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Special Topic Forum: *Indigenous Spirituality and the Law*

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The *Australian Journal of Law and Religion* acknowledges the traditional custodians of the lands and waterways where the journal is produced and printed. Further, the *AJLR* acknowledges the cultural diversity of Aboriginal and Torres Strait Islander peoples and pays respect to Elders past, present, and future.

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Book Reviews

Special Topic Forum: Indigenous Spirituality and the Law

Editorial

As these words are being written in the morning of 30 August 2023, news reports indicate that later today Prime Minister Anthony Albanese will announce the date of the referendum on whether Australia should establish a First Nations Voice to Parliament in the Constitution. By the time you are reading this, the outcome of the referendum will be known. At this stage, one thing seems certain: the Voice referendum, whether it passes or fails, will be a notable historical event. It will join the 1967 referendum, the Yirrkala bark petitions, the National Apology, the Closing the Gap framework, and many others on the long and still evolving timeline of interactions between Australia and the First Nations Peoples who have called it home since time immemorial.

On that timeline, the Stolen Generations stands as one of the greatest injustices. For a period of over half a century, children of Aboriginal and Torres Strait Islander descent were involuntarily removed from their families, stripped of their cultural connections to country, forbidden to practice customary folkways and spirituality, forcibly converted to Christianity, and often treated with neglect and abuse. In 1997, legal redress for the incredible traumas faced by the Stolen Generations was sought in the High Court in what became known as the *Stolen Generation Case*.[1] The High Court denied all of the plaintiffs' claims.

The 25th anniversary of the *Stolen Generation Case* passed last year, and one of its many unfortunate lingering effects has been in the area of law and religion. When the plaintiffs argued that the guarantee of freedom of religion in s 116 of the Constitution was violated by the Commonwealth and Northern Territory through their involvement in suppressing Indigenous spiritual beliefs and practices, a majority of the High Court held that only laws with the *purpose* of prohibiting freedom of religion could be found invalid under that provision. The decision has been widely condemned by lawyers and scholars on every side of the political spectrum for essentially neutering one of the few explicit rights guarantees in the Australian Constitution — and more so, a right that is fundamental to the well-being of a pluralist democracy.

A combination of the Voice referendum and the anniversary of the *Stolen Generation Case* made it natural that the Special Topic Forum for this instalment of the *Australian Journal of Law and Religion* would be 'Indigenous Spirituality and the Law'. In this issue, Darshan Datar highlights the shortcomings of the High Court's approach to s 116 and suggests that, if passed, the Voice could provide a 'disaggregated' way for Indigenous spiritualities to be protected in Australia through legislative (instead of judicial) means. Ivan Ingram writes about First Nations' spirituality in the context of native title as recognised by the High Court in *Mabo*.[2] He makes the crucial point that the existing native title system can add to the invidious legacy of colonialism by denying recognition to a First Nations' People *because* so much of their cultural knowledge has been destroyed during colonisation. Laura Rademaker provides an insightful contribution about how Australian law has treated the compatibility of Christianity with Indigenous spirituality. Moving to Indonesia, Samsul Maarif discusses a landmark court decision which insisted that Indigenous spiritual beliefs should be given equal legal treatment alongside the country's six "official" religions—but also how enforcing that court decision has not been easy. Together, these contributions make it clear that even in the 21st century, the legal systems of the two countries have a long way to go in recognising and protecting the cultural and spiritual beliefs and practices of Indigenous Peoples.

[1] See *Kruger v Commonwealth* [1997] HCA 27 ('*Stolen Generation Case*').
[2] See *Mabo (No 2)* [1992] HCA 23.

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The research articles in this issue display the breadth of scholarship that fits conceptually into the interdisciplinary scholarly area of 'law and religion.' Ysabel Andrea Abordo and Alex Deagon discuss the conceptual distinction between freedom of religion and freedom from religious discrimination, using the national controversy over the Morrison Government's Religious Discrimination Bill for context. Guy Baldwin's article will be of particular interest to constitutional lawyers, as he critiques the recent trend of arguments in support of using proportionality analysis for s 116. Samuel Blanch suggests that the common academic understanding of legal pluralism needs revision in his piece on Islamic law in Australia. Barristers David Goodwin and Paul Reynolds present an impressively detailed analysis of historical trusts, using Victoria as a case study, to illustrate how doctrinal and organisational differences between religious movements and denominations can affect property rights. Evidence and criminal law scholar Andrew Hemming covers the challenging legal issues that have arisen over the high-profile prosecution of the leaders and members of a small religious group in Queensland over the death of a child. With the addition of book reviews by Myriam Hunter-Henin and Benjamin Saunders, we are confident you will find something that merits your attention in the pages that follow.

Alex Deagon
Jeremy Patrick
Co-Editors

Religious Freedom and Freedom from Religious Discrimination: Implications for the Religious Discrimination Bill

Ysabel Andrea Abordo[*]
Alex Deagon[**]

This article argues that religious freedom and freedom from religious discrimination are distinct but conceptually linked; in particular, freedom from religious discrimination is a sub-category of religious freedom. Their conceptual relationship is grounded in a common foundation of autonomy. However, autonomy in this context is not purely individualistic and includes group aspects. The article draws on this analysis to consider whether the most contentious provisions of the Commonwealth's 2021 Religious Discrimination Bill were appropriate to include as properly implementing principles of freedom from religious discrimination. The article suggests that the 'statement of belief' provision was not appropriate to include because it implemented religious freedom principles more broadly. Conversely, the 'conduct that is not discrimination' provision implemented freedom from religious discrimination principles and therefore was appropriate to include in the Bill.

I. INTRODUCTION

Religious freedom and freedom from religious discrimination are distinct ideas which share some conceptual overlap, but there is little consensus with respect to the precise nature of their relationship.[1] This presents a problem which is illustrated by the now lapsed Religious Discrimination Bill 2021 (Cth) ('RDB'). Critics argued that the RDB exceeded the traditional scope of discrimination legislation by incorporating principles of religious freedom, which resulted in some tensions in key provisions.[2] The most contentious provisions were the 'statement of belief' provision (cl 12), which would have allowed a person to make a statement of religious belief or about religion which may be offensive, and the 'conduct which is not discrimination' provision (cl 7), which would have allowed religious bodies to engage in conduct which may appear to be discriminatory.[3] This article argues that freedom from religious discrimination is a sub-category of religious freedom. In this way they are distinct but conceptually linked. As a consequence, they share a common conceptual foundation of

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[**] Associate Professor, Queensland University of Technology. The author discloses a formal affiliation with the *Australian Journal of Law and Religion*. The *AJLR*'s conflict-of-interest procedure was followed in the acceptance of this article for publication.

[1] See, eg, Ronan McCrea, 'Squaring the Circle: Can an Egalitarian and Individualistic Conception of Freedom of Religion or Belief Co-Exist with the Notion of Indirect Discrimination?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 149; Jonathan Fox, *Thou Shalt Have No Other Gods before Me : Why Governments Discriminate against Religious Minorities* (Cambridge University Press, 2020) 20; Ilias Trispiotis, 'Religious Freedom and Religious Antidiscrimination' (2019) 82(5) *Modern Law Review* 864, 864.

[2] Renae Barker, 'The Freedom of Religion Debate: Where Are We and How Did We Get Here?' (2020) 47(4) *Brief* 27, 29 ('*Freedom of Religion Debate*').

[3] Kirrily Schwartz, 'Discrimination: Spotlight on Religious Discrimination' [2020] 65 (April) *Law Society of New South Wales Journal* 36, 39.

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autonomy. The article then draws on this analysis to consider the implications for these two contentious provisions of the RDB. To be conceptually consistent, the RDB would need to only include freedom from religious discrimination protections such as the 'conduct that is not discrimination' provision, not religious freedom protections more broadly, such as the 'statement of belief' provision. The former provision is included by virtue of the incorporation of group aspects.

Part II articulates definitions of religious freedom and freedom from religious discrimination to show that freedom from religious discrimination is a sub-category of religious freedom. Part III suggests both concepts are therefore grounded in a common foundation of autonomy, which also entails ethical independence. However, autonomy does not adequately take the communal nature of religion into account, so the article argues incorporation of group aspects is necessary. Part IV transitions to the RDB and considers its political context with respect to the conceptual relationship between religious freedom and freedom from religious discrimination. Part V applies the principles articulated in Parts II and III, suggesting that the 'statement of belief' provision was outside the scope of the RDB because it primarily involved principles of religious freedom more broadly, while the 'conduct which is not discrimination' provision was within the scope of the RDB because it primarily involved principles of freedom from religious discrimination.

II. DEFINING RELIGIOUS FREEDOM AND FREEDOM FROM RELIGIOUS DISCRIMINATION

This part argues that freedom from religious discrimination is a sub-category of religious freedom, and as such, the ideas are distinct but conceptually linked.

Religious Freedom

There is no consensus on a definition of religious freedom.[4] Ilias Trispiotis states that there is a lack of clarity regarding its purpose, its relationship with freedom from religious discrimination, and how it affects areas such as the workplace, education, and the wider community.[5] In response to this ambiguity, Trispiotis, Heiner Bielefeldt, Tarunabh Khaitan, Jane Calderwood Norton, and Lucy Vickers are prominent examples of authors who attempt to define religious freedom, explain its purpose, and distinguish it from freedom from religious discrimination. These attempts set out below are illustrative rather than comprehensive. It is also worth noting that in this article we will primarily be engaging with the secondary literature. Except for the purposes of illustration, to also engage with the primary materials is beyond the scope of our aim, which is to address particular theoretical problems which arise from the secondary materials and consider the implications for the RDB.

Khaitan and Calderwood Norton note that religious freedom 'is best understood as protecting our interest in religious (non) adherence'.[6] They use the term (non) adherence to mean sole 'commitment to some combination of a set of beliefs or practices'[7] by religious or non-religious

[4] Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Legal Foundations of Religious Freedom in Australia* (Interim Report, November 2017) 15 [3.1]; Fox (n 1) 20.
[5] Trispiotis (n 1) 864.
[6] Tarunabh Khaitan and Jane Calderwood Norton, 'The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretical Distinctions' (2019) 17(4) *International Journal of Constitutional Law* 1125–6.
[7] Ibid 1129, 1138.

persons, to the exclusion of other beliefs or practices.[8] For instance, an individual's adherence to a Christian faith and its practices would therefore mean non-adherence to a Jewish faith.[9] For a non-religious individual, their adherence to non-practice of a religion means non-adherence to any or all religions.[10] Furthermore, decisional autonomy is considered the foundation for religious freedom, which allows for an individual to have the opportunity to adhere or not adhere to a religion.[11] Khaitan and Calderwood Norton take an approach similar to Trispiotis[12] and Vickers[13] by including non-religious persons in defining religious freedom. Brian Leiter also reflects this view in the sense of grounding 'liberty of conscience' in 'being able to choose what to believe and how to live', which is an autonomy justification that includes non-religious persons.[14] Khaitan and Calderwood Norton give a broad reading to 'beliefs and practices' by acknowledging that religion can be communal and thus extends beyond the individual, and noting the degree of adherence can vary depending on the religion.[15] Heiner Bielefeldt provides implied support for Khaitan and Calderwood Norton's definition, arguing that religious freedom values diversity (that is, the wealth of different beliefs and practices) and the individual's continuous search for meaning.[16] Bielefeldt also considers that religious freedom entails the freedom to proselytise, publicly and privately worship, and to embrace new religious beliefs, among other aspects.[17] An individual's ability to adhere (or not adhere) to a religion should be protected. Khaitan and Calderwood Norton's definition of religious freedom is therefore an appropriate starting point as it is broad enough to protect religious and non-religious individuals and recognises that an individual's degree of adherence can differ depending on the religion.

Trispiotis describes religious freedom as a vertical relationship between the individual, the state, and each other.[18] Trispiotis grounds the concept in 'ethical independence', which is a person's freedom to 'pursue their own ethical or religious commitments' within the limits of state interference.[19] Interference is reasonable where it is 'prescribed by law, pursue[s] a legitimate aim and [is] necessary in a democratic society'.[20] It should be noted that ethical independence as the foundation for religious freedom is ostensibly distinct from Khaitan and Calderwood Norton's argument for decisional autonomy as the foundation for religious freedom.[21] This tension between conceptual foundations is analysed further in Part III.

An important aspect of understanding the scope of religious freedom is understanding when it may be limited. Since state interference is reasonable if it is necessary and pursues a legitimate aim (such as protecting the fundamental rights and freedoms of others), the state plays an active

[8] Ibid 1129–30.
[9] Ibid.
[10] Ibid.
[11] Ibid 1137.
[12] Trispiotis (n 1) 887.
[13] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2nd ed, 2016) 10.
[14] Brian Leiter, 'Why Tolerate Religion?' (2008) 25(1) *Constitutional Commentary* 1, 7. For an extended articulation of Leiter's argument see Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013).
[15] Khaitan and Calderwood Norton (n 6) 1131–2.
[16] Heiner Bielefeldt, 'Freedom of Religion or Belief--A Human Right under Pressure' (2012) 1(1) *Oxford Journal of Law and Religion* 15, 16–7.
[17] Ibid 21–2.
[18] Trispiotis (n 1) 878.
[19] Ibid 866.
[20] Ibid 870.
[21] Khaitan and Calderwood Norton (n 6) 1127.

role in determining the extent of religious freedom in society.[22] Amos Guiora points out that states should be more proactive in limiting freedom of speech and association to prevent and mitigate the rise of religious extremism.[23] In Australia, for example, Poulos notes that there has been heavy politicisation of religious freedom, and as a result, legislators have prevented religious individuals from maximising their religious freedom.[24] Vickers also notes the ongoing problem of balancing competing rights.[25] Vickers recognises that religious freedom is multifaceted; it includes the right to not have religious beliefs and to be free from religious influences.[26] This potentially creates tension in areas such as the workplace and education, especially where non-religious parents are reluctant for their child to follow a religious school's ethos. It is also important to acknowledge that different religious groups have varying needs, and this may conflict with the interests of non-religious groups — and the interests of both groups may change over time.[27]

Freedom From Religious Discrimination

Similar to religious freedom, there is no consensus on a definition of freedom from religious discrimination.[28] It is generally considered to be part of discrimination law and aims at bridging disadvantage due to an individual's belief or religion.[29] Khaitan and Calderwood Norton define freedom from religious discrimination 'as protecting our interest in the unsaddled membership of our religious group'.[30] Unsaddled membership covers external factors (economic, social, and political) that may influence an individual's religious adherence.[31] Freedom from religious discrimination protects a person's privileges and mitigates any disadvantages from being part of a religious group.[32] They claim an individual's degree of religious adherence is irrelevant, as external disadvantages of religious membership are beyond a person's control.[33] Hence, freedom from religious discrimination sits along the spectrum of discrimination, with the goal of bridging the gap between religious groups and the wider community.[34]

Khaitan and Calderwood Norton's approach is supported by Trispiotis and Vickers.[35] Trispiotis describes freedom from religious discrimination as a horizontal relationship, where protection of this right contributes to distributive justice.[36] This means the state is responsible for addressing any disparity and fairly generating opportunities for religious individuals,[37] especially within the education and employment sector.[38] Where the disadvantages are addressed the individual is able to undertake their life plans.[39] However, there are also vertical

[22] Trispiotis (n 1) 870.
[23] Amos Guiora, *Freedom from Religion: Rights and National Security* (Oxford University Press, 2013) 10.
[24] Elenie Poulos, 'Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom' (2019) 10(10) *Religions* 583, 583.
[25] Vickers (n 13) 3.
[26] Ibid.
[27] Ibid.
[28] Fox (n 1) 20.
[29] Khaitan and Calderwood Norton (n 6) 1143; Trispiotis (n 1) 866.
[30] Khaitan and Calderwood Norton (n 6) 1126.
[31] Ibid.
[32] Ibid 1133.
[33] Ibid 1133–4.
[34] Ibid 1141.
[35] Trispiotis (n 1) 881; Vickers (n 13) 1–2.
[36] Trispiotis (n 1) 880.
[37] Ibid 881.
[38] Ibid 885.
[39] Ibid.

aspects to freedom from religious discrimination. For example, if a state imposes a religious test for public office, the state creates a disadvantage for religious individuals and it is the responsibility of the state to remove that disadvantage so that religious individuals are free to adhere to their commitments. Vickers also considers some of the tensions of freedom from religious discrimination.[40] For example, she states that freedom from religious discrimination may be challenged where religious groups discriminate against an individual, such as in cases where religious schools want to employ persons of the same faith and may therefore discriminate against those who do not share the same faith.[41] She then lists other relationships that may be affected where a right to freedom from religious discrimination is encroached, including discrimination by religious groups with respect to individuals who practice the same religion but have diverse beliefs.[42] On the other hand, Vickers also notes that freedom from religious discrimination is challenged from the perspective of religious groups where they are unable to choose members which adhere to their doctrine, because then religious groups are not able to exist on the same footing as other groups which choose members on the basis of beliefs (such as political parties).[43] This difficulty is particularly illustrated by the 'conduct that is not discrimination' provision in the RDB.

In general, Khaitan and Calderwood Norton propose that religious freedom and freedom from religious discrimination are separate rights as each protects distinct religious interests.[44] Religious freedom protects an individual's (non) adherence to their religious or non-religious commitments, while freedom from religious discrimination concerns an individual's interest that their religious group is protected from economic, social, and political disadvantage compared to other religious and non-religious groups.[45] Ronan McCrea,[46] Khaitan and Calderwood Norton,[47] and Trispiotis[48] also to some extent distinguish religious freedom as an individual right, while categorising freedom from religious discrimination as a group-based right. However, Trispiotis concedes that both concepts overlap.[49] For example, an individual is unable to experience religious freedom if their freedom from religious discrimination is not protected.[50] Furthermore, there are cases where individuals experience violence because of their religious group membership, or cases where a religious group is denied legal status.[51] The religious freedom of both individuals and groups is infringed when individuals or groups suffer religious discrimination. This implies that there is a conceptual link between religious freedom and freedom from religious discrimination even though they are distinct ideas.

Freedom from religious discrimination is aimed at bridging disadvantages due to an individual's religious beliefs.[52] Religious freedom is aimed at protecting (non) adherence to an individual's religious or non-religious commitments.[53] These are distinct concerns. Yet, entailed in protecting (non) adherence to an individual's religious or non-religious

[40] Vickers (n 13) 2.
[41] Ibid.
[42] Ibid.
[43] Ibid 94–5.
[44] Khaitan and Calderwood Norton (n 6) 1136.
[45] Ibid 1145.
[46] McCrea (n 1) 162.
[47] Khaitan and Calderwood Norton (n 6) 1141–2.
[48] Trispiotis (n 1) 880.
[49] Ibid 868.
[50] Ibid.
[51] Ibid.
[52] Ibid 866.
[53] Khaitan and Calderwood Norton (n 6) 1129.

commitments is bridging disadvantage which burdens the ability of individuals to adhere to their religious commitments, as in the religious test example where imposing a disadvantage decreases freedom to adhere to commitments. Thus, we propose that freedom from religious discrimination is more precisely a sub-category of religious freedom. These definitions of religious freedom and freedom from religious discrimination are broad enough to cover both religious and non-religious individuals. Both concepts also require the incorporation of group aspects, and consideration of how to balance state interference and competing interests, such as other human rights, non-religious interests, and other religious groups. These principles are further explored in the following part.

