of religious beliefs as evidence of the benefit (or detriment) thereby conveyed to members of the religious group. Evidence of public benefit can be adduced at differing levels of abstraction: there are clear advantages to adopting a high level of abstraction of benefit in relation to purely religious purposes.

B *Consistent with Human Rights Norms*

The second criterion for a defensible legal framework for public benefit and religious charitable status is that it be consistent with human rights norms. Unlike other jurisdictions in which there has been charity law reform, there are few direct human rights protections that bear on the charitable status of Australian religious groups.⁸⁴ The Commonwealth government's proposed statutory definition of charity will, of course, be subject to s 116 of the *Constitution*, which relevantly provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion ...

⁸¹ I am indebted for this argument to an anonymous reviewer of my related application for research funding.

⁸² *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 912, 927 [57].

⁸³ Harding, 'What Is the Point of Charity Law?', above n 59, uses moral philosophy alone to determine the requisite public benefit.

⁸⁴ But see *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 14, 19; *Human Rights Act 2004* (ACT) ss 8, 11, 14, 27. For a discussion of the common law's protection of freedom of religion in Australia, see Pauline Ridge, 'The Financing of Religion: Guidelines for Legal Regulation' (2009) 30 *Adelaide Law Review* 85, 99–101. For a discussion from an English perspective of the human rights of religious associations, see Rivers, above n 48, ch 2.

Other than s 116, it is the norms of international human rights law that should be considered, in particular, those enshrined in art 18(1) of the *International Covenant on Civil and Political Rights* ('ICCPR'),⁸⁵ ratified by Australia in 1980:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The right to freedom of religion in art 18 is also protected through arts 2(1) and 26 of the ICCPR in relation to discrimination on the basis of religion.⁸⁶ Also relevant is the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*,⁸⁷ which elaborates upon the right to 'manifest' one's religion in art 18 of the ICCPR. The following discussion also draws upon cases concerning arts 9 and 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR'),⁸⁸ and

⁸⁵ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸⁶ Article 2(1) of the ICCPR states (emphasis added):

Each state Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states (emphasis added):

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status.

⁸⁷ GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (25 November 1981). In art 6, the Declaration includes the freedom

- (a) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) to establish and maintain appropriate charitable or humanitarian institutions; ... [and]
- (f) to solicit and receive voluntary financial and other contributions from individuals and institutions ...

'Charitable' in art 6(b) refers to philanthropic activity generally, rather than to the Anglo-Australian technical meaning of the term. For an explanation of arts 6(a), (b) and (f) of the Declaration, see Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 237, 246, 271. Although the Declaration is not binding, it is relied upon by the Human Rights Committee of the United Nations and the Special Rapporteur on Freedom of Religion and Belief: see Rivers, above n 48, 42–3; Derek H Davis, 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' [2002] *Brigham Young University Law Review* 217. See also Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [4] ('General Comment No 22').

⁸⁸ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010). Article 9, titled 'Freedom of thought, conscience and religion', states:

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with

English domestic case law concerning the *Human Rights Act 1998* (UK) c 42, to which the *ECHR* is appended.⁸⁹ The intention in the following discussion is to identify ways in which human rights norms concerning freedom of religion may inform the framework for a statutory definition of religious charity, even if they are not directly applicable to it.⁹⁰ The discussion is, of necessity, speculative.

1 Section 116

It is unlikely that a Commonwealth statutory definition of charity, whether replicating the current law or not, would be found to be ‘for prohibiting the free exercise of any religion’ pursuant to s 116 of the *Constitution* because, even if the definition effectively excluded some groups from the fiscal privileges of charitable status, it is difficult to imagine that this would prohibit, rather than impede, the activities of such groups.⁹¹ A further constraint is that s 116 will only apply if any prohibition of the free exercise of religion was the direct purpose of the reform legislation, rather than simply a consequence of it.⁹² It is not clear how such a purpose should be ascertained. For example, would Senator Xenophon’s motivation of removing the income tax privileges of the Church of Scientology through his Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth) mean that the purpose of the Bill was to prohibit the free exercise of religion? Or would the Bill’s expressed general application to ‘religious and charitable institutions’⁹³ rule out such an argument?

others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

- (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14, titled ‘Prohibition of discrimination’, states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁸⁹ This jurisprudence must be treated carefully as the *ECHR* does not apply in Australia and, in some respects, has been interpreted differently to the *ICCPR*. Despite the need for caution, the similarities in wording and the lack of analogous cases in the *ICCPR* jurisprudence justify consideration of the European cases. On the relationship of art 9 of the *ECHR* to art 18 of the *ICCPR*, see Taylor, above n 87, ch 1.

⁹⁰ This discussion will not consider the meaning of ‘religion’, although it should be noted that a decision on s 116 of the *Constitution* would adopt the broad definition given by the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120. A broad definition of religion is taken in relation to both the *ICCPR* and the *ECHR*: Taylor, above n 87, 208–10.

⁹¹ The Senate Economics Legislation Committee, in its report on the Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth), dismissed concerns that the Bill contravened s 116. Instead the Committee accepted the argument (in Andrew Lind’s submission) that ‘freedom of religion does not mean freedom from tax’: Senate Economics Legislation Committee, above n 43, 8 [1.17], 9 [1.23].

⁹² *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J), 131–3 (Gaudron J), 160–1 (Gummow J, Dawson J agreeing). See also Tony Blackshield, ‘Religion and Australian Constitutional Law’ in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion — God, the State and the Common Law* (Routledge, 2005) 81, 106–7.

⁹³ This phrase is included in the long title of the Bill.

The High Court has made it clear that s 116 does not prevent the ‘giving of aid to or encouragement of religion’.⁹⁴ This suggests that even a public benefit requirement that favoured certain religious groups over others, either directly or by its effect, would not contravene s 116 so long as it did not amount to ‘the establishment of a religion’ pursuant to that provision.

2 *International Human Rights Norms*

Apart from s 116 of the *Constitution*, which will apply to a Commonwealth statutory definition of religious charity, but not to any great effect, it is the norms of international human rights law that should be considered.⁹⁵ There are two relevant norms that could be infringed by a public benefit requirement in a statutory definition of religious charity: (i) the right to ‘manifest one’s religion’ in ‘worship, observance, practice and teaching’, protected by art 18(1) of the *ICCPR* (and also by art 9 of the *ECHR*); and (ii) the right not to be discriminated against in relation to freedom of religion, which is given by arts 2(1) and 26 of the *ICCPR* (and also by art 14 of the *ECHR*). A prima facie violation of art 18(1) can be justified pursuant to art 18(3) and it is recognised under international law that state discrimination on the ground of religion can be similarly justified.

(a) *The Right to ‘Manifest One’s Religion’*

Does exclusion from charitable status infringe the right of religious groups to manifest religion pursuant to art 18(1) of the *ICCPR*? An analogous question has arisen in two recent cases decided within a day of each other by the House of Lords and the European Court of Human Rights. Both cases concerned art 9 (the right to manifest religion) read in conjunction with art 14 (the right to non-discrimination) of the *ECHR*: neither involved charitable status as such. In *Gallagher’s Case*, which is now before the European Court of Human Rights and which is discussed above in Part IV, the House of Lords had to decide whether restricting a rating exemption to places of ‘public religious worship’ contravened the *ECHR* art 9 rights of a group (the Mormon Church) that excluded the public from some of its worship spaces.⁹⁶ Although the group was ineligible for the full rates exemption it was still able to conduct worship and, in fact, still received a rates exemption, albeit smaller than if it conducted public worship.

Lord Hoffmann (with whom Lord Hope agreed) held that the rating legislation did not prevent the group manifesting its religion.⁹⁷ In Lord Hoffmann’s words,

⁹⁴ *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 582 (Barwick CJ). See also at 616 (Mason J).