III. THEORETICAL RELATIONSHIP BETWEEN RELIGIOUS FREEDOM AND FREEDOM FROM RELIGIOUS DISCRIMINATION

This part further explores two tensions identified in the previous part. First, it considers the ostensibly distinct conceptual foundations of ethical independence and autonomy, arguing that these can be aspects of the same broader autonomy rationale which undergirds both religious freedom and freedom from religious discrimination (as a sub-category of religious freedom). Second, it argues that any conceptual foundation for these concepts must properly take into account the communal nature of religion, and so this part augments an individualistic autonomy rationale by incorporating group aspects. The principles articulated in this part are then applied in an analysis of the two contentious provisions of the RDB in Part V.

Autonomy and Ethical Independence

Khaitan and Calderwood Norton propose 'decisional autonomy' as the foundation for religious freedom.[54] Decisional autonomy empowers individuals to make their own decision in practicing (or not practicing) their religion, and underpins diversity between and within religions.[55] Decisional autonomy can be considered a subset of general autonomy, as both share similar preconditions. This includes an individual's ability to make their own decisions on how to best live out their life, without any internal or external interferences.[56]

Farrah Ahmed agrees with Khaitan and Calderwood Norton and defines autonomy as 'the ideal of controlling, creating, authoring or shaping one's own life'.[57] This ideal is met where the individual has a 'degree of freedom from coercion and manipulation, and possession of an adequate range of options', along with identification towards a particular idea or belief.[58] Ahmed argues that autonomy is widely recognised as a conceptual foundation of religious freedom in both scholarship and relevant case law.[59] Ahmed acknowledges some weaknesses

[54] Khaitan and Calderwood Norton (n 6) 1127.
[55] Ibid 1138.
[56] Farrah Ahmed, 'The Autonomy Rationale for Religious Freedom' (2017) 80(2) *Modern Law Review* 238, 239; Khaitan and Calderwood Norton (n 6) 1138–9.
[57] Ahmed (n 56) 239.
[58] Ibid 241.
[59] Ibid 239. See, eg, Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74(2) *Modern Law Review* 287, 292; Vickers (n 13) 39; Khaitan and Calderwood Norton (n 6) 1137; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001) 33. English and Canadian courts have applied autonomy as the rationale for religious freedom in cases such as *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 and *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, and international law recognises autonomy as a rationale in seminal cases such as *Kokkinakis v Greece* (1994) 260 Eur Court HR (ser A) and *Sahin v Turkey* [2005] XI Eur Court HR 173. There are of course other potential theoretical foundations for religious freedom such as theology and natural law: see, eg, J Daryl Charles, *Natural Law and Religious Freedom* (Routledge, 2018); Karen

of grounding religious freedom under autonomy. She particularly cites manipulative proselytism and the hesitance of religious individuals to revise their beliefs.[60] Firstly, manipulative proselytism is most relevant where parents decide to raise their children in accordance with a religion. This may include enrolling them in a religious school, thus undermining children's autonomy.[61] Secondly, an individual's autonomy is weakened when they have religious beliefs that become inconsistent with their personal beliefs.[62] For instance, an individual's religious belief might mandate that voluntary assisted dying is evil, but after empathising with a friend who is suffering a serious illness, the individual personally believes otherwise.[63] The individual is then unable to make an autonomous decision supporting or dissenting from their longstanding religious belief. Therefore, they cannot experience true religious freedom.[64] Trispiotis also contends that an autonomy rationale 'cannot justify' a broad protection of religious freedom 'which includes practices that do not enhance autonomy, such as those involving autonomy-diminishing resistant beliefs and manipulative proselytism'.[65]

In response to these weakness, Ahmed suggests Ronald Dworkin's principle of authenticity as an alternative to autonomy, which is linked to Dworkin's rationale of 'ethical independence'.[66] Dworkin describes ethical independence as a relationship where the state is unable to restrict the freedom of citizens, thus allowing them to decide how to live their life.[67] This means an individual can be authentic in the sense of making their own decisions regarding their religious views.[68] Interference is limited to cases where the state needs to protect a vulnerable group by, for example, protecting them from harm or facilitating their welfare.[69] Dworkin argues that religious freedom is better grounded in ethical independence because it covers both religious and non-religious individuals, and ethical independence assumes that no particular faith or belief is superior to another.[70] As already noted in the previous part, Trispiotis agrees, claiming that ethical independence allows for individuals to pursue their life plans, while maintaining the balance between state interference and liberty.[71]

Ahmed therefore considers ethical independence as an important aspect of religious freedom because it places the burden on the state to enable an individual to have options in living a religious life (which extends to religious doctrine and personal belief).[72] Autonomy conversely places the burden on the individual to actively make the decisions to enable themselves to live (or not live) a religious life.[73] However, ethical independence also has weaknesses. At its core, ethical independence gives no special value to religion.[74] This presents problems because

Taliaferro, *The Possibility of Religious Freedom: Early Natural Law and the Abrahamic Faiths* (Cambridge University Press, 2019). We do not consider these in this article for the sake of space and instead focus on autonomy as one of the most prominent options.

[60] Ahmed (n 56) 240.
[61] Ibid 257.
[62] Ibid 247.
[63] Ibid.
[64] Ibid.
[65] Trispiotis (n 1) 874.
[66] Ahmed (n 56) 260.
[67] Ronald Dworkin, *Religion without God* (Harvard University Press, 2013) 130 ('*Religion Without God*').
[68] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 211.
[69] Dworkin, *Religion without God* (n 67) 130.
[70] Ibid 134.
[71] Trispiotis (n 1) 865, 873.
[72] Ahmed (n 56) 260–1.
[73] Ibid 239.
[74] Matthew Clayton, 'Is Ethical Independence Enough?' in Cécile Laborde and Aurélia Bardon (eds), *Religion in Liberal Political Philosophy* (Oxford University Press, 2017) 142.

ethical independence does not protect individuals who believe they must follow their religious beliefs, such as conscientious objectors.[75] Ethical independence also cannot account for religious exemptions because these may accommodate some but not all religions, and therefore not all individuals are given options for how to best live their life.[76] In addition, such individuals are also vulnerable to instances of religious discrimination, limiting their options to live a life of their choosing.[77]

Decisional autonomy and ethical independence can be reconciled as a common conceptual foundation for religious freedom and freedom from religious discrimination. Both decisional autonomy and ethical independence focus on the ability of an individual to choose how to live their life with respect to religion without external interference (religious freedom). Choice is appropriately extended to both religious and non-religious individuals.[78] Some individuals experience a disadvantage which hinders this choice, perhaps due to external interference (religious discrimination). Mitigating disadvantage (freedom from religious discrimination) provides the conditions for an individual to freely pursue the religion of their choice (religious freedom).[79] Freedom from religious discrimination is therefore a necessary condition for religious freedom. This fact further supports the claim that freedom from religious discrimination is a sub-category of religious freedom, despite their distinctive emphases on mitigating disadvantage and life choices respectively.

Though ethical independence focuses on the state as the enabler of choice, this can be incorporated into the autonomy rationale: the state is responsible for allowing its citizens to have autonomy in the sense of protecting them from coercion and manipulation and ensuring they have access to a wide range of options, but this state interference can also be reasonably limited to maintain the autonomy and ethical independence of others.[80] For example, a religious individual can have autonomy in the workplace where accommodation for their religious beliefs is proportional to competing religious interests and does not interfere with the ethical independence of the employer and non-religious employees.[81] Combining autonomy and ethical independence also addresses the weaknesses of both rationales. Autonomy can facilitate the choice of religion as a special way of authoring one's life which can be accommodated through exemptions and conscientious objections, while ethical independence can facilitate genuine choice which addresses situations where autonomy is limited by interference, such as manipulative proselytism and revising beliefs.

Hence, autonomy is a broader conceptual framework that can entail ethical independence.[82] It provides a more robust rationale which is recognised in the scholarship and international law (as noted above) and incorporating ethical independence can address the shortcomings of both rationales. In this sense autonomy can properly be considered as a conceptual foundation for religious freedom and freedom from religious discrimination.[83] The next section continues to refine the autonomy rationale by considering the group aspect of religion.

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[75] Ibid 141.
[76] Ibid.
[77] Ibid.
[78] Khaitan and Calderwood Norton (n 6) 1138; Dworkin, *Religion without God* (n 67) 134.
[79] Ahmed (n 56) 239; Khaitan and Calderwood Norton (n 6) 1134; Dworkin, *Religion without God* (n 67) 130.
[80] Ahmed (n 56) 243; Trispiotis (n 1) 865–6.
[81] Vickers (n 13) 65; Trispiotis (n 1) 873.
[82] See, eg, Michael J Sandel, 'Religious Liberty--Freedom of Conscience or Freedom of Choice?' 1989(3) *Utah Law Review* 597, 609.
[83] Ahmed (n 56) 261.

Individual and Group Aspects

This section examines the group aspect of religion to refine autonomy as a conceptual foundation for religious freedom and freedom from religious discrimination. Calderwood Norton grounds religious freedom in the individual, who is then able to join (or form) religious organisations. This provides the individual with access to further guidance and knowledge for a better religious life.[84] An individual's religious freedom is enriched by membership within a religious organisation; without this, an individual cannot fully live autonomously and maximise their religious freedom.[85] Government interference (a kind of religious discrimination) which hinders membership of a religious organisation also conflicts with an individual's autonomy to live a religious life, again illustrating how freedom from religious discrimination is a sub-category of religious freedom in the specific context of groups.[86]

Calderwood Norton distinguishes between the internal and external activities of religious groups with respect to autonomy.[87] External activities include matters within the public sphere that are 'external or outside the essential purpose of the [religious group]'.[88] More autonomy is given to religious groups for activities that are internal to the group and part of their essential religious purpose, thus allowing religious groups (comprised of individuals) more options on living their lives alongside their religious beliefs.[89] There are difficulties in providing examples for internal activities, as both kinds of activities overlap and the categorisation of internal or external shifts depend on perspective. A non-religious approach might draw sharp boundaries between internal and external activities, while some religious individuals and groups do not view their religious practice as something that is so easily divisible.[90] For instance, employment in a religious organisation is both an internal and external activity because it draws in an external person, but that person may be required to meet particular religious conditions set by the organisation.[91] In this context there are tensions between protecting the internal doctrine of the religious organisation, protecting the interests of the external applicant, and protecting the state's external interest in removing employment discrimination.[92] Although there are potential abuses in allowing religious groups full autonomy with respect to internal activities, Calderwood Norton resolves this concern by arguing that the state retains power to interfere in cases where group activities are inconsistent with autonomy or where an individual is at a risk of harm when they decide to join the group.[93]

External activities are more likely to be subject to discrimination law and state interference.[94] As external activities include 'engaging with non-members' the state has a larger concern in protecting individuals from harm or discrimination from religious groups.[95] For instance, religious groups supply goods and services to both their followers and the general

[84] Jane Calderwood Norton, *Freedom of Religious Organizations* (Oxford University Press, 1st ed, 2016) 37.
[85] Ibid.
[86] Ibid.
[87] Ibid 39.
[88] Ibid 205.
[89] Ibid 199–200.
[90] Ibid 200, 202.
[91] Ibid 202; Joel Harrison, 'The Liberal Political Imagination and Religious Liberty: Autonomy, Boundary-Refining, and State Power in Jane Calderwood Norton's *Freedom of Religious Organizations*' (2017) 42(1) *Australian Journal of Legal Philosophy* 280, 289–290 ('*The Liberal Political Imagination and Religious Liberty*').
[92] Calderwood Norton (n 84) 202; Harrison, *The Liberal Political Imagination and Religious Liberty* (n 91) 289–90.
[93] Calderwood Norton (n 84) 31, 65.
[94] Ibid 65.
[95] Ibid.

community.[96] Calderwood Norton argues that theoretically this means religious groups consent to obey state laws and acknowledge that these laws will not unnecessarily burden their religious doctrine or purpose. She concedes that religious groups may seek exceptions to increase their autonomy and maximise religious freedom.[97] In the United Kingdom, for example, there are sexual and religious discrimination exceptions for religious groups in providing goods and services. Religious groups are allowed to restrict the provision of goods or the use of a place where it is normally used for religious purposes on the basis of 'belief or sexual orientation'.[98] Similar to the earlier example on seeking employment in religious organisations, these exceptions involve overlaps between internal and external activities because there is a tension when goods and services are offered externally by a religious organisation, but only on the basis of internal conditions set by the doctrine of the organisation.[99]

Nicholas Aroney disagrees with Calderwood Norton's perspective regarding the individual autonomy foundation of the religious group, as he argues that religion is irreducibly communal and, thus, transcends the individual. The religious freedom of individuals is maximised when individuals join a religious group, not because it increases their autonomy but because religious freedom starts and ends with religious groups.[100] Religious freedom 'must necessarily have individual, associational and communal dimensions' which support the ability of religious individuals to gather together in groups to manifest their religion, and supports the ability of groups to maintain their 'distinctive identity'.[101] Aroney illustrates his argument using the freedom of religion provision in Section 116 of the Australian Constitution and international law.[102] Firstly, the freedom of religion provision in s 116 of the Australian Constitution contains the term 'religion', which is a set of beliefs or ideas shared by a group, and manifested by conduct.[103] The ordinary meaning of religion therefore itself implies religion is communal, in comparison to the implication if the constitutional drafters used the terms 'belief, conscience or conviction'.[104] In addition, according to an ordinary reading, s 116 protects any legal personality, including individuals, associations, and corporations.[105]

Aroney's reading of the case law affirms the argument that s 116 protects both individuals and groups.[106] In *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria),*[107] Mason ACJ and Brennan J state that individuals and groups are both entitled to practice the religion of their choice, notwithstanding the type of religion.[108] Additionally, Wilson and Deane JJ suggest that group identity is a strong factor supporting the existence of a religion, regardless of whether the group has a clear doctrine or is loosely formed.[109] Murphy J similarly concluded

[96] Ibid 163.
[97] Ibid 205–6.
[98] *Equality Act 2010* (UK) sch 23 para 2(3). Australia has similar provisions in s 47B of the *Marriage Act 1961* (Cth), which allows bodies established for religious purposes to refuse to provide goods or facilities for the solemnisation of a marriage if the refusal conforms to the doctrine of the body.
[99] Calderwood Norton (n 84) 206.
[100] Nicholas Aroney, 'Individual, Community and State: Thoughts on Jane Norton, Freedom of Religious Organizations' (2017) 42(1) *Australian Journal of Legal Philosophy* 270, 274–5.
[101] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 183–4 ('*Freedom of Religion*').
[102] Ibid 154–5.
[103] Ibid 156.
[104] Ibid.
[105] Ibid.
[106] Ibid 158.
[107] (1953) 154 CLR 120 ('*Church of the New Faith*').
[108] Ibid 136; Aroney, *Freedom of Religion* (n 101) 162.
[109] *Church of the New Faith* (n 107) 174; Aroney, *Freedom of Religion* (n 101) 163.

that a religious group is a group that 'claims to be religious or offers a way to find meaning and purpose in life'.[110] Therefore, all five justices acknowledged that religion has a 'group' element.[111] In *Jehovah's Witnesses*, a majority held that the Witnesses were competent to bring their action as an incorporated organisation — which implies the majority assumed the protection granted to s 116 extends to groups.[112] Furthermore, group-based religious freedom is reflected in international law provisions, such as Articles 18, 22, and 27 of the *International Covenant on Civil and Political Rights* ('*ICCPR*').[113] These provisions allow individuals with similar beliefs to band together and create a group, and for individuals to exit, not join a group, or be expelled by the wider group, and for the group to express their shared doctrine.[114] The fact that religion has group aspects has implications for how tensions between the autonomy of individuals and groups may be resolved with respect to activities of the group.

As Julian Rivers argues, groups should retain full autonomy with respect to membership such that group rights should prevail over individual rights in the event of conflict.[115] Calderwood Norton's solution is problematic because it limits the autonomy of groups (and consequently the autonomy of individuals within those groups) where decisions about group activities limit the autonomy of external individuals or impose harm upon them. As Aroney and Rivers correctly advocate, more weight should be given to the membership criteria of religious groups compared to the individual's interest in joining the group, such that the distinctive identity, ethos, and doctrine of the religious group can be consistently preserved.[116] This autonomy for religious groups might be legally protected in the form of exemptions which allow religious groups to engage in conduct against individuals which is necessary to protect the ethos of the group and consequently the autonomy of the group and its individual members (such as the 'conduct that is not discrimination' provision of the RDB).[117] Without these exemptions, religious groups must justify their beliefs against non-religious individuals, which potentially compromises the autonomy and identity of religious groups and their religious freedom as a whole.[118] Exemptions in this context simultaneously support freedom from religious discrimination for religious groups because it prevents undue external interference which would otherwise create a disadvantage for religious groups and their members. Thus, the autonomy of the group (and the individuals who comprise it) is upheld because the group is allowed to maintain its ethos in how it selects and regulates its members.

However, this does not mean the autonomy of the affected individual is ignored. The autonomy of the individual is also upheld because the individual is free to join another group or form their own group through a right of exit.[119] The right of exit refers to an individual's right to leave a religious group when they 'no longer wish to live by the terms of [the religious group's] association'.[120] Using the example of a religious group acting as an employer, an individual

[110] *Church of the New Faith* (n 107) 151; Aroney, *Freedom of Religion* (n 101) 163.
[111] *Church of the New Faith* (n 107) 132, 135, 151, 174; Aroney, *Freedom of Religion* (n 101) 163.
[112] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; Aroney, *Freedom of Religion* (n 101) 159–161, 166. This is further reflected in *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, where it was 'taken for granted' that the Lebanese Moslem Association could bring the action as a group to protect its right to select its religious leaders.
[113] Opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[114] Aroney, *Freedom of Religion* (n 101) 197.
[115] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 321–2.
[116] Ibid; Aroney, *Freedom of Religion* (n 101) 183–4.
[117] Rivers (n 115) 322.
[118] Ibid 321–2.
[119] Calderwood Norton (n 84) 62.
[120] Ibid 57.

who becomes non-religious or wishes to practice a different faith is able to voluntarily leave the group and seek employment elsewhere, or join another religious group. Therefore, both individual and group religious freedom is protected. However, some individuals may not have the option of exiting their religious group.[121] This compromises their autonomy, as they are unable to make fully-formed decisions about their religious beliefs outside of their religious group.[122] For a right of exit to be sufficient to preserve autonomy, Calderwood Norton emphasises the 'adequacy of the exit', which includes educating the individual to be able to make their own decisions in matters of religion and making all choices meaningfully available to them (such as joining a different religious group or not practicing at all) so that they are not forced to continue as a member of the religious group.[123] Where there is an adequate right of exit, the individual utilises their autonomy and is able to practice (or not practice) their religious beliefs by joining (or not joining) another religious group, and the religious group is able to retain their autonomy in selecting their members in accordance with their doctrine. Aroney and Rivers therefore supplement a deficiency in Calderwood Norton's view regarding the autonomy foundation of religious groups (that groups exist to enhance the autonomy of individuals). Rather, religion is intrinsically communal and it is the autonomy of groups which enables the autonomy of individuals (as supported by an adequate right of exit).

Preserving autonomy through a right of exit provides a reasonable avenue to allow religious groups to maximise their religious freedom and freedom from religious discrimination, while respecting those same rights for other religious and non-religious individuals. Both religious freedom and freedom from religious discrimination entail individual and group aspects, which ultimately refines autonomy as a rationale by acknowledging the group as an autonomous entity exercising distinct authority which is greater than the sum of its individual parts.[124] Hence, freedom from religious discrimination entails particular religious freedom principles through mitigating disadvantage due to an individual's religion or belief in a group or individual context.[125] Where freedom from religious discrimination is met, religious groups can better practice their religious beliefs and protect their members, which allows them to 'live a free and flourishing life'.[126] Individuals and groups cannot experience religious freedom if there is religious discrimination within their environment, and in this sense freedom from religious discrimination is a sub-category of religious freedom.[127] The next part considers these principles in an overview of the political context of the RDB before the final part applies these principles in an effort to resolve the question of whether the 'statement of belief' and 'conduct which is not discrimination' provisions were appropriate to include in the RDB.

IV. LEGISLATIVE AND POLITICAL CONTEXT OF THE RDB

The genesis of the RDB occurred through the same-sex marriage debate, which resulted in Australia recognising same-sex marriage in law through amending the legal definition of marriage. The debate emphasised the challenge of protecting religious freedom to uphold traditional beliefs of family and marriage in the context of a push for legal equality between all

[121] Ibid 60.
[122] Ahmed (n 56) 247.
[123] Calderwood Norton (n 84) 60–1, 157–8.
[124] Rivers (n 115) 321–2. See also Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020) 49–50, 174, 179.
[125] Trispiotis (n 1) 871.
[126] Khaitan and Calderwood Norton (n 6) 1141–2.
[127] Trispiotis (n 1) 881.

types of couples, regardless of gender or sexual orientation.[128] Specific issues raised included the freedom of religious celebrants to conduct weddings in accordance with their beliefs and the freedom of religious schools to continue teaching the traditional view of marriage.[129] In response, then Prime Minister Malcolm Turnbull commissioned an Expert Panel to analyse whether religious freedom is adequately protected within Australian law.[130] The Panel was colloquially termed the 'Ruddock Review' after the Panel's Chair and former Howard Government Minister, Philip Ruddock.

The Ruddock Review can be seen as a gauge of the public's interest in religious freedom protection in Australia.[131] The submissions and the Report highlighted the inadequacy of religious freedom protections within Australian legislation, including the inconsistency of religious freedom protections across states and territories, the lack of positive religious freedom laws, gaps within anti-discrimination laws, and the limitations of religious freedom protections in the Australian Constitution.[132] The Panel considered and rejected enacting a 'Religious Freedom Act' which would be aimed at protecting religious freedom, freedom of expression, and freedom of association.[133] They argued it would be difficult to prioritise religious freedom and attempt to balance this with other human rights.[134] They instead favoured a 'Religious Discrimination Act' intended to protect freedom from religious discrimination.[135] This recommendation was accepted by the Australian Government in December 2018 and resulted in the emergence of the RDB.[136] Importantly, in rejecting a 'Religious Freedom Act' and recommending a 'Religious Discrimination Act', the Panel itself distinguished between legislation protecting religious freedom and legislation protecting freedom from religious discrimination. This supports the argument that freedom from religious discrimination is a sub-category of religious freedom, and consequently they are distinct yet overlapping rights which should be protected in distinct legislation. It implies the RDB should contain protections for freedom from religious discrimination rather than religious freedom rights more broadly, but in doing so, the RDB will also necessarily protect aspects of religious freedom which are covered by the sub-category of freedom from religious discrimination.[137]

Two exposure drafts of the RDB were released as part of a suite of religious discrimination legislation in 2019.[138] Overall, both exposure drafts elicited mixed responses before an updated version was introduced to Parliament in 2021.[139] In then Prime Minister Scott Morrison's second reading speech in the House of Representatives, he emphasised the aims of the RDB, which included protecting beliefs of religious individuals and mitigating the disadvantages

[128] Ian McAllister and Feodor Snagovsky, 'Explaining Voting in the 2017 Australian Same-Sex Marriage Plebiscite' (2018) 53(4) *Australian Journal of Political Science* 409, 413–4.
[129] Elenie Poulos, 'The Power of Belief: Religious Freedom in Australian Parliamentary Debates on Same-Sex Marriage' (2020) 55(1) *Australian Journal of Political Science* 1, 1.
[130] *Religious Freedom Review* (Interim Report, 18 May 2018) 3 [1.2].
[131] Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93(9) *Australian Law Journal* 721, 729–30.
[132] Ibid 730.
[133] *Religious Freedom Review* (n 130) 41 [1.120].
[134] Hobbs and Williams (n 131) 730.
[135] *Religious Freedom Review* (n 130) 5.
[136] Australian Government, *Australian Government Response to the Religious Freedom Review* (December 2018) 17.
[137] *Religious Freedom Review* (n 130) 107 [1.435].
[138] Department of Attorney-General (Cth), *Religious Discrimination Bills: First Exposure Drafts* (Consultation Paper, 2019); Department of Attorney-General (Cth), *Religious Discrimination Bills: Second Exposure Drafts* (Consultation Paper, 2019).
[139] Religious Discrimination Bill 2021 (Cth) ('*RDB*').

suffered due to their religious beliefs.[140] These aims were consistent with the Panel's vision for the 'Religious Discrimination Act' and a focus on securing protection for freedom from religious discrimination specifically rather than religious freedom more broadly. However, according to the Explanatory Memorandum, the 'statement of belief' provision was designed to protect the religious freedom of individuals, which includes expression of their religious beliefs without fear of legal action.[141] The 'conduct which is not discrimination' provision allows for religious organisations (such as schools) to engage in conduct, consistent with religious doctrine, against an individual in good faith (such as refusing employment due to the prospective employee not sharing the beliefs of the organisation).[142] The Explanatory Memorandum suggests the provision was designed to balance freedom of religion and association of religious groups with freedom of religion and association of religious individuals (both religious freedom principles), purporting to rely on the external affairs power for constitutional validity.[143] It is beyond the scope of this article to comment on the important question of the constitutional validity of the RDB.

The RDB was largely supported by religious groups, as the above provisions would have expanded protections for their religious freedom and freedom from religious discrimination.[144] However, critics argued that the RDB allowed harmful statements to be made under the façade of being 'statements of belief',[145] and allowed for religious bodies to 'discriminate' in employment, potentially placing vulnerable groups such as the LGBTQIA+ community at risk.[146] In the face of this division the RDB met an inauspicious end. Shortly after midnight on 10 February 2022 the RDB passed the House of Representatives but with amendments (supported by Coalition Government backbenchers and the Labor Opposition) to protect LGBTIQIA+ students in the *Sex Discrimination Act 1984* (Cth) ('SDA').[147] It was then shelved by the Government in the Senate before it lapsed following the 2022 Australian Federal Election. The new Labor government has asked the Australian Law Reform Commission to examine the relationship between religious schools and anti-discrimination laws; a consultation process is underway at the time of writing.[148]

It has been claimed that the RDB's underlying issue is that it went beyond the traditional scope of discrimination legislation by incorporating principles of religious freedom — thus creating tensions between protecting religious freedom and protecting freedom from religious discrimination (as exemplified in the two contentious provisions of 'statement of belief' and

[140] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2021, 10812 (Scott Morrison, Prime Minister).
[141] Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 53 [153], [158] ('*RDB Explanatory Memo*').
[142] Ibid 11 [19].
[143] Ibid 10 [21], 11 [22]–[23].
[144] Paul Karp, 'Faith Leaders Put Pressure on Labor to Support Religious Discrimination Bill', *The Guardian* (online, 22 November 2021) <https://www.theguardian.com/australia-news/2021/nov/22/faith-leaders-put-pressure-on-labor-to-support-religious-discrimination-bill>.
[145] *RDB* (n 139) cl 5.
[146] Siobhan Marin, 'Queer and Devout: The Australians Caught in the Middle of the Religious Discrimination Bill', *ABC News* (online, 23 November 2021) <https://www.abc.net.au/news/2021-11-23/religious-discrimination-bill-and-queer-christians/100635486>.
[147] Paul Karp, 'Anthony Albanese Warns Religious Discrimination Bill Could "Drive Us Apart" as Labor Pushes for Amendments', *The Guardian* (online, 9 February 2022) <https://www.theguardian.com/australia-news/2022/feb/09/labor-to-seek-protections-for-lgbtq-students-but-will-pass-religious-discrimination-bill-in-lower-house>.
[148] See Australian Law Reform Commission, *Consultation Paper on Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, 27 January 2023).

'conduct that is not discrimination').[149] The aims of the RDB and the recommendations made in the Ruddock Review suggest that religious freedom and freedom from religious discrimination are distinct rights, and therefore should be in separate legislation. The RDB, as an anti-discrimination law, should only cover freedom from religious discrimination principles because religious freedom rights more broadly are beyond its proper scope. In Part V, we draw on the principles articulated in Parts II and III to engage with these claims, arguing that the 'statement of belief' provision is indeed susceptible to this criticism. However, the 'conduct that is not discrimination' provision exemplifies the fact that freedom from religious discrimination is a sub-category of religious freedom, and therefore it is appropriate to include in a law protecting freedom from religious discrimination — even though in doing so it also protects some aspects of religious freedom.

V. RELIGIOUS FREEDOM AND FREEDOM FROM RELIGIOUS DISCRIMINATION IN THE RDB

This part applies the above principles to the 'statement of belief' provision and the 'conduct that is not discrimination' provision. Fundamentally, where the provisions applied principles of freedom of religion more broadly, they should not have been included in the RDB. Conversely, where the provisions applied principles of freedom from religious discrimination, there was no conceptual problem with their inclusion in the RDB. This is so even in the case where religious freedom principles are simultaneously protected, because if freedom from religious discrimination is a sub-category of religious freedom, then protecting freedom from religious discrimination necessarily entails protecting some aspects of religious freedom. Importantly, we are not commenting on whether the RDB was preferable from a policy perspective if it included broader religious freedom protections. We are merely saying that the RDB would have been more conceptually consistent with freedom from religious discrimination principles if it did not.

Statement of Belief

Statements of belief were not considered to be discrimination under the RDB and related legislation.[150] A statement was a statement of belief 'if the statement is of a religious belief held by a person and is made in good faith, by written or spoken words…and is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teaching of that religion; or…[if a person is non-religious] relate to the fact of not holding a religious belief'.[151] As mentioned above, this provision was made to protect religious freedom, which includes expression of religious views without fear of legal action.[152] Barker explains that a statement of belief provision could primarily be justified as a protection of freedom of religion through the expression of religious speech or speech regarding religion.[153]

This provision potentially involved both freedom from religious discrimination principles and religious freedom principles more broadly. This is because an individual would have been positively allowed to make statements of belief to others, provided it was done in good faith. This is consistent with Khaitan and Calderwood Norton's framing of religious freedom, as the

[149] Barker, *Freedom of Religion Debate* (n 2) 29; Schwartz (n 3) 39.
[150] *RDB* (n 139) cl 12.
[151] Ibid cl 5(a) (definition of 'statement of belief').
[152] *RDB Explanatory Memo* (n 141) 53 [153], [158].
[153] Renae Barker, Submission No 6 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Religious Discrimination Bill 2021 and Related Bills* (8 December 2021) 7–8 ('*Submission No 6*').

individual is unable to fully adhere to their religious beliefs if they are unable to voice their opinion, both in the public and private spheres.[154] The provision is also supported by Bielefeldt's rationale for religious freedom, as the individual is empowered to proselytise and change religious beliefs if they can make statements to others about their beliefs.[155] The relationship between the individual and state was also balanced in this provision, as the state allows individuals to make statements about their faith to others even if it may offend the receiver of the statement, provided that the statement was made in good faith.[156]

Furthermore, allowing statements of belief enhances group-based religious freedom. Calderwood Norton would argue that this provision enhances individual religious freedom, as individuals (and groups by extension) are better able to live autonomously if they are able to freely state their religious beliefs.[157] Therefore, statements of belief, to the extent they are externally directed, are external activities; the provision primarily protects religious individuals who express their religious beliefs to the wider community from interference.[158] Consequently, the state is warranted in limiting statements of belief to those made in good faith and genuinely in accordance with religious belief.[159] Protecting statements of belief also enhances the autonomy of religious groups by enabling them to commune with their members around a central published doctrine.[160] However, the autonomy of individuals and groups who reject those doctrines may be compromised to the extent that those statements of belief undermine their ability to make decisions on controversial issues such as abortion and voluntary assisted dying.[161] That is, autonomy is undermined if statements of belief are critical of views or beliefs that support making such decisions. Rightly or wrongly, this kind of criticism at least implicitly narrows decision-making options by making those decisions less palatable.

This provision could also be framed as a freedom from religious discrimination provision. Khaitan, Calderwood Norton, and Trispiotis define freedom from religious discrimination with a focus on external factors that affect religious adherence. Addressing these factors bridges the gap between religious and non-religious individuals.[162] This provision might be perceived as bridging a gap, as statements of belief by religious individuals cannot be used as a basis for discriminating against them under this provision, even if such statements are controversial or offensive. However, there are two problems with this framing. First, the provision does not equally protect religious and non-religious statements of belief. Religious statements of belief are protected if they are 'in accordance with the doctrines … of that religion' while non-religious statements of belief are only protected if they 'relate to the fact of not holding a religious belief'.[163] The effect is to give religious people a much broader right to make statements of belief than non-religious people.[164] This actually creates a disadvantage for non-religious people compared to religious people, which is antithetical to freedom from religious discrimination principles. Second, the provision is susceptible to abuse. It may increase

[154] Khaitan and Calderwood Norton (n 6) 1129, 1131–2.
[155] Bielefeldt (n 16) 21–2.
[156] Trispiotis (n 1) 866.
[157] Calderwood Norton (n 84) 37.
[158] *RDB Explanatory Memo* (n 141) 26 [67].
[159] *RDB* (n 139) cl 5(a) (definition of 'statement of belief').
[160] Aroney, *Freedom of Religion* (n 101) 156; Rivers (n 115) 321–2; Calderwood Norton (n 84) 37.
[161] Harrison, *The Liberal Political Imagination and Religious Liberty* (n 91) 289.
[162] Khaitan and Calderwood Norton (n 6) 1126; Trispiotis (n 1) 881.
[163] *RDB* (n 139) cls 5(a)(iii), (b)(iii); Timothy Nugent, 'Statements of Belief as Political Communication' (2023) 2 *Australian Journal of Law and Religion* 81, 83.
[164] Luke Beck, Submission No 38 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Religious Discrimination Bill 2021 and Related Bills* (17 December 2021) 4–5.

religious discrimination by allowing statements about religion which are offensive, and this may result in less favourable or disadvantageous treatment of a person adhering to the impugned religion.[165] Since these problems undermine freedom from religious discrimination principles, and freedom from religious discrimination is a sub-category of religious freedom, they also ironically undermine religious freedom. This conclusion is supported by the fact that a 'statement of belief' is an external activity as Calderwood Norton defines it, because it necessarily involves members of the religious group engaging with non-members or outsiders. The effect of this categorisation is the state has greater scope to limit (or not enable) such an activity if it causes harm and discrimination — which, as just noted, it may well do.

Fundamentally, this provision aligned with religious freedom principles more broadly. The statement of belief provision would have been a positive law enabling religious and non-religious individuals and groups to state their good faith opinions in accordance with their religious belief. Therefore, individuals and groups would have been better able to pursue their religious beliefs and commitments without external interference. The provision promoted religious freedom to make statements of belief but may have increased religious discrimination in principle by not extending equal protection to non-religious persons, and in practice if a statement is critical of other beliefs (which in turn undermines religious freedom). Since the 'statement of belief' provision aligned with the principles of religious freedom more broadly, and potentially enhanced religious discrimination, it was not appropriate for inclusion in the RDB.

Conduct That is Not Discrimination

This provision stated that religious organisations do not discriminate by acting in accordance with their religious beliefs in areas such as employment, education, and the provision of services.[166] As discussed above, it ostensibly aimed to protect the religious freedom of groups, with the effect that non-religious individuals would have been potentially disadvantaged from accessing employment and services from religious organisations.[167] This disadvantage was resolved by only exempting conduct which was consistent with religious doctrine in order to balance individual and group rights of religious freedom and freedom of association.[168] There are certainly freedom of religion principles protected by this provision. This provision is consistent with religious freedom principles as religious individuals and groups would have been allowed to engage in conduct and perform services in accordance with their religious beliefs, enabling them to maximise their religious freedom in public and private.[169] Using Vickers' example, where religious organisations are able to prefer potential employees of the same faith, both parties are better able to experience religious freedom and adhere to their religious beliefs. The organisation can promote its autonomy and the autonomy of its members by selecting employees in accordance with its doctrine, and potential employees can exercise their autonomy by choosing another organisation which better suits their religious beliefs.[170]

However, this provision more primarily reflected freedom from religious discrimination principles, specifically the need to mitigate disadvantage between religious and non-religious

[165] Vickers (n 13) 2, 10.
[166] *RDB* (n 139) cl 7.
[167] *RDB Explanatory Memo* (n 141) 10 [21].
[168] Ibid 11 [22]–[23].
[169] Khaitan and Calderwood Norton (n 6) 1129, 1131–2.
[170] Ibid; Vickers (n 13) 2.

groups.[171] For example, where religious groups such as schools are able to favour hiring applicants with similar faith, these groups are able to overcome an externally imposed disadvantage of being legally compelled to hire applicants who would not be able to preserve the ethos and doctrine of the school.[172] In effect, this provision would have placed religious organisations on an equal footing with non-religious organisations so that all parties are able to pursue their commitments without external interferences which could constitute a disadvantage.[173] This simultaneously incorporates religious freedom principles because all parties are better able to exercise their autonomy and adhere to their religious doctrine.[174] In this sense, the provision exemplified the fact that freedom from religious discrimination is a sub-category of religious freedom. A religious group cannot fulfil its purpose if it cannot engage in differential treatment to preserve the integrity of its doctrine and membership. Prohibiting a religious group from engaging in such conduct actually discriminates against the religious group by rendering it impotent, which in turn undermines freedom of religion by removing the autonomy of the group and its constituent members.[175]

There are consequent implications for individual and group-based religious freedom in this context. Membership within a religious group is part of an individual's experience of religious freedom.[176] Where a religious group is able to preference applicants of the same faith, both the individual and group are able to maximise their religious freedom. This provision also illustrates the overlap between internal and external activities. The provision would have protected internal activities, as the state would allow religious groups such as schools to reasonably decide on preferring applicants of a similar faith, increasing their autonomy on matters concerning their religion. However, this provision also related to external activities, as the provision would have allowed religious groups to discriminate against non-members, placing non-members at a disadvantage in seeking employment.[177] This is the tension within freedom from religious discrimination identified by Vickers in Part II.[178]

On the one hand, religious organisations would argue that this provision, although potentially discriminatory, is justified as their autonomy and religious freedom is compromised if they are unable to prefer hiring applicants with the same faith.[179] They are at a disadvantage without the provision. The person seeking employment is at a disadvantage with the provision where they seek employment with a religious group with different beliefs. The disadvantage of both parties is remedied by the existence of a right of exit with respect to religious groups. The right of exit resolves the problem of individual discrimination by enabling a person to form their own group or join a different group that shares their beliefs. Also, religious members who disagree with their group's doctrine are able to break away and form or join a different group which reflects their developing beliefs. The right of exit in conjunction with the provision resolves the problem of group discrimination by providing religious groups with the autonomy to maintain their ethos through selecting members.[180] Employment with a religious organisation as both an external and an internal activity links to reconciling the autonomy of

[171] Khaitan and Calderwood Norton (n 6) 1133.
[172] Ibid 1126; Trispiotis (n 1) 881.
[173] Trispiotis (n 1) 885.
[174] Khaitan and Calderwood Norton (n 6) 1126, 1129.
[175] This is reflected in, eg, Barker, 'Submission No 6' (n 153) 2–3; Freedom for Faith, Submission No 96 to Senate Standing Committee on Legal and Constitutional Affairs, Religious Discrimination Bill (2021) 5–6.
[176] Calderwood Norton (n 84) 37.
[177] Harrison, *The Liberal Political Imagination and Religious Liberty* (n 91) 289.
[178] Vickers (n 13) 2, 94–5.
[179] Calderwood Norton (n 84) 206.
[180] Ibid 57.

the group and the individual — namely, the state can justify non-interference with the autonomy of the group to select its members (as an internal activity) on the basis that affected external individuals have a right of exit. In this way, the 'conduct that is not discrimination' provision would have mitigated the disadvantages suffered by religious groups and individuals, and was therefore a genuine application of freedom from religious discrimination principles (even if it also implemented some religious freedom principles — this is a function of freedom from religious discrimination being a sub-category of religious freedom). Implementing freedom from discrimination principles necessarily entails implementing a limited subset of religious freedom principles. This means the 'conduct that is not discrimination' provision was therefore appropriate to be included in the RDB because it reflected the principles of freedom from religious discrimination.