⁹⁵ Peter Radan suggests that *ICCPR* art 18 embodies a principle of customary international law: Peter Radan, ‘International Law and Religion: Article 18 of the *International Covenant on Civil and Political Rights*’ in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion — God, the State and the Common Law* (Routledge, 2005) 9, 10. As to the normative influence of international human rights upon the common law, see *Mabo v Queensland [No 2]* (1991) 175 CLR 1, 42 (Brennan J); Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 263–8.

⁹⁶ [2008] 1 WLR 1852, 1855 (Lord Hoffmann). See also *Church of Jesus Christ of Latter-Day Saints v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 7552/09, 12 April 2011).

⁹⁷ *Gallagher’s Case* [2008] 1 WLR 1852, 1857–8 (Lord Hoffmann), 1862 (Lord Hope).

the ‘loss of the opportunity to gain a financial advantage was too remote from interference with the right [to manifest religion] in question.’⁹⁸ Lord Scott was more cautious, finding that that ‘the levying of taxation on a place of religious worship, or on those who enter the premises for that purpose, would be capable in particular circumstances of constituting a breach of article 9’.⁹⁹ Article 9 was only indirectly relevant in *Gallagher’s Case*, however, because the claim was based on discrimination under art 14 and, possibly for this reason, the applicability of art 9 was not explored as fully as it could have been. Lord Scott’s view is certainly consistent with a suggestion by the Charity Commissioners for England and Wales in 1999 that a refusal to register a group as a charity and thus withhold charitable privileges might interfere with the right to manifest one’s religion through ‘teaching and “evangelising” activities’, even though it would not interfere with a person’s right to manifest their religious beliefs per se.¹⁰⁰

The European Court of Human Rights in *Religionsgemeinschaft der Zeugen Jehovas v Austria* (*Jehovah’s Witnesses v Austria*)¹⁰¹ appeared to give much more weight to the importance of legal privileges to religious groups, although, with respect, the Court’s reasoning is difficult to follow. The case involved a decision by Austria to register the Jehovah’s Witnesses as a ‘recognised religious community’ rather than as a ‘religious society’, which would have made the group eligible for the fullest range of legal privileges possible for a religious group. The alleged violations by Austria also included lengthy delays in the registration processes. The Court emphasised the importance in Austria of the privileges associated with status as a religious society (privileges that resonate with those available in Australia with respect to religious charitable status):

under Austrian law, religious societies enjoy privileged treatment in many areas. These areas include exemption from military service and civilian service, reduced tax liability or exemption from specific taxes, facilitation of the founding of schools, and membership of various boards.

Given the number of these privileges and their nature, in particular in the field of taxation, the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society’s pursuance of its religious aims.¹⁰²

It can be implied from this that the Court considered the withholding of such substantial legal privileges to have restricted the group’s right to manifest their religion pursuant to art 9. But the Court went on to decide that Austria had discriminated against the Jehovah’s Witnesses, thus violating art 14, rather than

⁹⁸ Ibid 1858. Lord Scott agreed that art 9 was not infringed, but went on to consider the application of art 14 in the context of the art 9 right: at 1866–7.

⁹⁹ Ibid 1867.

¹⁰⁰ Charity Commission for England and Wales, ‘Application for Registration as a Charity by the Church of Scientology (England and Wales)’ (Decision, 17 November 1999) 10.

¹⁰¹ (2009) 48 EHRR 424. See further Carolyn Evans, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’ (2010–11) 26 *Journal of Law and Religion* 321.

¹⁰² *Jehovah’s Witnesses v Austria* (2009) 48 EHRR 424, 445 [92].

finding unequivocally that art 9 had been breached.¹⁰³ On the other hand, Judge Steiner in his partly dissenting opinion argued that art 9's protection extended only to the ability of religious groups to acquire legal personality (which the group could have done by seeking status as an association) and ability to organise their internal affairs free from state interference. The withholding of the privileges associated with status as a 'religious society' did not interfere with the group's ability to manifest religion.¹⁰⁴