VI. CONCLUSION

This article has suggested that freedom from religious discrimination is a sub-category of religious freedom, with both concepts sharing autonomy as a rationale. Both rights have individual and group aspects, and autonomy is upheld in both these aspects through the right of exit. These principles were identified in the political context leading to the RDB, and were applied with respect to two contentious provisions of the RDB: the 'statement of belief' provision and the 'conduct that is not discrimination' provision. If the impugned provisions applied principles of freedom of religion more broadly, they should not have been included in the RDB. Conversely, if the provisions applied principles of freedom from religious discrimination (which necessarily entails applying some aspects of religious freedom, since freedom of religious discrimination is a sub-category of religious freedom), then there would have been no conceptual problem with their inclusion. Following this standard, the 'statement of belief' provision applied religious freedom principles more broadly and would have potentially undermined freedom from religious discrimination principles (in turn ironically undermining religious freedom), and therefore should not have been included in the RDB. Conversely, the 'conduct which is not discrimination' provision applied principles of freedom from religious discrimination (which necessarily includes some aspects of religious freedom), and therefore it was appropriate to include this provision in the RDB.

Freedom of Religion under the Australian Constitution: Is Proportionality the Answer?

Guy Baldwin*

Under the current approach set out in the 1997 'Stolen Generations' case of Kruger v Commonwealth, *the free exercise clause of s 116 of the Australian Constitution is only violated if a law has the purpose of prohibiting the free exercise of religion. In the light of the introduction of structured proportionality testing in some areas of Australian constitutional law, scholars have recently considered whether the current test under the free exercise clause might be replaced with proportionality, given its current momentum. However, proportionality is a controversial test whose introduction to Australian law has been contested. This article seeks to contribute to the debate over proportionality in Australian law by outlining a case for why proportionality should not be adopted in respect of the free exercise clause under s 116. After first considering the current interpretation given to the free exercise clause, the article assesses proportionality as a possible test. It contends that proportionality is a flawed test because its final balancing stage involves a weighing of incommensurable values that confers excessive discretion on the judiciary. Rather than proportionality, the High Court should return to earlier dicta and develop a means-end test of reasonable necessity for assessing interference with the free exercise of religion.*

INTRODUCTION

Very few human rights are protected by the Australian Constitution, though there is statutory human rights protection in some jurisdictions in Australia.[1] One of the few protections for human rights in the Australian Constitution is that in respect of the free exercise of religion, provided for by s 116 of the Constitution.[2] The heading of s 116 is 'Commonwealth not to legislate in respect of religion'. Reflecting influence from the First Amendment to the United States Constitution,[3] the text of the provision is as follows: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for

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[1] See *Human Rights Act 2004* (ACT), *Human Rights Act 2019* (Qld), and *Charter of Human Rights and Responsibilities Act 2006* (Vic). Given the presence at the constitutional level of a limited number of protections, the Australian Constitution has been described as providing for a 'partial bill of rights': Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80.

[2] The High Court construes s 116 (including the free exercise clause) as placing a limitation on Commonwealth legislative power rather than as conferring a right: see, eg, *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559, 605, 609 (Stephen J), 615–16 (Mason J), 652–53 (Wilson J) ('*DOGS Case*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 46 (Brennan CJ), 124–5 (Gaudron J), 147 (Gummow J) ('*Kruger*'). Nonetheless, in substance the provision protects a human right, since the Commonwealth Parliament is disabled from passing laws for prohibiting the free exercise of religion: see, eg, *DOGS Case* (n 2) 603 (Gibbs J).

[3] See, eg, Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 83. The First Amendment to the US Constitution relevantly provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …'. In addition, the fourth clause of s 116, prohibiting religious tests, resembles a clause of art VI of the US Constitution.

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prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

The provision has four clauses; this article focuses on the third clause relating to the free exercise of religion. In practice, the free exercise clause has been given little effect and never found to be violated by the High Court. Under the current approach, set out in the 1997 'Stolen Generations' case of *Kruger v Commonwealth* ('*Kruger*'),[4] the free exercise clause is only violated if a law has the purpose of prohibiting the free exercise of religion. In the light of the introduction of structured proportionality testing in some areas of Australian constitutional law,[5] scholars have recently considered whether the current test under the free exercise clause of s 116 might be replaced with proportionality, given its current momentum.[6] However, proportionality is a controversial test whose introduction to Australian law has been contested.

This article seeks to contribute to the debate over proportionality in Australian law by outlining a case for why proportionality should not be adopted in respect of the free exercise clause of s 116. After first considering the current interpretation given to the free exercise clause, the article assesses proportionality as a possible test. It contends that proportionality is a flawed test because its final balancing stage involves a weighing of incommensurable values that confers excessive discretion on the judiciary. Rather than proportionality, the High Court should return to earlier dicta and develop a means-end test of reasonable necessity for assessing interference with the free exercise of religion.

The article proceeds in two main parts. First, I outline and critique the current interpretation of the free exercise clause, tracing the three High Court decisions that have considered it, culminating in the decision in *Kruger*. I advance the view that the 'purpose' test set out in that decision is inapposite, in particular because it focuses on the nature of the law interfering with religious exercise rather than the justification for the interference. Second, I discuss whether to introduce proportionality under the free exercise clause of s 116 as a replacement for the purpose test, putting forward a possible alternative approach instead. Adopting either this alternative approach, or indeed proportionality, might well have led to a different result for the victims of the Stolen Generations in *Kruger*.

I. THE CURRENT INTERPRETATION OF THE FREE EXERCISE CLAUSE

In more than 100 years, there have only been three High Court cases interpreting the free exercise clause of s 116: *Krygger v Williams* ('*Krygger*')[7] in 1912, *Adelaide Company of Jehovah's Witnesses v Commonwealth* ('*Jehovah's Witnesses*')[8] in 1943, and *Kruger*[9] in 1997. These cases each adopted different approaches, culminating in the purpose test set out in *Kruger.* In this part, I first outline these cases before turning to a critique of the current law in

[4] *Kruger* (n 2).
[5] See *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Palmer v Commonwealth* (2021) 272 CLR 505 ('*Palmer*').
[6] See, eg, Benjamin B Saunders and Dan Meagher, 'Taking Seriously the Free Exercise of Religion under the Australian Constitution' (2021) 43(3) *Sydney Law Review* 287; Anthony Gray, 'Proportionality in Australian Constitutional Law: Next Stop Section 116?' (2022) 1 *Australian Journal of Law and Religion* 103; Dane Luo, 'The "March of Structured Proportionality": The Future of Rights and Freedoms in Australian Constitutional Law' (Blog Post, 8 April 2022) <https://www.auspublaw.org/blog/2022/04/the-march-of-structured-proportionality-the-future-of-rights-and-freedoms-in-australian-constitutional-law>.
[7] (1912) 15 CLR 366 ('*Krygger*').
[8] (1943) 67 CLR 116 ('*Jehovah's Witnesses*').
[9] *Kruger* (n 2).

the form of the purpose test. I argue that this test is not a suitable one for the free exercise clause as it misdirects the inquiry, turning it away from the question of the justification for a law that burdens the free exercise of religion, towards a focus on the nature of the law.

(a) High Court Decisions on the Free Exercise Clause

In *Krygger*, s 116 was found not to apply to a conscientious objector who cited his religious beliefs as a basis for refusing to engage in military training (including for non-combatant duties) because according to Griffith CJ — who set out his views in a very brief judgment — military service had 'nothing at all to do with religion' and therefore it was 'not prohibiting him from a free exercise of religion'.[10] Griffith CJ reasoned as follows:

> It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of s 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.[11]

Barton J, the other member of the Court sitting in the case, added: 'I think this objection is as thin as anything of the kind that has come before us'.[12] Although the Court's reasoning is vague and dismissive, it seems to turn on a distinction between belief and conduct, in which there is freedom of belief but s 116 does not extend to conduct, even if that conduct is required or motivated by a person's religious convictions. A similar distinction was emphasised by the US Supreme Court in *Reynolds v United States* in 1879.[13] Waite CJ (delivering the opinion of the Court) drew a distinction between 'practices', which were said not to be protected by the Free Exercise Clause of the First Amendment, and 'belief', which was protected.[14] However, US courts have long since adopted a different approach to the First Amendment.[15]

The next case in which the High Court considered the free exercise clause was *Jehovah's Witnesses*, which concerned the Commonwealth dissolving a group of Jehovah's Witnesses and taking possession of its premises pursuant to national security regulations, on the basis that the group was prejudicial to the defence of the Commonwealth and the efficient prosecution of World War II.[16] The group had been preaching that the British Empire and also other organised political bodies were organs of Satan.[17] In this decision, the Court did not rely upon any distinction between conduct and belief.[18] Instead, the focus was on the fact that the free exercise of religion under s 116 was not 'absolute'.[19] Because of the prejudice to the

[10] *Krygger* (n 7) 369, 371 (Griffith CJ).
[11] Ibid 369 (Griffith CJ).
[12] Ibid 373 (Barton J).
[13] (1879) 98 US 145.
[14] Ibid 166. This approach of protecting only belief seems inadequate because it does not give real protection to the free exercise of religion. As Sachs J of the Constitutional Court of South Africa has put it, '[r]eligion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture': *Christian Education South Africa v Minister of Education* (2000) 4 SA 757, [33]. Some religious freedom provisions, such as art 9 of the *European Convention on Human Rights*, make explicit that manifestations of religious belief are protected, not merely the holding of beliefs (*forum internum*).
[15] For the current approach in the US, see *Employment Division v Smith* (1990) 494 US 872 and *Church of Lukumi Babalu Aye v Hialeah* (1993) 508 US 520 ('*Lukumi*').
[16] *Jehovah's Witnesses* (n 8) 145 (Latham CJ).
[17] Ibid 146 (Latham CJ).
[18] Ibid 124, 129 (Latham CJ).
[19] Ibid 127 (Latham CJ), 149 (Rich J), 154 (Starke J), 157 (McTiernan J), 160 (Williams J).

prosecution of the war thought to be posed by the Jehovah's Witnesses group, the Court found that s 116 was not violated, though it struck down part of the regulations on other grounds.[20]

Most recently, *Kruger* related to a 1918 Ordinance empowering the 'Chief Protector of Aborigines' to undertake the care, custody, or control of any Aboriginal or 'half-caste' person if 'in his opinion it is necessary or desirable in the interests of the Aboriginal or half-caste for him to do so', as well as to 'cause any Aboriginal or half-caste to be kept within the boundaries of any reserve or Aboriginal institution'.[21] The resulting abductions of large numbers of Indigenous children from their families have come to be known as the Stolen Generations.[22] This Ordinance was challenged on various grounds before the High Court, 40 years after its repeal in 1957. In respect of the challenge under s 116, the claim was that the removal of Indigenous children violated the free exercise clause because it interfered with their ability to practise religion. However, the Ordinance was found not to violate s 116 because it was said not to have the purpose of prohibiting the free exercise of religion.

The reasoning in *Kruger* was again different from the previous two cases and turned on the use of the word 'for' in the phrase 'any law … for prohibiting the free exercise of any religion' in s 116. This word was now read to mean, as Gummow J put it, that '[t]he question becomes whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved'.[23] Most members of the Court found that the Ordinance did not have that purpose,[24] while Gaudron J did not consider that whether the Ordinance had the proscribed purpose could 'presently be determined' and reached no decision on the issue.[25] Dawson J, with whom McHugh J agreed, also rejected the claim on the different basis that s 116 did not apply to the Northern Territory.[26] In the result, the reading of s 116, alongside the rejection of other bases of challenge, meant that the Ordinance was found to be constitutional.

(b) Critique of the Purpose Test

There are a number of difficulties with the purpose test under s 116 as set out in *Kruger.* A significant one is that the test is not textually compelled. 'Purpose' is only one possible reading of 'for' in s 116. 'For' can also mean 'in respect of or with reference to',[27] making it, as Stephen McLeish puts it, a 'tenuous basis for directing the whole interpretive enterprise'.[28] Luke Beck

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[20] Ibid 168.
[21] *Kruger* (n 2) 33–5 (Brennan CJ), quoting *Aboriginals Ordinance 1918* (NT) ss 6, 16.
[22] See generally Human Rights and Equal Opportunity Commission, *Bringing Them Home* (Report, April 1997).
[23] *Kruger* (n 2) 160 (Gummow J, Dawson J agreeing at 60–1); see also at 40 (Brennan CJ), 86 (Toohey J).
[24] Ibid 40 (Brennan CJ), 60–1 (Dawson J), 86–7 (Toohey J), 161 (Gummow J).
[25] Ibid 134 (Gaudron J). Gaudron J, in dissent, instead considered provisions of the Ordinance to be invalid on the basis of an implied freedom of movement and association: ibid 130, 141. Toohey J also considered that there was an implied freedom of movement and association, as well as a principle of legal equality, but did not reach a conclusion about whether provisions of the Ordinance were invalid as a result: ibid 97–8.
[26] Ibid 60 (Dawson J, McHugh J agreeing at 141–2). Section 116 is expressed to apply to the Commonwealth government, rather than the States, though most members of the Court in *Kruger* were prepared to consider its application to the Northern Territory. Attempts to amend s 116 to apply to the States have failed at referenda: see Constitution Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth) s 2; Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth) s 4.
[27] See, eg, *Australian Oxford Dictionary* (2nd ed, 2004), 'for'. See also *Lamshed v Lake* (1958) 99 CLR 132, 141 (Dixon CJ) (interpreting 'for' as meaning 'with respect to' in the context of s 122).
[28] Stephen McLeish, 'Making Sense of Religion and the Constitution' (1992) 18(2) *Monash University Law Review* 207, 212. For the narrow and literal approach that the High Court has taken to some express protections, see George Williams, 'Civil Liberties and the Constitution: A Question of Interpretation' (1994) 5(2) *Public Law Review* 82, 89.

similarly points out that the purpose test is a 'narrow and pedantic' interpretation at odds with the High Court's general approach to constitutional interpretation.[29] Moreover, it is not a historically sound interpretation that aligns with the intent of the framers. Beck outlines that the drafting history of s 116 seems to indicate that the intention was for it to have a broad, not narrow, effect; the use of the word 'for' was apparently not a deliberate choice to narrow the scope of the provision.[30]

Equally important, the purpose test was not compelled by precedent: although consonant with the approach to the establishment clause taken by several members of the Court in the *DOGS Case*,[31] it departed, without explanation, from the approach of the Court to the free exercise clause taken in *Jehovah's Witnesses*. Unlike the reasoning in *Kruger*, this was a justificatory analysis that treated the purpose of the law as merely an aspect of assessing an interference with free exercise.[32] The members of the Court in *Kruger* were seemingly aware of the discontinuity with precedent. As Gaudron J said — considering the dicta of Latham CJ in *Jehovah's Witnesses* — purpose was (now) 'the only matter to be taken into account in determining whether a law infringes s 116'.[33] However, it was not made clear for what reason the approach in *Jehovah's Witnesses* had been rejected.

Commentators have pointed out that the purpose test seems to deprive the free exercise clause of meaningful operation. This view is bolstered by the decision in *Kruger*, as the extreme seeming interferences with free exercise of religion that occurred in that case were immune from challenge under s 116 since the Court concluded that they did not have the proscribed purpose. As Carolyn Evans puts it, it is not sufficient under the purpose test 'to show that the effect of the law is to restrict or even seriously undermine … free[] exercise'.[34] Benjamin Saunders and Dan Meagher argue that this 'has made the clause of little or no effect in practice, … affording little protection to the free exercise of religion'.[35] Given this concern, it might be said that the better approach to an express constitutional protection such as s 116 is to give it meaningful scope.

However, by way of partial qualification to the point, the narrowness of a purpose test can vary based on how it is interpreted. In the US, courts have increasingly managed to find proscribed purposes under the First Amendment's neutrality test — which looks to whether the object of a law is to restrict the free exercise of religion — due to some creative (and at times rather strained) readings of the impugned laws.[36] Much depends on what approach a court takes to discerning the purpose of a law. This directs attention to an ambiguity under the purpose test as articulated in *Kruger* — namely, how deep courts are willing to dig to find a proscribed purpose.[37] Is a court just looking at the face of the legislation, or beyond it, at parliamentary

[29] Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Australian Constitution' (2016) 44(3) *Federal Law Review* 505, 529.
[30] Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) 96, 161–2. See also Beck (n 29) 514–20.
[31] See *DOGS Case* (n 2) 579 (Barwick CJ), 598 (Gibbs J), 609 (Stephen J), 615–16 (Mason J), 653 (Wilson J).
[32] See *Jehovah's Witnesses* (n 8) 132 (Latham CJ).
[33] *Kruger* (n 2) 132 (Gaudron J).
[34] Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (2009) 23. However, the law's effect might be considered to demonstrate its purpose: see *Kruger* (n 2) 131–2 (Gaudron J), 160–1 (Gummow J).
[35] Saunders and Meagher (n 6) 288.
[36] See generally Guy Baldwin, 'The Coronavirus Pandemic and Religious Freedom: Judicial Decisions in the United States and United Kingdom' (2021) 26(4) *Judicial Review* 297.
[37] See, eg, *Kruger* (n 2) 160 (Gummow J). See also Nathan Van Wees, 'Judicial Review of Legislators' Motives' (2017) 45(4) *Federal Law Review* 681.

materials? Or does the court infer the proscribed purpose from the mere fact of differential treatment of religious exercise, as the US Supreme Court often does?

Even if a purpose test is not necessarily narrow, since whether that is so depends on the approach taken by the courts, its focus — on the nature of the law that interferes with free exercise of religion rather than its justification — seems misplaced. Such a focus can lead to distorted results because if a law lacks the proscribed purpose it is valid even if it has a burden on freedom of religion that has minimal justification. Consider as a hypothetical example if Parliament banned the consumption of carrots out of an erroneous health concern, and a religion existed for which carrot consumption was an important practice. Despite the negligible, indeed mistaken, justification for the ban, and the burden it imposed on a religious practice, since the law's purpose was health related it would not be in violation of the free exercise clause of s 116 under the purpose test.

Equally, a law might have the proscribed purpose, but with good reason, and yet be invalid. A religious practice such as animal sacrifice might be deliberately targeted out of concerns for the welfare of non-human animals,[38] yet the law would fail the purpose test with no consideration of whether it was justified because it has the purpose of prohibiting a religious practice. Such a test might also overlook the impact of a religious practice on the rights of others: provided that a law has the proscribed purpose, it would not matter if the religious practice that is constitutionally protected harms others. For these reasons, a focus on the nature of the law diverts attention from more relevant matters. To give the free exercise clause of s 116 an operation that protects religious freedom within appropriate limits — the concern to which the free exercise clause is directed — it is preferable for the legal test to turn not on the nature of a law interfering with free exercise, but on its justification.

Although in all three cases in which the free exercise clause was considered the High Court rejected the religious freedom claim, of these three cases, the judgments in *Jehovah's Witnesses* represented the best approach to the clause because they emphasised the non-absoluteness of religious freedom. As Latham CJ suggested in *Jehovah's Witnesses*, the issue under the free exercise clause might appropriately be understood as 'whether a particular law is an undue infringement of religious freedom'.[39] A test that considers this question of justification, while taking into account any effect on the rights of others of the religious practice that is sought to be protected, would give the free exercise clause of s 116 meaningful operation while also constraining its scope. The question that then arises is what the most appropriate test is for assessing a law's justification.

The obvious choice may seem to be structured proportionality. For example, Saunders and Meagher consider that proportionality would 'provide the analytical tools needed: to perform a justification analysis that transparently ventilates and evaluates the competing rights and interests in legislative play; and to ensure that it is done in a manner that is sufficiently context-sensitive', though they consider the alternative of 'calibrated scrutiny' advanced by Gageler J to do so as well.[40] Anthony Gray makes a prediction: 'Given the embrace of proportionality by

[38] See *Lukumi* (n 15). See also Guy Baldwin, 'Rawls and Animal Moral Personality' (2023) 13(7) *Animals* 1238. Under the US test, even if a law is considered not to be neutral and of general applicability, it can still be found to be constitutional at the strict scrutiny stage if it is narrowly tailored to serve a compelling state interest. However, there seems to be no such additional stage in the *Kruger* test, which suggests that if a law has the proscribed purpose, it is unconstitutional, irrespective of any other considerations: cf *Kruger* (n 2) 133–4 (Gaudron J).
[39] *Jehovah's Witnesses* (n 8) 131 (Latham CJ).
[40] Saunders and Meagher (n 6) 314.

a majority of the High Court in relation to both express and implied freedoms in the Australian Constitution, it is considered likely that, when the Court next considers a s 116 challenge to a law, it will apply proportionality analysis to that section.'[41]

II. EVALUATING PROPORTIONALITY AS AN ALTERNATIVE TEST

Is proportionality the right choice for a test of justification to apply in relation to the free exercise clause of s 116? Since it is a test of justification, it may be accepted that proportionality has one clear advantage over the purpose test applied in *Kruger*. However, it also has significant problems. In this part, I first set out the circumstances of the introduction of proportionality in Australia, before critiquing proportionality, and finally advancing an alternative proposal. I argue that proportionality is not the best possible test for the free exercise clause of s 116, and instead make a suggestion for a test based on High Court dicta in *Jehovah's Witnesses*.

(a) The Introduction of Proportionality to Australian Constitutional Law

Proportionality was developed in Germany before it spread internationally.[42] Its relevance to Australian constitutional law was previously doubted in High Court dicta.[43] Nonetheless, it has come to be accepted as the test in respect of the implied freedom of political communication and s 92, which is a constitutional provision that concerns the freedom of interstate trade, commerce, and intercourse.[44] The pre-proportionality test for the implied freedom was set out by a unanimous seven member High Court in *Lange v Australian Broadcasting Corporation* ('*Lange*') in 1997.[45] The test in *Lange* asked: does the impugned law effectively burden freedom of communication about government or political matters, and if it does, is the law reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of the system of representative and responsible government?[46]

The relevance of structured proportionality to Australian constitutional law was raised by the current Chief Justice at the time of writing, Susan Kiefel, while a puisne Justice of the Court, in *Rowe v Electoral Commissioner* in 2010 and some subsequent cases.[47] Proportionality was then adopted in respect of the implied freedom of political communication in *McCloy v New*

[41] Gray (n 6) 104.

[42] See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) ch 7; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020) ch 2. See also Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) *International Journal of Constitutional Law* 263.

[43] See, eg, *Cunliffe v Commonwealth* (1994) 182 CLR 272, 356–7 (Dawson J); *Leask v Commonwealth* (1996) 187 CLR 579, 601 (Dawson J), 615–16 (Toohey J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197–200 [34]–[39] (Gleeson CJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 [17] (Gleeson CJ). For commentary on the previous position, see generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668 ('Limits of Constitutional Text and Structure').

[44] See *McCloy* (n 5); *Palmer* (n 5). Cf *Murphy v Electoral Commissioner* (2016) 261 CLR 28, in which proportionality was not applied in relation to the franchise: at 52–3 [37]–[39] (French CJ and Bell J).

[45] (1997) 189 CLR 520 ('*Lange*').

[46] Ibid 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[47] (2010) 243 CLR 1, 131–45 [424]–[478] (Kiefel J). See also *Momcilovic v The Queen* (2011) 245 CLR 1; Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Monis v The Queen* (2013) 249 CLR 92; *Tajjour v State of New South Wales* (2014) 254 CLR 508.

South Wales ('*McCloy*') in 2015 by a majority comprising French CJ, Kiefel, Bell and Keane JJ.[48] The change altered the test for the implied freedom set out in *Lange* (as slightly amended in 2004 in *Coleman v Power*).[49] The plurality judgment did not explain how the new test could be supported by the text and structure of the *Constitution*, instead describing proportionality as a 'tool of analysis' and placing emphasis on benefits for 'transparency' in applying proportionality because it was 'structured'.[50] The plurality wrote that:

> Proportionality provides a uniform analytical framework for evaluating legislation which effects a restriction on a right or freedom. It is not suggested that it is the only criterion by which legislation that restricts a freedom can be tested. It has the advantage of transparency. Its structured nature assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for a legislative restriction on a freedom will be tested.[51]

However, the change was criticised by Gageler J and Gordon J in separate judgments in that case and in the years since in other cases.[52] In *McCloy,* Gageler J described the move of the majority as the 'wholesale importation' of a 'one size fits all' approach, without the benefit of argument on the point from counsel, and raised concerns about the 'adequacy' stage of the test in particular.[53] Gordon J wrote that 'there can be no automatic adoption or application of forms of legal analysis made in overseas constitutional contexts', which might not align with 'the constitutional framework which underpins those principles in Australia'.[54] Despite this criticism, proportionality has the support of a majority, including recent appointments Steward J and Gleeson J (though the former has doubted whether the implied freedom exists).[55] In *Palmer v Commonwealth* ('*Palmer*'), a case that concerned border closures during the coronavirus pandemic, proportionality was extended by Kiefel CJ and Keane J and Edelman J to s 92, again over the objections of Gageler J and Gordon J.[56]

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[48] *McCloy* (n 5) 193–5 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ).
[49] (2004) 220 CLR 1, 51 [95]–[96] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).
[50] *McCloy* (n 5) 200–1 [23], 213 [68], 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ).
[51] Ibid 215–16 [74] (French CJ, Kiefel, Bell and Keane JJ).
[52] For a summary of the criticisms, see Chordia, *Proportionality in Australian Constitutional Law* (n 42) 181–8.
[53] *McCloy* (n 5) 234 [140], 235 [142], 236 [145] (Gageler J). Gageler J has advanced a preferred approach of 'calibrated scrutiny', which 'adjusts the level of scrutiny brought to bear on an impugned law to the nature and intensity of the risk which the burden imposed by the law on political communication poses for the constitutionally prescribed system of representative and responsible government': see *Clubb v Edwards* (2019) 267 CLR 171, 225 [161] ('*Clubb*'). For suggestions of a hybrid approach between proportionality and calibrated scrutiny, see Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92; Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Anne Carter, 'Bridging the Divide? Proportionality and Calibrated Scrutiny' (2020) 48(2) *Federal Law Review* 282.
[54] *McCloy* (n 5) 288–9 [339] (Gordon J).
[55] See *LibertyWorks v Commonwealth* (2021) 274 CLR 1, 23 [46] (Kiefel CJ, Keane and Gleeson JJ), 95 [247] (Steward J).
[56] *Palmer* (n 5) 530 [62] (Kiefel CJ and Keane J), 556 [151] (Gageler J), 572 [198] (Gordon J), 597 [264] (Edelman J). The extension of proportionality to s 92 was in some ways surprising because, as Chordia observes, s 92 purports to provide an absolute standard. Proportionality is usually a test for qualified rights and freedoms, and seems unsuited to the interpretation of such a provision; the more obvious choice would have been a test of characterisation: see Shipra Chordia, 'Border Closures, COVID-19 and s 92 of the Constitution – What Role for Proportionality (If Any)?' (Blog, 5 June 2020) AUSPUBLAW. <https://www.auspublaw.org/blog/2020/06/border-closures-covid-19-and-s-92-of-the-constitution>; Chordia, *Proportionality in Australian Constitutional Law* (n 42) ch 7.

To guide the discussion of whether proportionality should be applied in respect of the free exercise clause of s 116, it is helpful to set out the current test under the implied freedom of political communication, drawing from the judgment of Kiefel CJ and Keane J in *Farm Transparency v New South Wales* ('*Farm Transparency*').[57] This case concerned a challenge to what are sometimes called 'ag gag' laws, that is, laws that have the effect of preventing the communication or publication of recordings, taken as a result of a trespass, of the slaughter or mistreatment of animals in the agriculture industry.[58] The High Court, by majority, upheld the laws as proportionate to a legitimate end in their application to recordings of lawful activity (at least where communicated or published by a person complicit in the recording being obtained exclusively in breach of the statute).[59] The case is the most recent application of structured proportionality by the Court at the time of writing, handed down in August 2022. The test in respect of the implied freedom of political communication as stated by Kiefel CJ and Keane J may be summarised as follows:

1. There is an initial question of whether the implied freedom of political communication is burdened having regard to the legal and practical operation of the impugned law.[60]
2. If the law burdens the implied freedom, the next question is the legitimacy of the purpose of the law. The purpose is required to be compatible with the system of representative government for the law to be valid.[61]
3. Then there is a three-stage proportionality assessment:
    a. First, the law must be suitable, which requires that its measures are rationally connected to the purpose they seek to achieve.[62]
    b. Second, the law must be necessary. This test looks to whether there is an alternative measure available which is equally practicable when regard is had to the purpose pursued, and which is less restrictive of the freedom than the impugned provision. The alternative measure must be obvious and compelling.[63]
    c. Third, the law must be adequate in its balance. The current position is that a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom.[64]

The proportionality test as stated by Kiefel CJ and Keane J in *Farm Transparency* has changed since its original articulation by French CJ, Kiefel, Bell and Keane JJ in *McCloy* in 2015. In *Brown v Tasmania* ('*Brown*') in 2017, the plurality judgment of Kiefel CJ, Bell and Keane JJ corrected a point of confusion by making clear that a court assesses the legitimacy of a law's purpose without also assessing the means at that stage; rather, the means are assessed at the later stages, through the proportionality test.[65] In *Clubb v Edwards* ('*Clubb*') in 2019, Kiefel CJ, Bell and Keane JJ tacitly adopted an observation made by Nettle J in *Brown*, requiring at the adequacy stage that 'it is only if the public interest in the benefit sought to be achieved by

[57] (2022) 96 ALJR 655 ('*Farm Transparency*').
[58] Ibid 662–3 [1]–[5] (Kiefel CJ and Keane J).
[59] Ibid 708–9.
[60] Ibid 666 [27] (Kiefel CJ and Keane J).
[61] Ibid 666–7 [29] (Kiefel CJ and Keane J).
[62] Ibid 668 [35] (Kiefel CJ and Keane J).
[63] Ibid 669–70 [46] (Kiefel CJ and Keane J).
[64] Ibid 671 [55] (Kiefel CJ and Keane J).
[65] *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104] (Kiefel CJ, Bell and Keane JJ) ('*Brown*'). Cf *McCloy* (n 5) 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ).

the legislation is *manifestly* outweighed by an adverse effect on the implied freedom that the law will be invalid'.[66]

(b) Critique of Proportionality

Proportionality has so far been extended to two areas of Australian constitutional law — the implied freedom of political communication and s 92 — but not to the free exercise of religion under s 116. Should it be so extended? Certainly, proportionality has a degree of momentum, and — although proportionality is a controversial test internationally — there has been little criticism of it in the commentary in Australia. But whether proportionality is the best possible test for the free exercise clause may be doubted. The difficulty with proportionality is that, of the three stages of the test (suitability, necessity, and adequacy), only the necessity stage appears to be both useful and an appropriate task for the judiciary to perform.

Suitability, which in Australia requires that the impugned measures are rationally connected to the purpose that they seek to achieve, does not add very much because a law that is not suitable will inevitably fail necessity, a more stringent test. That is, it will not be possible to say that a law that has no rational connection to its purpose represents the least restrictive means of pursuing that purpose. Suitability is a low bar: as Shipra Chordia says, 'it will be a rare case where a law is said by the government to be pursuing a particular purpose when it is indeed not pursuing that purpose'.[67] For example, in *Farm Transparency*, suitability was not even put in issue by the plaintiffs.[68]

Possibly the strongest argument that can be made in favour of the suitability stage of proportionality is that it allows a court, in a particularly clear case, to invalidate a law without recourse to the more evaluative assessments taken at the necessity and balancing stages. Further, in so doing, it might enable a court to send a stronger signal to the legislature than would be possible at the later stages — specifically, that the impugned law lacks even a rational connection with its purpose. Although this much may be true, it is a slight benefit at best, since it is a rare law that would fail such a test, and such a law would be caught at the necessity stage anyway, so suitability would have no impact on the outcome. In the vast majority of cases, the suitability stage merely adds an unnecessary step.

However, the main problem with proportionality is the final stage requirement of adequacy (also referred to as the balancing stage or proportionality *stricto sensu*). This stage of the test seems ill suited to be performed by the judiciary, because it is not well placed to 'balance' the benefit of a law against the adverse effect on a freedom. The objection is often put in terms of an 'incommensurability' problem because there is no common measure between the two things that are being compared.[69] In practice, balancing the benefit of a law against the adverse effect

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[66] *Clubb* (n 53) 200–1 [69]–[70] (Kiefel CJ, Bell and Keane JJ) (emphasis added), citing *Brown* (n 65) 422–3 [290] (Nettle J). While all three Justices were on the High Court, Kiefel CJ, Bell and Keane JJ had a tendency to agree with each other and produce joint judgments in almost every case in which they sat together. For concerns about this tendency, which might have been important to the adoption of proportionality by a 4-3 majority in *McCloy*, see Jeremy Gans, 'The Great Assenters', *Inside Story* (Web Page, 1 May 2018) <https://insidestory.org.au/the-great-assenters/>.

[67] Chordia, *Proportionality in Australian Constitutional Law* (n 42) 52. For a possible rare case, see *Brown* (n 65) 371 [135]–[136] (Kiefel CJ, Bell and Keane JJ).

[68] *Farm Transparency* (n 57) 668 [35] (Kiefel CJ and Keane J).

[69] See, eg, Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) *International Journal of Constitutional Law* 468, 471–5. For opposing views, see, eg, Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4(1) *Law & Ethics of Human Rights* 1, 15–16.

on a freedom entails such a broad discretion to evaluate the merits of a law that it resembles something of a political exercise, rather than a legal test. In this vein, Patrick Elias writes in respect of proportionality as follows:

> The controversial area is [the final stage of proportionality], the balance between the individual right and the countervailing public interest, and cases frequently turn on this assessment. This is not a simple comparison because one is not comparing like with like; there are no obvious objective criteria for making the assessment. In truth there is little which can properly be called judicial in this exercise, and the fact that Parliament has chosen to give these powers to the judges does not alter that fact. *The courts are being given a power that is often essentially political in nature*.[70]

In response to this problem, Chordia argues that 'incommensurability may be considered inherent to judicial decision-making' because it is found in 'numerous' areas of law.[71] However, there may be a difference in the nature of the task between judicial review for constitutionality and other areas of law, since not all judicial decision-making involves reviewing Acts of Parliament and determining their validity. A judge finding a law disproportionate under the implied freedom or s 92 — or the free exercise clause of s 116 if proportionality is adopted in that context — can strike it down in the Australian system. Other areas of law in which incommensurability is said to arise do not necessarily have those stakes; Chordia gives the example of damages in a tort judgment, but such a judgment only affects the parties to the case.[72] It is legitimate to question the wisdom of investing judges with such a large discretion in the constitutional law context even if some discretions are accepted elsewhere.

There may also be a basis within some other tests for comparisons to take place, whereas no such basis is apparent in proportionality. Ruth Chang describes how comparability proceeds with respect to an evaluative 'covering consideration'.[73] The breach of duty inquiry in negligence may be an example, since the factors there appear to be related by the consideration of what a reasonable person would have done in the circumstances.[74] What assists a court in comparing, say, the burden of taking precautions with the likely seriousness of harm is the effect of those factors on the behaviour of a reasonable person in response to a risk of harm. In

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[70] Patrick Elias, 'Reflections on Judicial Power and Human Rights' in Alan Bogg, Jacob Rowbottom and Alison L Young (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Bloomsbury, 2020) 3, 10 (emphasis added). Elias writes in the context of the UK's proportionality test under the *Human Rights Act 1998* (UK). It is worth noting that in *McCloy*, the High Court arrogated the power to invalidate statutes under the proportionality test to itself. That is different from a potential situation in which courts are required by statute to compare certain factors, even if those factors are considered to be incommensurable.

[71] Chordia, *Proportionality in Australian Constitutional Law* (n 42) 58.

[72] Ibid. These stakes might also constitute a point of difference between a system like Australia's and a system of review without strike-down powers like that of the UK under the *Human Rights Act 1998* (UK). It may also be relevant that in other areas of law where factors are compared, the question tends to turn on the facts in the individual case. The final balancing stage of proportionality often entails an abstract assessment about social values, though facts may still be relevant: see Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart, 2022).