Harding argues that the English charity legislation, which incorporates a positive public benefit test for charitable status, could violate the right to manifest religion pursuant to art 9.¹⁰⁵ He gives the example of a testamentary trust for religious purposes.¹⁰⁶ If the trust is struck down as a non-charitable purpose trust for lack of public benefit, the settlor's intention will be frustrated. Furthermore, those specific purposes may not be able to be carried out at all if the religious group lacks alternative funds. In this situation, the religious group's right to manifest religion is curtailed. This reasoning is not directly applicable to the proposed Australian reforms, which can apply only to Commonwealth agencies and hence will not affect trusts law directly. But it could apply if the states and territories were to adopt the Commonwealth's charity definition.¹⁰⁷ Harding's testamentary trust example raises the same dilemma as that evident in the reasoning of the House of Lords in *Gallagher's Case* and of Judge Steiner in *Jehovah's Witnesses v Austria*: does a public benefit test that makes it more costly to manifest religion violate the right to freedom of religion? The foregoing review provides only weak support for the argument that it does.

Furthermore, unlike the right to freedom of belief, the right to manifest religion recognised by art 18(1) of the *ICCPR* may be restricted by art 18(3), which reads:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹⁰⁸

The Human Rights Committee's *General Comment No 22* provides further guidance on the application of art 18(3). For example,

[I]mitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.¹⁰⁹

¹⁰³ Ibid 445–6 [96]–[99].

¹⁰⁴ Ibid 455 [OI 5].

¹⁰⁵ Harding, 'Trusts for Religious Purposes', above n 69, 179–80.

¹⁰⁶ Harding's example is based upon the facts of *Thornton v Howe* (1862) 31 Beav 14; 54 ER 1042.

¹⁰⁷ The federal Treasurer, in announcing the proposed reforms, expressed an intention to work with the states and territories to achieve a 'consistent definition across all jurisdictions': Commonwealth of Australia, above n 1, 37.

¹⁰⁸ The preferred interpretation is that 'public' is a descriptor of 'order, health, or morals' as well as 'safety': Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997) 223.

¹⁰⁹ *General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [8].

Each of the ‘necessary’ grounds listed in art 18(3) relate to the public benefit in some way. This suggests that Australian law reformers have a wide discretion in formulating a test for religious charitable status that incorporates a public benefit requirement. So long as the parameters of a religious charity definition that infringes the right to manifest religion is a direct and proportionate response to a need to protect ‘protect public safety, order, health, or morals’ then no issues should arise. So, for example, using *Gallagher’s Case* by analogy, the rates law requirement that religious worship be public could be justified on the grounds of promoting public safety and/or public order so long as it was not a disproportionate response to the dangers posed by private religious services. This appears to be the approach taken by Lord Scott who, after detailing the potentially divisive and dangerous effects of religion, concluded that the state was fully justified in limiting rates exemptions to bodies conducting public religious worship.¹¹⁰ On the other hand, if the purpose of the rates exemption was actually to protect national security this could not be justified because it is not a purpose referred to in art 18(3).¹¹¹

The ‘public health’ justification could be used to explain a legislative provision such as that in the Republic of Ireland’s reform legislation. Section 3(10) of the *Charities Act 2009* (Ireland) excludes from charitable status gifts to

an organisation or cult — ...

(b) that employs oppressive psychological manipulation —

(i) of its followers, or

(ii) for the purpose of gaining new followers.¹¹²

These exclusionary criteria were the result of a last-minute amendment and may not have been well thought through.¹¹³ They do, however, reflect similar concerns expressed in the Australian Senate Economics Legislation Committee in 2010,¹¹⁴ as well as by the English Charity Commission.¹¹⁵ It seems inevitable

¹¹⁰ [2008] 1 WLR 1852, 1867.

¹¹¹ See *General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [4]. Cf *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131, where Latham CJ stated:

It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.

¹¹² In Ireland, the Charities Regulatory Authority cannot determine that a gift is not for the public benefit without the consent of the Attorney-General: *Charities Act 2009* (Ireland) s 3(5). An appeal would have to be made to the High Court: Breen, above n 58, 79.

¹¹³ Breen, above n 58, 80.

¹¹⁴ Senate Economics Legislation Committee, above n 43, 29 [3.54]. The Committee considered that concerns regarding the behaviour of cults went beyond taxation law (the particular matter before it) and international best practice should be explored with a view to addressing the concerns.

¹¹⁵ Charity Commission for England and Wales, *The Advancement of Religion for the Public Benefit* (2008) 11. Such detriment must be shown by ‘objective and informed evidence’ but need not constitute illegal behaviour: at 12. An appendix lists examples of possible detriment or harm: at 27–8 (annex C). The examples given refer to international activities that may be illegal overseas although not illegal within the home jurisdiction, conduct that is dangerous to physical or mental health so long as this is verified by ‘objective and informed independent medical opinion’, conduct ‘that encourages or promotes intentional threats of violence or hatred towards others’ and conduct which ‘unlawfully [restricts] a person’s freedom’.

that Australian law reformers will address this issue in formulating a statutory definition of charity. It is questionable, however, whether a provision in the form of the Irish provisions is 'proportionate' as required by the Human Rights Committee. A more proportionate response to the fear that the psychological health of members of a religious group is jeopardised could be to legislate directly to criminalise such harm. One should also be mindful of the fact that minority and/or new religious groups will be particularly vulnerable to unsubstantiated allegations of harming public health.¹¹⁶

The 'public morals' justification in art 18(3) raises the danger that a dominant religious group's moral values will be taken as the norm, although the Human Rights Committee has stipulated that 'limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.'¹¹⁷ Thus, a public benefit test that incorporated the moral position of one or more established religious groups and thereby excluded others from charitable status is not justifiable unless the moral position can be said to truly reflect a universal view. Interestingly, this resonates with the restrictions placed by the common law upon the right to freedom of religion. The Court of Chancery would not discriminate between religions for the purposes of charity law except to the extent that 'the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and ... are subversive of all morality.'¹¹⁸

Christopher McCrudden's suggestion that a racist religious group would fall outside the protected manifestations of religion in art 9 of the *ECHR* is an example of where a public benefit test could legitimately discriminate on the basis of a universally accepted moral position against racism.¹¹⁹ This might also be justified as necessary to protect 'the fundamental rights and freedoms of others' pursuant to *ICCPR* art 18(3).

(b) Discrimination on the Grounds of Religion

Much stronger arguments can be made that a public benefit test for religious charitable status may constitute discrimination on the grounds of religion in contravention of arts 2(1) and 26 of the *ICCPR*,¹²⁰ rather than a violation of art 18. Importantly, a finding of discrimination does not depend upon an actual

¹¹⁶ See Anthony Bradney, 'Faced by Faith' in Peter Oliver, Sionaidh Douglas Scott and Victor Tadros (eds), *Faith in Law: Essays in Legal Theory* (Hart Publishing, 2000) 89; James T Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 *University of Queensland Law Journal* 183. Peter M Smith, 'Religious Charities and the *Charities Act 2006*' (2007) 9 *Charity Law and Practice Review* 57, 73 gives examples of how religious groups might fail the English public benefit test including some that conceivably go to public health: 'the current charitable status of Christian Scientists and Jehovah's Witnesses might ... be compromised by their absolute refusal to allow blood transfusions even for a child in a life-threatening situation.' This latter example is acknowledged to be contentious by the Charity Commission for England and Wales: see above n 115 and accompanying text.

¹¹⁷ *General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [8].

¹¹⁸ *Thornton v Howe* (1862) 31 Beav 14, 20; 54 ER 1042, 1044 (Romilly MR).

¹¹⁹ Christopher McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 *Ecclesiastical Law Journal* 26, 34.

¹²⁰ See above n 86. See also *ECHR* art 14.

violation of art 18 (freedom to manifest religion); it suffices that the discrimination relates to a matter within the ambit of art 18.¹²¹ A public benefit test that relates to a group's purely religious purposes does come within the ambit of art 18 because it bears upon the group's manifestation of its beliefs and will, of necessity, discriminate between religious groups according to whether or not their purposes are determined to provide public benefit. Discrimination can be justified, however, if 'the criteria for [differentiation of treatment] are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]'.¹²² Daniel Moeckli describes this as a two-pronged test requiring a legitimate aim on the part of the state and proportionality in its execution.¹²³ It is thus similar to the approach used under art 18(3).