[73] See Ruth Chang, 'Incommensurability (and Incomparability)' in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Blackwell, 2013) 5–8. See also Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45(4) *Hastings Law Journal* 813 (pointing to the possibility of ordinally comparing some incommensurable considerations even if they cannot be measured against a common cardinal scale).

[74] See, eg, *Civil Liability Act 2002* (NSW) s 5B. See also *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J).

contrast, at the balancing stage of proportionality, there is nothing in the terms of the test that relates the items being balanced; it is simply a matter of which is said to outweigh the other. Moreover, attempts by scholars to discern an unstated common criterion have failed.[75]

As a result, the likely tendency for judges at the balancing stage of proportionality is to supply their own moral or political considerations in order to make the required comparison. Stavros Tsakyrakis observes that 'there is no way to accept the notion that values [at the final balancing stage of proportionality] are commensurable without a moral argument, that is, an argument that relates them and justifies degrees of priority'.[76] Indeed, Chordia seems to accept the 'centrality of normative or moral reasoning to the final balancing stage of proportionality analysis'.[77] But that raises a problem of institutional competence: courts are not well placed to make highly discretionary comparisons of values that are informed by subjective, personally chosen moral or political criteria, particularly when those comparisons determine the constitutional validity of Acts of Parliament.

The incommensurability problem also undercuts the main argument advanced for proportionality: that its steps of analysis create transparency. For example, Evelyn Douek claims that '[o]ne of the key promises of structured proportionality is that it will make judicial reasoning more constrained and transparent' as '[t]he step-by-step nature of the testing' is 'methodical and not "approached as a matter of impression … pronounced as a conclusion, absent reasoning"'.[78] However, because it invests judges with such a large discretion at its final stage, the proportionality test is better understood as opaque, rather than transparent. Timothy Endicott explains that, at this final stage, '[t]he attractive structure of the judicial role crumbles at that point into an unstructured, opaque choice, when the task involves balancing the unbalanceable'.[79]

Admittedly, it might be possible to imagine a proportionality test that omits the balancing stage. Although this stage may be implicit in what Julian Rivers describes as an 'optimising' conception of proportionality, which 'sees proportionality as a structured approach to balancing fundamental rights with other rights and interests in the best possible way', there is an alternative 'state limiting' conception, which 'sees proportionality as a set of tests warranting judicial interference to protect rights'.[80] Such an understanding of proportionality could focus on comparing means and ends, as at the earlier stages of the proportionality test; it may even be more consistent with the initial use of the concept of proportionality.[81] Nonetheless,

[75] See Francisco J Urbina, 'Incommensurability and Balancing' (2015) 35(3) *Oxford Journal of Legal Studies* 575, 591.
[76] See Tsakyrakis (n 69) 474.
[77] Chordia, *Proportionality in Australian Constitutional Law* (n 42) 59.
[78] Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551, 552, 557.
[79] Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 311, 328.
[80] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174, 176.
[81] See, eg, Martin Luterán, 'The Lost Meaning of Proportionality' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 21, 26-27; Chordia, *Proportionality in Australian Constitutional Law* (n 42) 4, 18–22. On a possible middle ground approach, see Alison L Young, 'Proportionality Is Dead: Long Live Proportionality!' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 43, 58.

currently proportionality is widely understood, including by the High Court, as including the balancing stage.

Given the difficulties with structured proportionality as currently conceived, judicial contestation of it in Australia over the past few years seems only natural. David Hume points to the multi-year effort to introduce proportionality into Australian constitutional law as suggesting that it is 'surprising' that the doctrine remains contested.[82] However, the opposite seems to be true: the lengthy process illustrates that far from being a consensus position, the push for proportionality was a project that attracted little support for years, and was ultimately imposed by a bare majority over minority protests that it was alien to the Australian Constitution.[83] Moreover, the introduction of proportionality unsettled a unanimous seven-member judgment of the High Court without any attempt to support the change by reference to constitutional text or structure.

McCloy also inaugurated a period of volatility in which the test for the implied freedom of political communication changed every few years, first in *McCloy* in 2015, then in *Brown* in 2017, and then again in *Clubb* in 2019. This 'doctrinal instability'[84] raises further questions about the merits of the introduction of proportionality. The alteration in *Clubb* appears intended to offset concerns about the breadth of the final balancing stage, since by requiring a 'manifest' outweighing of benefit by adverse effect, the standard is more deferential, albeit without employing deference as a distinct concept.[85] The UK Supreme Court has, in contrast, expressly invoked deference at this stage.[86] However, attempts to reposition the test to be more deferential seem to be an implicit acknowledgment of the underlying problem: the test gives judges an unsuitable task. That problem persists at the conceptual level even if the practical concerns are eased by applying the test in a restrained manner.[87]

Although proportionality is a popular test around the world, it is not a universal one. Japan and the US are two major jurisdictions that do not apply it.[88] In the US, tests of rational basis, intermediate scrutiny, and strict scrutiny overlap with the earlier stages of the proportionality test, but courts generally seek to avoid analysis similar to the final balancing stage.[89] For example, the strict scrutiny test asks whether a law is narrowly tailored to pursue a compelling

[82] David Hume, '*Palmer v Western Australia* (2021) 95 ALJR 229; [2021] HCA 5: Trade, Commerce and Intercourse Shall Be Absolutely Free (Except When It Need Not)' (Blog Post, 23 June 2021) <https://www.auspublaw.org/blog/2021/06/palmer-v-western-australia-2021-95-aljr-229-2021-hca-5>.

[83] See Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 123.

[84] John Basten, 'Understanding Proportionality Analysis' (2021) 43(1) *Sydney Law Review* 119, 120.

[85] See *McCloy* (n 5) 220 [90]–[92] (French CJ, Kiefel, Bell and Keane JJ). On deference in this context, see, eg, Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27(2) *Public Law Review* 101; Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45(2) *Federal Law Review* 181.

[86] See *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, 285 [161] (Lord Reed PSC, Lady Black JSC, Lords Hodge JSC, Lloyd-Jones, Kitchin, Sales and Stephens agreeing).

[87] Although proportionality grants courts a considerable discretion, whether this discretion leads to judicial activism may depend on other factors (such as institutional considerations): see Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, 2017).

[88] For an account of the convergence of Hong Kong, Taiwan, and South Korea as the only Asian jurisdictions in which courts regularly apply structured proportionality in judicial review of legislation, see Po Jen Yap and Chien-Chih Lin, *Constitutional Convergence in East Asia* (Cambridge University Press, 2022). Proportionality has also sometimes, but not regularly, been used in India.

[89] For criticism of this, see Jud Mathews and Alec Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60(4) *Emory Law Journal* 797.

government interest; this narrow tailoring analysis resembles the necessity stage of proportionality.[90] As Aharon Barak explains, a means-end test of that kind is different from the final balancing stage of proportionality, which 'does not examine the relation between the limiting law's purpose and the means it takes to achieve it' but instead 'examines the relation between the limiting law's purpose and the constitutional right'.[91]

The *Lange* test, before its reformulation in *McCloy*, was stated as a means-end test: it asked whether a law that burdened the implied freedom was appropriate and adapted to a legitimate end, not whether the end outweighed the burden on the freedom. This formulation directs attention to — as Gageler J has put it — the 'degree of fit between means (the manner in which the law pursues its purpose) and ends (the purpose it pursues)'.[92] Adrienne Stone describes this as involving a '*balancing* of means against ends'.[93] Significantly, though, means-end analysis does not involve the wide judicial discretion to compare incommensurable values entailed by the final stage of proportionality. That is not to say that courts applying the pre-*McCloy* test for the implied freedom were not required to evaluate laws. As John Basten says, '[t]here is undoubtedly an evaluative judgment to be made; the question ultimately is whether structured proportionality provides a better basis for that exercise and its expression'.[94]

(c) A Test of Reasonable Necessity as Preferable to Proportionality

In respect of the free exercise clause of s 116, there are dicta from *Jehovah's Witnesses* that can provide guidance without recourse to proportionality. The starting point is the recognition that religious freedom is not absolute, and the relevant question is one of justification of a law that interferes with religious freedom. In *Jehovah's Witnesses*, Latham CJ referred favourably to a test of whether there was an 'undue infringement of religious freedom', before concluding that in the circumstances of the case it was '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'.[95] Rich J similarly emphasised that 'freedom of religion is … subject to powers and restrictions of government essential to the preservation of the community'.[96]

Starke J wrote that '[t]he critical question is whether the particular law, as in this case, is reasonably necessary for the protection of the community and in the interests of social order. In my opinion the present Regulations … would not have transcended those limits'.[97] Although there was not a detailed elaboration of what reasonable necessity requires in the judgment, it is possible to develop Starke J's reference to reasonable necessity into a test that is consistent with the High Court's pre-*McCloy* case law. Addressing the free exercise clause as a non-absolute freedom, a test derived from the language in *Jehovah's Witnesses* might ask whether a law that interferes with or burdens free exercise of religion is 'reasonably necessary' for a

[90] See, eg, *Lukumi* (n 15) 531–2. See also Mathews and Sweet (n 89) 803.
[91] Barak, *Proportionality: Constitutional Rights and Their Limitations* (n 42) 344. See also Chordia, *Proportionality in Australian Constitutional Law* (n 42) 20, 196–7.
[92] *Brown* (n 65) 378–9 [165] (Gageler J) (setting out a calibrated scrutiny approach).
[93] Stone, 'Limits of Constitutional Text and Structure' (n 43) 682 (emphasis added). See also Stone, 'Proportionality and Its Alternatives' (n 53) 141–2; Chordia, *Proportionality in Australian Constitutional Law* (n 42) 157–8.
[94] Basten (n 84) 126.
[95] *Jehovah's Witnesses* (n 8) 131 (Latham CJ).
[96] Ibid 149 (Rich J).
[97] Ibid 155 (Starke J). See also *Palmer* (n 5) for discussion of 'reasonable necessity' in the context of s 92.

legitimate end, a test similar to the *Lange* test before it was altered by the adoption of proportionality in *McCloy*.

After first determining whether there was a burden on or interference with the free exercise of religion, a court would assess the legitimate end said to be pursued, which could be a state or social interest, or perhaps the protection of the rights of others affected by religious practice. In his dictum, Starke J refers to the protection of the community and the interests of social order; these would certainly be possible legitimate ends. The court would then apply a means-end test that focused on the availability of alternatives to assess whether the means adopted by the impugned law corresponded to the legitimate end identified earlier in the inquiry. The analysis would bear a strong resemblance to the necessity stage of proportionality, which considers whether there is an alternative measure available that is equally practicable and less restrictive of the freedom than the impugned law.[98]

However, by omitting the suitability and final balancing stages of the proportionality test, the reasonable necessity test would avoid the criticisms that can be made against those inquiries. In particular, the omission of the final balancing stage would mean that a law could not be found in violation of the free exercise clause of s 116 on the basis of a weighing of incommensurable values, namely that the benefit sought to be achieved by the law is outweighed (or manifestly outweighed) by its adverse effect on free exercise of religion. Provided that the means adopted by a law – upon assessing the availability of alternatives, their practicality, and the burden they would place on religious freedom – are considered by a court to be reasonably necessary for a legitimate end, it would be upheld as a valid restriction on the free exercise of religion under s 116, and the inquiry would end at that point.

Applying such a test in *Kruger* might well have led to a different result for the victims of the Stolen Generations, though the issue is clouded by some factual difficulties. There were no facts before the Court on the effect on religious practice of the Ordinance; thus, Gaudron J commented that 'the question whether the Ordinance authorised acts which prevented the free exercise of religion involves factual issues which cannot presently be determined'.[99] As Saunders and Meagher point out, the failure to determine or agree these facts before questions were reserved for the consideration of the Full Court was 'procedurally unusual'.[100] However, it is possible that it could have been concluded, through inference from facts about Indigenous communities taken on judicial notice, that the law empowering the removal of Indigenous children interfered with the free exercise of religion by those children by permitting their separation from the communities within which their religious practice was possible.

Some members of the Court acknowledged that there may well have been such an effect, but they seemingly did not consider it necessary to pursue the issue because they were applying a purpose test. For example, Toohey J stated that 'it may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose'.[101] Gummow J (with whom Dawson J agreed on this point) wrote:

[98] *Farm Transparency* (n 57) 669–70 [46] (Kiefel CJ and Keane J).
[99] *Kruger* (n 2) 132 (Gaudron J).
[100] Saunders and Meagher (n 6) 301, citing *Kruger* (n 2) 48–9 (Dawson J).
[101] *Kruger* (n 2) 86 (Toohey J).

> The withdrawal of infants … from the communities in which they would otherwise have been reared, *no doubt may have had the effect, as a practical matter, of denying their instruction in the religious beliefs of their community*. Nonetheless, there is nothing apparent in the 1918 Ordinance which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion, as the objective to be achieved by the implementation of the law.[102]

Yet if that effect on free exercise is accepted, then the question under a reasonable necessity test becomes whether the interference with religious freedom was reasonably necessary for any legitimate end in the circumstances (instead of merely turning on the absence of a proscribed purpose, as under the test applied in *Kruger*). The impugned Ordinance was very unlikely to be reasonably necessary for a legitimate end. On one view, there was no legitimate end that the Ordinance pursued. However, even if there were considered to be a legitimate end, such as protecting the safety of children who actually needed protection, the blanket authorisation of removals, with minimal safeguards, that applied only to Indigenous children could not have been viewed as reasonably necessary to that end. A more tailored law would have been a viable alternative to address such an end. On this view, the relevant provisions of the Ordinance should have been found to be unconstitutional under the free exercise clause of s 116.[103]

CONCLUSION

Despite its inclusion as an express protection in the Australian Constitution, the free exercise clause in s 116 has been considered on only three occasions by the High Court and on each of these occasions it has been found not to be violated. The current approach to the clause was set out by the Court in *Kruger* and focuses on the purpose of a law that interferes with religious freedom. This test has a number of serious faults — it is not textually compelled, it is at odds with the history of the provision, it represents a break with earlier precedent, and it risks being narrow, depending on a court's approach to discerning the purpose — but perhaps the most important fault is that it misdirects the inquiry from the relevant matter of a law's justification to the peripheral matter of the law's nature.

This raises the question, addressed recently by some commentators, whether the test of structured proportionality utilised by the Court in respect of the implied freedom of political communication and s 92 should be applied to adjudicate claimed violations of the free exercise clause of s 116. I argue that it should not be, because proportionality, too, is a flawed test. Its suitability stage adds little, while its final balancing stage invests excessive discretion in a court because it involves weighing incommensurable values. The introduction of proportionality in respect of the implied freedom and s 92 presumably cannot be undone, but the mistake should not be extended any further.

The dicta from *Jehovah's Witnesses* represent a preferable starting point for interpreting the free exercise clause of s 116. Even though the free exercise claim was unsuccessful in that case, the members of the Court in *Jehovah's Witnesses* took s 116 seriously, engaged in careful

[102] Ibid 161 (Gummow J, Dawson J agreeing at 60) (emphasis added).

[103] In reaching this conclusion, I leave aside any question of whether it is better to understand the relevant provisions of the Ordinance as invalid under the Constitution directly or, alternatively, invalid as not authorised by the enabling statute when that statute is interpreted consistently with constitutional requirements. Further, I acknowledge that the same result of unconstitutionality could be arrived at through an application of the proportionality test. However, a reasonable necessity test achieves this result without the weighing of incommensurable values at the final balancing stage of proportionality that strains the judicial function.

reasoning about it, and articulated credible approaches to adjudicating the limits of the free exercise clause. A reasonable necessity test that adopts the dicta in that case and develops them in the way proposed in this article would give the free exercise clause a meaningful and sensible operation while also appropriately limiting the judicial role. The purpose test adopted in *Kruger* unfortunately does not do this, but nor would the proportionality test currently employed under the implied freedom and s 92.

Legal Pluralism and Islamic Law in Australia

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Legal pluralism offers a critical and empirically sensitive way of thinking about justice in multicultural societies with a variety of legal traditions – Western, Indigenous, Islamic, or otherwise. Yet the critical theoretical potential of legal pluralism has not yet been properly utilised for understanding Islamic law in Australia. This article shows how studies of Islamic law in Australia have tended to reduce legal pluralism to a pluralism of rules or norms, or, in discussing its political implications, have failed to take seriously John Griffith's now famous claim that legal pluralism is simply 'the fact'. Against this, this article highlights some key theoretical insights of legal pluralism, focusing on its capacity to draw our socio-legal attention to the deeper normative, conceptual, and material processes that constitute a legal tradition. Based on ethnographic fieldwork in Western Sydney, it then offers an account of such processes as they appear in the Shia Muslim tradition of law in Australia. It shows material logics of hierarchy and plurality whose difference exceeds narrow rule-based approaches to law.

I. INTRODUCTION

How deep does multiculturalism go? Amongst its constituent communities, what types of diversity are the West capable of recognising? Australia has often struggled to comprehend diverse religious practices. These practices are sometimes barely legible as a form of diversity, and are instead represented as a backward and malign vehicle for offence, a dog whistle to elements of the 'progressive' left.[1] Even the widely used term 'Culturally and Linguistically Diverse' ('CALD'), while aspiring to include migrant and other communities, can work to subordinate religion to culture and language as preferred forms of diversity. In this article, I explore the presence of Islamic law in Australia through a critical discussion of legal pluralism. The existing literature on Islamic law in Australia offers a relatively narrow reading of legal pluralism, and so tends to reduce the encounter between Islamic and common law traditions to a conflict of norms. This limits scholarship's resources for understanding legal diversity in Australia. That is, it fails to recognise the legal traditions of Australia's constituent communities as they take place in fact.

I show here how Shia legal practices are more than a collection of threadbare rules left over from an archaic past. Drawing on broader ethnographic fieldwork in the transnational Shia community in Qom, Iran and Sydney, Australia, I consider how Muslims adopt, adapt, and in some cases transform the forms of modernity, including the law. Here I focus on Sydney, and the legal processes surrounding the obligatory tax or tithe on profit knows as the *khums*. Alongside my theoretical discussion, the ethnography discussed here shows how a more robust approach to legal pluralism facilitates a richer understanding of the autochthonous logics and

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[1] Ben Smee, 'Brisbane's Citipointe Christian College Withdraws Anti-gay Contract but Defends "Statement of Faith"', *The Guardian* (online, 3 February 2023) <https://www.theguardian.com/australia-news/2022/feb/03/brisbanes-citipointe-christian-college-withdraws-anti-gay-contract-but-defends-statement-of-faith>; 'Purity: An Education in Opus Dei', *Four Corners* (Australian Broadcasting Corporation, 2023) <https://www.abc.net.au/news/2023-01-30/purity:-an-education-in-opus-dei/101908488>.

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processes by which Islamic law generates norms, practices, and institutions. These are the laws and practices, moreover, that in fact make up the substance of multicultural life in Australia's suburbs.