The decision in *Jehovah's Witnesses v Austria* suggests how a test for religious charitable status may impermissibly discriminate against some religious groups. It also illustrates the particular susceptibility of minority religious groups to discrimination, which is a particular concern of the Human Rights Committee.¹²⁴ After describing the privileges associated with status as a religious society, the Court went on to conclude that:

if a state sets up a framework for conferring legal personality on religious groups to which a specific status is linked, 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.¹²⁵

On the facts it was impossible for the Jehovah's Witnesses to receive 'religious society' status until a substantial legislative waiting period expired. This was held to amount to discrimination. The Austrian government argued that the legitimate aim of the waiting period was to ensure that new religious groups had properly integrated into the society and did not pose any threat. But the Court held that this could only be legitimate in exceptional circumstances involving 'newly established and unknown religious groups.'¹²⁶ Given that the Jehovah's

¹²¹ See Taylor, above n 87, 183 n 247. Contra *Gallagher's Case*, in relation to *ECHR* art 9, where both Lord Hoffmann and Lord Hope appear to require an actual violation of the right to manifest religion before any question of discrimination can arise pursuant to art 14: [2008] 1 WLR 1852, 1857–8 (Lord Hoffmann), 1862 (Lord Hope). With respect, this is incorrect. The correct view is expressed by Lord Scott at 1866: 'an allegedly discriminatory act said to be in breach of article 14 does not need to constitute an actual breach of the substantive article within whose ambit the act in question is said to fall.' See further Russell Sandberg, 'Underrating Human Rights: *Gallagher v Church of Jesus Christ of Latter-Day Saints*' (2009) 11 *Ecclesiastical Law Journal* 75.

¹²² Human Rights Committee, *General Comment No 18: Non-Discrimination in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HR1/GEN/1/Rev.7 (12 May 2004) [13].

¹²³ Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 189, 201–2. In relation to *ECHR* art 14, see also *Jehovah's Witnesses v Austria* (2009) 48 EHRR 424, 444 [87], 445–6 [96].

¹²⁴ See *General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [2].

¹²⁵ *Jehovah's Witnesses v Austria* (2009) 48 EHRR 424, 445 [92].

¹²⁶ *Ibid* 446 [98].

Witnesses had a ‘long-standing existence internationally’ and was a well-established religion in Austria, the discrimination was unjustified.¹²⁷

Lord Scott in *Gallagher’s Case* also easily found discrimination pursuant to art 14 of the *ECHR*.¹²⁸ The rating legislation in that case discriminated between religious groups on the basis of whether or not they allowed for public religious worship. Nonetheless, the legislature’s objective, namely, to promote ‘openness in religious practices’, was in Lord Scott’s view entirely reasonable and, presumably, he also considered it to be a proportionate response to the threat to public order posed by private religious practices. These two cases suggest that finding discrimination that violates arts 2(1) and 26 of the *ICCPR* should be straightforward in relation to a public benefit test for religious charitable status. The much more challenging question is when such discrimination will be found to be justified.

Thus, neither s 116 of the *Constitution* nor art 18 of the *ICCPR* are likely to be directly infringed by restricting legal privileges to those religious groups showing public benefit. It is more likely that a public benefit requirement will discriminate in contravention of arts 2(1) and 26 of the *ICCPR* in relation to the right of religious groups to manifest religion. But even if a prima facie violation of art 18 or arts 2(1) and 26 is shown, this can be justified on grounds linked to public benefit. The most likely way in which to show unjustified discrimination would seem to be if the public benefit component of a religious charity test is not a proportionate response to the objectives of the legislation.

C Cost-Effectiveness

Any legislative scheme concerning not-for-profit entities such as religious groups must take into account the compliance costs. Religious groups traditionally rely heavily on the services of volunteers and seek to minimise their costs. The significance of cost can be illustrated by considering the public benefit model adopted in England.¹²⁹

English charity legislation requires that public benefit from religious purposes be proved. Detailed statutory guidance documents on religion and public benefit have been issued by the Charity Commission¹³⁰ and these show that proof is required at a fairly low level of abstraction, although the Commission is willing in principle to consider intangible benefits.¹³¹ But, as discussed above, the more specific an inquiry into public benefit is, the harder and more costly it becomes to demonstrate through neutral expert evidence a link between specific religious

¹²⁷ Ibid 445–6 [95]–[96].

¹²⁸ *Gallagher’s Case* [2008] 1 WLR 1852, 1867.

¹²⁹ See *Charities Act 2006* (UK) c 50, s 3(2); Morris, above n 38.

¹³⁰ See, eg, Charity Commission for England and Wales, *The Advancement of Religion*, above n 115; Charity Commission for England and Wales, *Analysis of the Law*, above n 21.

¹³¹ Charity Commission for England and Wales, *The Advancement of Religion*, above n 115, 11.

purposes and a public benefit. This can be seen in the Charity Commission's 2009 public benefit assessment of the Church Mission Society ('CMS').¹³²

The CMS is a missionary organisation established in 1799 by William Wilberforce and John Newton, among others, to proclaim the Christian gospel through 'missionary and outreach activities'.¹³³ It is a well-established group with, one would have to say, impeccable institutional credentials, and the 10 page report of the Commission concluded without any apparent difficulty that public benefit flowed from its activities. Yet this appears a costly exercise for both parties to undertake in order to reach what surely must have been an entirely predictable outcome.¹³⁴ The CMS public benefit assessment is also of concern because the Commission appears only to have accepted the CMS's arguments as to their beneficial impact upon 'the development of civil society' (that is, an intangible, 'higher level of abstraction' benefit)¹³⁵ because the combination of tangible and intangible benefits (that is, the 'totality' of benefits) was significant. This suggests that newer religions may find it harder to rely upon intangible benefits, particularly if there are no, or few, tangible benefits.

VII THREE MODELS FOR RELIGIOUS CHARITABLE STATUS

The thesis of this article is that whilst state control of religious groups through a public benefit test in charity law is defensible in principle, it can only be so in practice if it is done through an evidentially sound framework, is consistent with human rights norms and is cost-effective. These criteria should inform the drafting of a statutory charity definition that applies to purely religious purposes. With this in mind, and by way of conclusion, three legal frameworks (models) for religious charitable status that could be adopted in Australia are now suggested.

A Model A

The simplest, but most extreme, public benefit model is to abolish advancement of religion as a category of charitable purpose. On this approach, the advancement of religion per se is not an activity that needs to be facilitated or encouraged by the state unless, for instance, it advances some other charitable purpose.

Model A meets at least two of the three criteria for a defensible legal framework: it minimises evidential problems by focusing upon measurable and

¹³² Charity Commission for England and Wales, *Church Mission Society — A Public Benefit Assessment Report by the Charity Commission* (2009).

¹³³ *Ibid* 2.

¹³⁴ Morris, above n 38, 120.

¹³⁵ Charity Commission for England and Wales, *Church Mission Society*, above n 132, 6. The CMS argued that less tangible or quantifiable benefits flowed from the promotion of its moral framework, namely, a 'contribution towards the development of civil society through imparting positive values, attitudes and skills.' This was attributed to 'the contribution of faith to people's well-being and the subsequent creation of societal bonds and cohesion.' It then itemised specific outcomes such as 'encouraging altruism and volunteering' and 'encouraging people to live with simplicity and a commitment to serve other people'.

tangible outcomes from activities that happen to be motivated by religious faith, and it is cost-effective to administer. It could be found to restrict the right to manifest religion, although the precedents for this argument are not particularly strong, particularly given that such a model does not appear to discriminate between religious groups.