II. LEGAL PLURALISM AND *SHARĪʿA IN AUSTRALIA*

A. *Legal Pluralism as a Narrow Aperture*

The *Sharīʿa* or Islamic law is frequently described as 'comprehensive'.[2] It covers subject matters as diverse as ritual cleanliness, clothing, charity, divorce, and theft, with this breadth adduced in contrast to what the liberal tradition understands as its own more restrained legal reach.[3] One might say that Islamic law — through its traditional fivefold categorisation of acts into obligatory, recommended, neutral, not recommended, or prohibited — intends to 'cover the field'. Yet the majority of scholarship on Islam in Australia has tended to probe the *Sharīʿa*'s 'comprehensive' quality only as far the substance of its norms, and only insofar as those norms line up with Western legal subject matter.[4] Scholars have been more hesitant to explore how norms are actually generated, interpreted, or adjudicated on the ground. Analysis of the encounter between Islamic and state law is organised by subject matter, roughly parallel to modules taught in an Australian law school (e.g., family law, criminal law, banking, and finance), and according to the difference between the norms present in each system.[5] The resulting tabular analysis is repeated across the literature, arranging the compatibility between systems in terms of the gap between norms, such as the difference in the periods of notice required for the certification of a divorce. Elsewhere, the allegedly 'private' quality of many *Sharīʿa* rules make it quite compatible, in the most stereotypical of Protestant sensibilities, with Western law's primarily 'public' concerns.[6] In another prominent sociologically-oriented study, the authors examined the *Sharīʿa*'s role in Australia by interviewing Muslim respondents on their perception of the alignment between legal traditions. Here the interview questions seem to have been organised according to the different subject matters mentioned above.[7] Compatibility was a function of how far each tradition's norms (are perceived to) differ from one another.

Scholars are thus able to conclude that particular areas of Islamic law might be reasonably aligned with Australian law,[8] and further that this alignment need only be facilitated by the

[2] Adam Possamai et al, 'Shari'a and Everyday Life in Sydney' (2016) 47(3) *Australian Geographer* 341, 348–9; Ann Black and Kerrie Sadiq, 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' (2011) 34(1) *University of New South Wales Law Journal* 383, 406. Noting that 'Islamic law' is at once an unsatisfactory and indispensable translation and terminology: Wael B Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge University Press, 2009).

[3] This comparison is already implicit in Schacht, who organises this analysis in terms of the strictly 'legal' and 'ritual' aspects of the *Sharīʿa*: Joseph Schacht, *An Introduction to Islamic law* (Clarendon, 1964) 200–11.

[4] Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011) 2–3, 32.

[5] See ibid; Abdullah Saeed, 'Shari'a in Australia' in Anver M Emon and Rumee Ahmed (eds), *The Oxford Handbook of Islamic Law* (Oxford University Press, 2018) 751; Possamai et al, 'Shari'a and Everyday Life in Sydney' (n 2); Adam Possamai et al, 'Shari'a in Sydney and New York: A Perspective from Professionals and Leaders Dealing with Islamic Law' (2019) 30(1) *Islam and Christian-Muslim Relations* 69 ('Shari'a in Sydney and New York'); Adam Possamai, Selda Dagistanli, and Malcolm Voyce, 'Shari'a in Everyday Life in Sydney: An Analysis of Professionals and Leaders Dealing with Islamic Law' (2017) 30(2) *Journal for the Academic Study of Religion* 109.

[6] Black and Sadiq (n 2) 398-400. A similar argument, but from a historical vantage, is made by Saeed (n 5).

[7] Possamai et al, 'Shari'a and Everyday Life in Sydney' (n 2); Possamai, Dagistanli, and Voyce (n 5); Possamai et al, 'Shari'a in Sydney and New York' (n 5).

[8] Possamai, Dagistanli, and Voyce (n 5) 119.

'piecemeal' or modest 'tweaking' of Australian law in particular ways.[9] For example, Islam's proscriptions on usury might be aligned with Australian property law through small changes, like amending legislation so that a purchaser need not effectively pay stamp duty twice on a home bought with an Islamic financial product.[10] In some areas, of course, alignment requires reading down possible *Sharīʿa* practices deemed beyond the pale.[11] In this way, Australia is described as 'a case study in legal pluralism',[12] for it showcases this theatre of competing norms. This is a legal pluralism analytically reduced to a conflict of norms. It assimilates Islamic law, making it known through the schematic arrangements of the Western legal tradition. Of itself this is not an illegitimate strategy. But this is an under-investment in the resources that legal pluralism offers for the understanding of Islamic legal traditions.

Moreover, a narrow analysis of the law's pluralism tends to demand a normative version of *Sharīʿa* for comparative purposes. The scholar, in other words, must take a stand on what is orthodox in order to assess the conflict between normative systems.[13] It is worth noting that the broader field of Islamic studies can be understood as having worked precisely to avoid this assignment of orthodoxy to particular traditions.[14] It often means that the rules of a Muslim sub-majority (that is, the largest part within a Muslim minority population) are taken as the standard. Even Jamila Hussain's attempt to introduce Islam to an Australian academic context, which works hard to include the voices of multiple legal schools, settles on certain aspects of legal orthodoxy.[15] Real normative differences between the four major schools of Sunni jurisprudence are passed over, not to mention the Twelver Shia tradition which is rendered marginal. My point, of course, is not to suggest a more diligent approach that would endlessly represent ever more minor Muslim voices. Rather I argue that analysis needs to be augmented in its entirety away from norms and towards broader questions of a plurality of method. To anticipate my discussion below, this is why the former Archbishop of Canterbury, Rowan Williams, defined the *Sharīʿa* in this way in his contribution to this broad debate: as 'a *method* of jurisprudence governed by revealed texts rather than a single system'.[16] Something in the direction of what I am suggesting here is offered by Ahmed and Krayem in their study of 'Sharia processes', which opens up the analysis through a broader assessment of the players, practices, and procedures involved in particular cases of family law.[17]

I want to focus on two different approaches to the presence of Islamic law that are critically instructive for the purpose of this article. In complex ways, both examples adopt an aperture broader than legal norms, and in doing so take different stances on legal pluralism. First, Voyce has given a comparative account and 'wider view' of inheritance law in both the *Sharīʿa* and Australia. He explicitly takes a narrow approach to legal pluralism, which (not without some

[9] Black and Sadiq (n 2) 387.
[10] Ibid 404.
[11] Possamai et al, 'Shari'a and Everyday Life in Sydney' (n 2).
[12] Black and Sadiq (n 2) 384.
[13] See for example Black and Sadiq (n 2). The study by Dagistanli and others is relatively nuanced on this issue but does ultimately defer a position on orthodoxy to what we might call the 'vibe' about Muslim majority opinion: Selda Dagistanli et al, 'The Limits of Multiculturalism in Australia: The Shari'a Flogging Case of *R v Raad*, *Fayed, Cifci and Coskun*' (2018) 66(6) *Sociological Review* 1258, 1267.
[14] See Talal Asad, *The Idea of an Anthropology of Islam* (Center for Contempary Arab Studies, Georgetown University, 1986).
[15] See, eg, Hussain (n 4) 33–41. Hussain's discussion of the sources of Islamic law makes the Sunni Caliphate normative, both excluding and misrepresenting the role of the Imams in the Shia tradition.
[16] Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10(3) *Ecclesiastical Law Journal* 262, 264 (emphasis in original).
[17] Farrah Ahmed and Ghena Krayem, *Understanding Sharia Processes: Women's Experiences of Family Disputes* (Hart, 2019) 6–9.

analytical ambiguity) he defines as a 'system of law that allows more than one legal system to operate at the same time'.[18] It follows that because the *Sharīʿa* is not an operative 'system', inheritance is thus framed not as an issue of legal pluralism but of conflicting 'customs' working in parallel.[19] Arguing that inheritance norms are examples of broader cultural processes of social control, he contrasts the group mentality of Islamic traditions with the more egalitarian principle of the 'reasonable testator' in modern Australian law. Putting aside the substance of the claims made here, this contextual turn in itself is very welcome. Yet the dénouement of his discussion remains the difference between rules, like those that exemplify gendered inheritance distributions.[20] Thus culture illustrates the substance of law, that is its *rules*. Turner, Possamai, and Richardson took a different approach in an exemplary 2015 edited volume, where they defined legal pluralism as 'the development of a number of different legal traditions within a given sovereign territory'.[21] Their focus was not so much the rules themselves, but rather the classical Durkheimian sociological problem of solidarity. The 'merit' of legal pluralism, they conceded, was its political affordance to minorities.[22] But thus, the danger of legal pluralism relates to its undermining of 'legal centralism'.[23] That is, legal pluralism upsets the *political* apparatus of a singular conception of law allegedly inseparable from the state itself. Their concerns extend both to the formal aspects of sovereignty, the idea that the state ought to be the ultimate and secular arbiter of disputes, and to a more culturally substantive unease about the shared assumptions, narratives, or '*nomoi'* (see below) needed to bind a society together.[24] Both of these examples show an interest in legal issues beyond norms. They do so, however, without the critical resources that a broader understanding of legal pluralism would provide.

B. *The Wider Aperture of Legal Pluralism*

There are other approaches to legal pluralism more fruitful for understanding *Sharīʿa* in Australia. The narrower approaches discussed above are more like what the common law knows as the conflict of laws, where a court must decide whether it has jurisdiction to hear a dispute involving elements from a foreign jurisdiction, and if so, 'what system of law should be applied to determine the dispute …?'[25] The court adjudicates, in short, on which body of norms will apply and what body will have the authority to decide. Legal pluralism is better thought of in a more expansive way than this. Certainly and minimally, legal pluralism calls for an attentiveness to the 'experiences' of the law's subjects and objects, and to the institutions and procedures that make up the 'processes' of Islamic traditions.[26] In addition, this article suggests two other particular expansions: firstly, towards a broader analysis of authority

[18] Malcolm Voyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (2018) 12(3) *Contemporary Islam* 251, 264.
[19] Ibid.
[20] Ibid 255–6. Noting that there are four main Sunni schools of law.
[21] Bryan S Turner and Adam Possamai, 'Introduction: Legal Pluralism and Shari'a' in Bryan S Turner, Adam Possamai, and James T Richardson (eds), *The Sociology of Shari'a: Case Studies from around the World* (Springer, 2015) 1, 1.
[22] Ibid 5.
[23] Ibid 1.
[24] Ibid 5; Bryan S Turner and James T Richardson, 'The Future of Legal Pluralism' in Bryan S Turner, Adam Possamai, and James T Richardson (eds), *The Sociology of Shari'a: Case Studies from around the World* (Springer, 2015) 305, 311.
[25] Maebh Harding and Ruth Hayward, *Conflict of Laws* (Taylor & Francis, 2013) 168.
[26] Salim Farrar and Ghena Krayem, *Accommodating Muslims under Common Law: A Comparative Analysis* (Taylor and Francis, 2016); Farrah Ahmed and Ghena Krayem, *Understanding Sharia Processes: Women's Experiences of Family Disputes* (Hart Publishing, 2021).

beyond positivist norms within a state context, and secondly, towards a reflection on epistemic difference.

While acknowledging the diversity of this scholarship, and the diversity of theoretical approaches to legal pluralism itself, it is my contention that the Australian literature misses legal pluralism's critical value for the study of Islam in Western contexts. Legal pluralism has already offered important resources to scholars working on more complex approaches to Islamic law. I have already mentioned the quality of Krayem's work with others.[27] In Shahar's contribution, legal pluralism brings together broader shifts in the study of Islamic law that directs scholars towards questions of law in action, procedure, personnel, and the role of state context.[28] Yet Australia remains strangely isolated from these dividends, and its scholarship is thereby impoverished. Legal pluralist scholarship has long sought to explore the plural *experience* of law, or in an older terminology, the plural reality of 'living law' and 'law in action'. This is what Griffiths meant by his famous claim that 'legal pluralism is the fact', and moreover that 'legal centralism' is an ideology tied to the purposes of the nation state that hinders 'accurate observation'.[29] The fact that legal pluralism draws us back to the more basic question of the definition of law itself is not something to be avoided.[30] It is precisely this generative and critical question that one must not avoid in examining the encounter between legal traditions. And this is why it is less helpful to think of legal pluralism as concerning legal 'systems' in a formal sense. To the contrary, it is about the possibility of legal phenomena, or phenomena that make us scratch our jurisprudential heads, precisely where a 'system' is not immediately obvious inter alia for reasons of the nation state's dominance.

Turner, Possamai, and Richardson are surely right to identify that legal pluralism has implications for political authority, and that the state remains the ultimate coercive authority in fact. Legal pluralism may disrupt the Habermasian or Rawlsian vision of a rationality of authority discursively crystallising around certain points within the imprimatur of the state. Yet legal pluralism is not primarily a political programme. It *describes* an empirical legal situation: the facticity of co-existent orders bearing a legal quality.[31] The desirability of formalising this situation in state law is a related but logically subsequent question. Legal pluralism makes an empirical claim that contests the fiction of the law's monopolisation by the state. Robert Cover puts it like this:

> The state becomes central in the process … not because the cultural processes of giving meaning to normative activity cease in the presence of the state. The state becomes central only because … an act of commitment is a central aspect of legal

[27] See Farrar and Krayem (n 26), Ahmed and Krayem (n 26), Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not to Recognise* (Melbourne University Publishing, 2014).
[28] Ido Shahar, 'Legal Pluralism and the Study of Shari'a Courts' (2008) 15(1) *Islamic Law and Society* 112, 140–1.
[29] John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 4.
[30] Krayem (n 27) 3–4. But see Bryan S Turner and Berna Zengin Arslan, 'Shari'a and Legal Pluralism in the West' (2011) 14 *European Journal of Social Theory* 139, 142.
[31] Gillian Rose is not a legal pluralist, but she does articulate the folly of modernity's attempt to separate and independently ground values and validity. Reflecting on Antigone and on Phocion's wife as they buried their loved ones outside the city walls, she observes: 'To acknowledge and to re-experience the justice and the injustice of the partner's life and death is to accept the law, it is not to transgress it — mourning becomes the law. Mourning draws on transcendent but representable justice, which makes the suffering of immediate experience visible and speakable': Gillian Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge University Press, 1996) 36. Here we do not tear apart fact and law.

> meaning. And violence is one extremely powerful measure and test of commitment.[32]

A situation of legal pluralism is therefore political in a deeper sense than Habermas and Rawls, and closer to that of Rancière. It is not a tactical political programme but a way of analysing in a spatial idiom who can speak, who can be heard, and who is legally visible.[33] The question rightly posed by Krayem is therefore whether the state can ignore these non-state orders.[34]

A brief contextual discussion of Indigenous legal traditions in light of settler colonialism shows what I mean by multiple co-existent orders, and that this concerns much more than rules. Clearly one needs to allow for significant differences in the colonial histories of these traditions. But the parallel between the situations of Islamic and Indigenous traditions in encountering the state form and its logic, which has not to my knowledge been remarked upon, also helps to clarify how analytical questions of law themselves relate to the politics of recognition. Law under settler colonialism should be understood as conceptually absolutist. As elsewhere, the Australian colonial 'structure' does not seek to exert power 'over' but rather 'destroys to replace', only allowing the vestiges of Indigenous forms of life so that the state can 'express its difference' in the international order.[35] As Wolfe famously expresses it: settler colonialism — being a 'structure not an event' — is not something that is completed. Rather, 'elimination is an organizing principle'.[36] This principle is expressed, among other ways, through the singularity of legal sovereignty. And in this sense, notwithstanding the liberal ideology of legal restraint, Western 'liberal' law does indeed intend to 'cover the field'.[37] Gover argues that states like Australia rely on 'absolutist notions of sovereignty and law to deny the independent legal authority of Indigenous peoples'.[38]

Recalling Turner, Possamai, and Richardson's arguments above, one might make the political case for the desirability of singular de jure sovereignty. But in making this argument, one needs to recognise that other sovereignties are being in fact *denied* the legal integrity that they claim. These other modes of governance exist in fact: but they are denied de jure recognition. However, one should note that even a strong form of legal pluralism takes on a violent hue when expressed in this way as a 'question of fact' because, as Gover says, even using the fact/law distinction serves to deny 'the authority of Indigenous law in situ'.[39] Thus *Mabo v Queensland [No 2]*,[40] an example of Australian law 'expressing its difference', effected a denial of Indigenous legal sovereignty by subordinating Native Title to a question of fact within

[32] Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97(1) *Harvard Law Review* 4, 11.
[33] See Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, tr Gabriel Rockhill (Continuum, 2004) 13. See also Mónica López Lerma and Julen Etxabe, 'Introduction: Rancière and the Possibility of Law' in Mónica López Lerma and Julen Etxabe (eds), *Rancière and Law* (Routledge, 2018) 1–13.
[34] Krayem (n 27) 5.
[35] Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 388.
[36] Ibid.
[37] As Schmitt has it, law comes from 'the initial measure and division of pasture land … it is the "radical title"': Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, tr G L Ulmen (Telos Press, 2003) 70.
[38] Kirsty Gover, 'Legal Pluralism and Indigenous Legal Traditions' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 848, 847.
[39] Ibid 848.
[40] (1992) 175 CLR 1.

a broader logic of extinguishment.[41] Indigenous law, in short, is denied its own de jure integrity. Yet Gover would I think say that Indigenous law *does* exist as a question of law, and further that it *judges* the violent illegalities of Western law. So against the extant fact of legal violence, legal pluralism tries to be attentive to Indigenous communities' historical and continuing capacity to generate the qualities, habits, and processes of a discrete legality. Gover argues that 'the very possibility that states do not have a monopoly on law confronts first principles of settler legal and political theory'.[42] The voices of Indigenous scholars therefore speak against elimination by asserting their legality and denying the absolutism of state sovereignty. Watson sings: 'The First Nations law of the land was birthed by song. Law is sung into place, land, waters, people, the natural world and the cosmos, the sky-world. It is the law that I speak of here, not "customary law", lore, myth or story.'[43] Indigenous voices say their law is neither lost nor dead.

Let me now offer a more positive account of legal pluralism pursuant to encountering the presence of Islamic law in Australia. Here my intention is not to offer a history or comprehensive analytic of legal pluralism.[44] Instead, my purpose is to signal and demonstrate legal pluralism's critical reach beyond rule comparison, and indeed beyond an attentiveness to law as 'experience', by drawing on two classic texts from the history of legal pluralism as well as a more recent summary by Margaret Davies. Boaventura de Sousa Santos examines legal pluralism through the metaphor of cartography.[45] Law exists at different 'scales' and 'projections' — both on the factory floor and in the stock exchange — and is distributed through different 'superfacts' or capillary mechanisms, like markets and bureaucracies. For Santos, these differences constitute the diversity of encounters with law that is legal pluralism. In his now classic essay, Robert Cover observed that a 'great legal civilization' is 'marked by the richness' of its *nomos* or normative universe. He continues:

> The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood but also worlds to be inhabited. To inhabit a *nomos* is to know how to live in it.[46]

Specific norms or rules are always interpretively and materially encumbered. 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.'[47] And to that we might add: for every scripture there is a cosmology. Cover therefore says that it is through a 'know-how' of the thickness of these *nomoi* that we are able to navigate our world.[48] So what we might very crudely call 'culture' is the medium of law, not just its backdrop or illustration, and

[41] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor & Francis, 2014) 37; Irene Watson, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8(1) *Australian Feminist Law Journal* 39, 47.
[42] Gover (n 38) 848.
[43] Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (n 41) 30.
[44] See Gover (n 38) 851–4.
[45] Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279.
[46] Cover (n 32) 6.
[47] Ibid 4.
[48] Ibid 6. For sophisticated treatments of Islam as a civilization, see Hodgson, *The Venture of Islam: Conscience and History in a World Civilization* (University of Chicago Press, 1974-1976) (three volumes); Armando Salvatore, *The Sociology of Islam: Knowledge, Power and Civility* (Wiley Blackwell, 2016).

law is made through the movement or 'jurisgenesis' by which these *nomoi* are propelled and generated across time.