On the other hand, model A negates several centuries of case law accepting that purely religious activity is good for society as a whole. Even taking into account the strong relationship of church and state over this period, it seems wise to be absolutely sure that this is not the case before overturning this body of law. The model also necessarily discounts the argument, based upon the High Court's reasoning in *Aid/Watch*, in favour of recognising public benefit from purely religious purposes at a higher level of abstraction; that is, the argument that a flourishing religious pluralism supported through charity law contributes to a healthy society. If this is so, model A may be inconsistent with the rationale of charity law, which is to facilitate purposes that provide collective goods to society. Furthermore, given that charity law is a regulatory mechanism for control of religious groups, there are advantages to the state in recognising the charitable status of religious groups even in relation to purely religious purposes.

B *Model B*

Under this model it is accepted that purely religious purposes may convey sufficient public benefit to justify charitable status, but positive proof is required. Model B raises concerns in relation to each of the three criteria for a defensible legal framework. Unless positive proof of public benefit can be accepted at a high level of abstraction, the evidential process will be costly, as is demonstrated by the English experience. If the highest level of abstraction of benefit on moral or empirical grounds is not accepted, then more attention must be given to what lower level empirical evidence of benefit from specific religious purposes will suffice. The potential for violation of human rights norms will increase in proportion to the number and nature of the evidential issues that need to be determined. England has adopted a model B framework for determining charitable status and its experience therefore provides a valuable resource for Australian law reformers in deciding whether to venture down this reform path.

C *Model C*

Model C is an inclusive framework: the advancement of religion provides public benefit in most cases and therefore religious purposes will only be disqualified from charitable status if any benefit is clearly outweighed by demonstrated harm to the public. On this approach, the advancement of religion is perceived as providing a public benefit most of the time. This is the model to be implemented in Ireland.

This model is still based upon objective evidence, but direct evidence of demonstrable public benefit flowing from specific religious purposes is not required. It presupposes that an evidential test has been satisfied at some higher

level of abstraction, whether this is according to empirical evidence of the general benefits provided by all religious purposes, or according to recognition of the contribution of religious pluralism and religious activity to a healthy society, or according to moral argument (the highest levels of abstraction of benefit).

Model C is evidentially sound, assuming, as argued above, that it is possible to find neutral, objective evidence of the benefits to society of religious activity and/or to rely upon a higher level of abstraction of benefit. Model C is also more cost-effective than model B because individual religious groups do not need to prove public benefit in relation to their specific purposes and nor does the state have to assess such evidence. Like model B, model C has the potential to violate human rights norms, but this is limited to the scope of any disqualifying criteria.

Model C is closest to the current Australian law on public benefit and religious charitable status, which suggests that perhaps the status quo should be maintained under a statutory charity definition. If this is so, hopefully law reformers will address the inconsistencies of the 'public' aspect of the public benefit requirement and clarify why religion provides public benefit (if that is the policy position adopted). If these steps are taken, then there is much to recommend model C.

VIII CONCLUSION

The imminent statutory reform of the test for religious charitable status in Australia raises important questions of policy, but also of legality. There are three possible public benefit models that Australia could adopt; the choice will likely depend upon non-legal considerations, such as the relative strength of the parties to the state–religion relationship. Realistically, given the present political balance between state and religion in Australia, model A is unlikely to be adopted. The remaining two models are similar to the legal frameworks for determining religious charitable status in England and the Republic of Ireland, which suggests that empirical research into the experience of these jurisdictions will be immensely valuable to Australian law reformers. This also raises interesting questions for policymakers concerning whether Australia's religious culture is more analogous to that of England or Ireland.¹³⁶ Applying the suggested criteria for a defensible legal scheme to the three public benefit models suggests that model C should be preferred, and this turns out to be closest to the current common law. Model C avoids the problems of model B in terms of the specificity of proof of public benefit, minimises the scope for human rights violations to the exclusionary provisions of a public benefit test, and is more cost-effective than model B. A final observation is that it is in the interests of the state to adopt a generous view as to the public benefit that flows from the advancement of religion if it wishes to control religious groups more effectively.

¹³⁶ The centrality of religious belief and activity to Irish culture and society has been recognised as a reason why public benefit is presumed in relation to religious charitable status: *Campaign to Separate Church and State in Ireland Inc v Minister for Education* [1998] 3 IR 321, 358–9 (Keane J).