I do want to admit Dupret's critique of a kind of scope creep in legal pluralism. Its analytical value diminishes when it becomes a functionalist proxy for any kind of social control.[49] Dupret therefore proposes restricting its use to what he calls the 'praxiological' scenarios where a community itself understands its order as 'law'.[50] With that caveat in mind, I adopt Davies' recent definition of pluralism as 'a situation in which incommensurable things coexist in a comparative space'.[51] This definition 'attempts to grasp … the situation where two or more theoretical objects (persons, legal systems, values, cultures) come into contact with each other … but cannot be reduced to a singular form'.[52] Davies here very helpfully points us to the heterogeneity that legal pluralism tries to catch sight of; a heterogeneity of kind and not just of variations across species. She offers us two foci: on the one hand, 'a comparative space', which I understand to be a location for the 'governance' or regulative ordering of people,[53] and on the other hand, an incommensurability. Schematic comparisons of norms are no doubt important. Yet Davies shows us why this approach does not exhaust the critical potential of legal pluralism. Rather than tracing differences between norms, legal pluralism directs us towards the *question* of the broader dynamics and quality of the incommensurability between legal traditions, questions that will inevitably touch critically upon the state form and sovereignty itself.

This argument, I suggest, aligns in an important respect with critical historical studies of Islamic legal traditions. The latter identify the advent of the state, that is the definitive colonial form, as the critical inflexion point in Islamic legal history.[54] Unless we consider Islamic law entirely backward, lost, or dead, we ought therefore consider the possibility of a conceptual incommensurability embedded in this legal civilization's narratives and logics, and should further be prepared to critically encounter an incommensurability through an attentiveness to the law's scale and projection. This is why legal pluralism is good to think with. But just so, is not religion also good to think with? In her contribution, Davies' key interlocutors include Indigenous legal perspectives, theorists of new materialism (particularly in light of our current ecological crises), new currents in feminism, and so on. Yet there seems to me perhaps a curious historicism to her work, which locates itself negatively vis-à-vis the past, and especially so-called 'natural law'.[55] Bringing the possibility of contemporary religious incommensurability into this conversation would perhaps serve to hallow the kind of poststructuralist triumphalism discernible in some renditions of the legal. This same point can be made through a critical reflection on the meaning of multiculturalism itself. The latter might be taken as a narrow cultural pluralism facilitated by the state wherein differences are presented as various *ethical* options.[56] Rose says 'this is where the danger of aestheticising politics

[49] Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices' (2007) 1(1) *European Journal of Legal Studies* 296, 303.
[50] Ibid 305–7.
[51] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) 10.
[52] Ibid.
[53] For an example of 'governance' as a way of thinking comparatively about Islamic law in a critical postcolonial context, see especially the foreword of Wael B Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press, 2013).
[54] Hallaq, *Sharīʿa: Theory, Practice, Transformations* (n 2).
[55] Davies (n 51) *passim*.
[56] See Gillian Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge University Press, 1996), especially ch 4. On this view, one envisages members of '*modern religion[s]*, practised according to private

currently lies': in this reduction of political life and frustration to a shallow cultural otherness.[57] But might we not take it as a richer encounter more attendant to the quality of pluralism we see in the Shia community? Might it not be a more 'difficult' history, 'the risk of action arising out of the negotiation of the law'?[58]

III. LAW AS REFRACTION AND EXCELLENCE

The remainder of this article draws on my own ethnographic fieldwork, which comprised participant observation over two years in and around three Islamic Centres in Sydney, Australia and five months in a religious seminary in Qom, Iran between 2017 and 2020. From one perspective, this multisite fieldwork occurred within a single, relatively unified community bound together by transnational practices of travel, media, finance, and kinship, as well as a whole economy of *Sharīʿa* advice, administration, and education. But from another perspective, my fieldwork was profoundly shaped by the plural authorities that characterise the Shia community. This dispersion of authority surfaces almost immediately as structurally distinct from the singular ideology of Western law. The Shia say that every Muslim is required to have a working knowledge of the *Sharīʿa* of everyday life.[59] For more complex legal matters, a structure of institutional *taqlīd* or what I will call *Sharīʿa* deference requires the Muslim to choose 'the most learned mujtahid (jurist)' to follow or emulate.[60] In short, Shia Muslims must defer to the judgement of one of the high-level clerics, the so called *marājiʿ al-taqlīd* (singular. *marjiʿ*) or 'objects of emulation', for matters that exceed their own jurisprudential capability.

In practice this means that the overwhelming majority of ordinary Shia are obligated to follow the rulings of a senior jurist for hard or novel cases, or for anything that falls in the uncertain 'penumbra' around settled principles. Notwithstanding what might seem the perilous clerical utopianism of this idea of a 'most learned' cleric, at any one time the global Shia community recognises plural *marājiʿ*.[61] An example of this can be seen even in an ethnically homogenous Islamic Centre in Sydney where I conducted much of my fieldwork. Within this single Centre, the important legal event that is Ramadan commences and concludes on different days within the community due to the different methods of the sighting of the moon employed by their respective *marājiʿ*.

The Shia *marājiʿ* also give different precise renderings of the rule of the *khums*, the tithe or tax on 20 per cent or one fifth of yearly profits obligatory on all Muslims within the Twelver Shia confession.[62] The *khums* is divided into two parts. The first is set apart for poor descendants of the Prophet who are distinguished by their status as 'Sayyids' and are prohibited from relying on alms. The second is set apart for the Imam or 'leader' of the time, which in the Shia community is a title given to a particular descendant of the Prophet, the rightful leader of the

inclination and interest by individuals defined as legal persons, bearers of rights and duties … within the boundaries of civil society separated from the modern state': at 94 (emphasis in original).

[57] Ibid 78.

[58] Ibid 85.

[59] See Hussain Waheed Khorasani, *Islamic Rulings*, tr Various (Negharish Press / Imam Baqir al-Ulum School, 2015) 15.

[60] Ibid.

[61] On the tension between the traditional plural formulation and the institutions of the Islamic Republic of Iran, see Naser Ghobadzadeh and Shahram Akbarzadeh, 'Religionization of Politics in Iran: Shi'i Seminaries as the Bastion of Resistance' (2020) 56(4) *Middle Eastern Studies* 570.

[62] For a more detailed discussion of the *khums,* see Samuel Blanch, 'Is the Subject the Locus of Muslim Ethics: Relocating the Ethics of Tithing in the Transnational Shi'i Community' (2022) 33(2) *Islam & Christian-Muslim Relations* 145.

community of Muslims. But in this time of the current Imam's occultation,[63] this part is to be given to and administered by the *marājiʿ* in his stead. Of the second part, Ayatollah Sistani says it 'must either be given to a fully qualified jurist or spent for purposes that he authorises. And the obligatory precaution is that the fully qualified jurist must be the most learned'.[64] Ayatollah Khorasani says that 'for its use, it must be given to the most just and knowledgeable jurist'.[65] Ayatollah Shirazi says it should be given 'to a just mujtahid [one capable of conducting jurisprudence] or his representative to be spent for such purposes to which the Imam consents including those that serve the interest of Muslims and needs of Islamic seminaries, etc'.[66]

The Quranic verse relevant to the *khums* reads as follows: 'And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah, and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer …'[67] There is a gap between the apparent meaning of the relevant verse and the *khums* jurisprudence mentioned above, a gap that widens further still when one takes into account the Sunni jurisprudence. This already hints at the analytical weakness of making the Quran functionally equivalent to primary legislation in the Western tradition. So again, the *Sharīʿa* must be considered a *method*. Moreover, I will show momentarily how focussing on the semantic issues is only one part of the legal aspects at play in the community. But it is worth even here making a few initial observations about the *Sharīʿa* in Australia based on the small example of the *khums*. First, it is not usefully described through the binary concepts of 'public' or 'private'.[68] The *khums* operates as an ordinance to organise relationships at a global scale, and yet is not enforceable by a public body as such. Second, it is not usefully thought of as 'culture' in a way that would distinguish this kind of normative order from a 'legal' system.[69] It understands itself quite consciously *as* law, and is treated as such by the community.[70] It has, for example, a very prominent place in the legal summaries of the Shia jurists.[71] Or as H. L. A. Hart might have put it, the *khums* has an 'internal aspect': a sense by which many Shia recognise themselves as 'having an obligation'.[72] And although I do not purport to make a quantitative claim about the Shia Muslim population in Australia writ large, my research shows the qualitative mechanisms of how the *khums* is in fact complied with within the pious Shia community in Australia. In this sense, again, legal pluralism is simply a fact. Third, and as I will continue to discuss, at least this aspect of *Sharīʿa* practice does not operate in the 'shadow' of Australian law.[73] The *khums* is not overshadowed. It has its own integrity which interacts in complex ways with the legal apparatus of the Australian state.

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[63] For an arresting account of the politics of the Twelfth Imam's absence in a Lebanese context, see Fouad Ajami, *The Vanished Imam: Musa al Sadr and the Shia of Lebanon* (IB Tauris, 1986).

[64] Ali al-Husayni al-Sistani, 'Islamic Laws', *The Official Website of the Office of His Eminence Al-Sayyid Ali Al-Husseini Al-Sistani* (Web Page) ch 6 <https://www.sistani.org/english/book/48/2277/>.

[65] Hussain Waheed Khorasani, *tuwḍīʿ al-masāʾil* (2010) 324-5, Rule 1852 <http://wahidkhorasani.com/Data/Books/resale.pdf> (my translation).

[66] Makarem Shirazi, 'Practical Laws of Islam', *The Official Website of Grand Ayatollah Makarem Shirazi* (Web Page) issue number 1566 <https://makarem.ir/main.aspx?lid=1&typeinfo=30&catid=9001>.

[67] Quran, Surat al-Anfal 41 (Haleem).

[68] Cf Ann Black and Nadirsyah Hosen, 'Fatwas: Their Role in Contemporary Secular Australia' (2009) 18(2) *Griffith Law Review* 405; Saeed (n 5).

[69] Cf Voyce (n 18).

[70] This seems to be the higher threshold test for legal pluralism set by Dupret (n 49) 309–10.

[71] See above nn 52–4.

[72] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961) 80–1, 98–9.

[73] Cf Malcolm Voyce and Adam Possamai, 'Legal Pluralism, Family Personal Laws, and the Rejection of Shari'a in Australia: A Case of Multiple or "Clashing" Modernities?' (2011) 7(4) *Democracy and Security* 338, 343.

Consider the way that the law of the *khums* does not project out from a single rule or principle, but rather refracts along and disperses along a network of relationships. Different renderings of this rule make up the diverse structure of the Islamic law. As mentioned, the Sunni schools take an entirely different approach to the *khums*, limiting it to the theoretical (or is it impossible?[74]) circumstance where the Muslim community is united under its Caliph. Within the Twelver Shia school of jurisprudence, plurality is built into the fact of the coexistence of multiple *marājiʿ*. Each cleric gives a different precise formulation, however marginal the difference between them. Each rule also contains an unstable interaction between the *Sharīʿa* legal categories 'obligatory', 'prohibited', and the medial categories between. Furthermore, and notwithstanding the rules mentioned above, the *khums* payer (functionally playing the role of the grantor of the *khums* conceptualised as a trust) makes their own prudential decision about the 'best' destination for their funds.

My own interlocutors in Sydney tended to distribute their *khums* widely, diversifying their investments by spreading it between different intermediaries: Islamic Centres, other charitable organisations, the authorised representatives of various *marājiʿ*, and trusted family members. These decisions do not always align with, and sometimes contradict, the semantics of the rules. And crucially, showing the recursive quality of the law, by making these decisions the grantors actually shape who is in fact considered a *marjiʿ*. For qualification as a *marjiʿ* is a matter of recognition by the consensus of the community: it turns on who the Shia community in fact treats as the most just and knowledgeable. Voting with their feet, as it were, this decision is made, among other ways, through the community's decisions about their *khums*. I suggest that this refraction through dispersed authorities operates as what Santos called 'superfacts', or principles that shape a particular 'projection' of legality,[75] in this case of the Shia tradition of Islamic law. In his classic study of Islamic legal pedagogies in North Africa up to their disruption by colonialism, Eickelman describes the mechanics of *Sharīʿa* 'interpretation and elaboration' as 'prismatic', or as allowing paradigmatically for a kind of improvisation within limits set by established classical patterns and economies of memorisation.[76] One might say, then, that something like this quality is also found in the dynamics of the Shia tradition of law. Like a hall of mirrors, the interaction between law and authority refracts and bounces up and down along a chain of relationships. This refraction is not ancillary to the law. It is central to its structure and practice. This stands distinct from the uniformity sometimes demanded by commentators on Islamic law in Australia.

As I have already suggested, to understand the plurality of the Shia tradition of law we need to go further even than the multiple *marājiʿ*. Consider this problem: in addition to his more 'orthoprax' dispersions of the *khums*, one of my interlocutors (I will call him Zain) chose to give part of his tithe to a member of his extended family in Iraq. He explained to me that this family member could disburse it directly to the poor and needy. 'This is like diversification, spreading the risk around', he said, 'putting your cash in different places'. This decision is an apparent breach of the *khums* rule as expressed by the *marājiʿ* mentioned above. Must we conclude, therefore, that Zain acted outside of the law?

[74] Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (n 53).
[75] Santos (n 45).
[76] Dale Eickelman, 'The Art of Memory: Islamic Education and its Social Reproduction' (1978) 20(4) *Comparative Studies in Society and History* 485, 490.

Seen from a broader socio-legal perspective the *khums* is regulated by what I am going to call practical reasoning.[77] As part of 'spreading the risk' Zain gave other parts of his *khums* to projects authorised by the *marājiʿ*. Thus, Zain's practical reasoning included but was not exhausted by the semantics of rules. To give a different example of practical reasoning, Qom's seminarians are entitled to receive a bursary drawn from trust funds made up of the *khums*, and administered by the *marājiʿ's* organisations. In class one day, our teacher reminded us that Ayatollah Khamenei (himself a *marjiʿ*) had pronounced study *wājib* ('obligatory') for those in receipt of the *khums* bursary, and that failing to study would constitute 'theft' from the Imam. Alongside these parameters, however, my interlocutors in Qom made various choices about their *khums*. These choices were informed by the shifting legal complexities of accounting for their actions between the Islamic legal categories of the obligatory and the prohibited, as well as what we might crudely think of as spiritual considerations.[78] Some chose not to accept the bursary at all, given their existing savings and the weighty moral burden of accepting money so auspiciously tied to the Twelfth Imam. Others chose to accept it, but severely limited their receipt and use according to the *Sharīʿa* principle of avoiding 'waste' (Persian. *isrāf*).

During my fieldwork in Sydney between 2017 and 2020, my interlocutors' practical reasoning saw them increasingly utilising charities simultaneously registered with the Australian Charities and Not-for-profits Commission ('ACNC'), and sometimes also authorised by a *marjiʿ*, as their preferred *khums* intermediaries. Charitable organisations with an income under A$250,000 are not required to provide the ACNC with their audited accounts (see below). Yet one of the Islamic Centres where I conducted fieldwork chose to submit their financial report notwithstanding that their income rarely met this threshold. They chose to report anyway, and adopted a suite of comprehensive accounting practices like universal receipting for all but anonymous donations, because they considered them 'best practice'. Assuming that the financial flows involved here are all compliant with sanctions and other discrete laws, there is a temptation to describe the *Sharīʿa* operating in the 'shadow' of state law, and relatedly, to describe the *khums* as a 'private' legal arrangement perfectly compatible with Australian financial regulation.[79] In a longer historical context, we might also see Zain's choice as consistent with Abdullah Saeed's suggestion that Muslims in Australia are intuitively liberal secularists simply wishing to carry on their religion without bothering the state.[80]

Yet we have learned from Robert Cover that 'to inhabit a *nomos* is to know how to *live* in it'.[81] Herein, the more interesting analytical question is the *nomos* that cradles my interlocutors' practical reasoning and guides their use of the *khums*. One ought to ask why Zain (who was, not incidentally, quite assiduous about his personal obedience to the *Sharīʿa*) did not consider his decisions outside of the law at all. We also need to understand why, for organisations like the Islamic Centre mentioned above, submitting their audited books had become what they considered a quite necessary part of 'common sense' (in their terms) or 'know-how' (in Cover's terms). Herein, Zain's decision should be understood as an act of prudence not outside of the law but rather within a tradition conceived as cosmologically ordered towards more excellent

[77] Here I am drawing loosely on Salvatore's approach to classical Islamic civilization: Armando Salvatore, *The Public Sphere: Liberal Modernity, Catholicism, Islam* (Palgrave MacMillan, 2007); Salvatore, *The Sociology of Islam: Knowledge, Power and Civility* (n 48).
[78] See Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge University Press, 2000).
[79] The expressions of 'in the shadow of the law' and 'private' are descriptions offered respectively by Voyce and Possamai (n 73) 343 and Black and Hosen (n 68) 423.
[80] Saeed (n 5).
[81] Cover (n 32) 6 (emphasis in original).

practice.[82] My research has also showed how a legality of rigorous prudence with the Imam's money also recursively forms the *marāji*ʿ and their organisations. Recall that the *marāji*ʿ emerge through the practical consensual actions of the global Shia community. My interlocutors in Sydney suggested that the rigorous prudence of best practice accounting would become the hallmark of the senior clerics. In other words, the conduct of auditing described within the Australian regulatory system will become part of the Shia *nomos*. 'The best *marāji*ʿ will do this', Zain reflected. Zain said this after describing the financial propriety of the first Shia Imam, Ali. Upon finding a suspicious discrepancy in the treasury, the Imam had said 'I will get that money back, even if it means going down into real property …' Zain then drew the link between this commitment to propriety and his enemies' opposition to him. 'This is why they hated him, they fought against him'. In the Shia tradition there can be no stronger affirmation than the practice of an Imam, figures who are considered, in a word, to *personify* the Quran. As an index of the superior character of the clerics who adopt them, auditing practices would literally form the *marāji*ʿ of the future, shaping the apex and chrysalis of *khums* law.

A compliance mechanism, like that of the annual financial report stipulated under the ACNC regime, is capable of bearing more than one legal meaning. First, the act of reporting is compliant with the Australian statute.[83] It denotes, in other words, the coincidence between practice and theory, action and rule, natural existence and legal meaning. This is the analysis of law in terms of what Foucault calls the 'juridical subject', where questions of behaviour relate to compliance with an external rule.[84] But, second, in the Shia community the same act of reporting indexes a *khums* stakeholder's relative probity as a trustee of the Imam's money. That is, the act can be taken as 'meaning' something else entirely, according to the 'schema' of the Shia tradition. This is one component of the legal plural situations that Santos also calls 'interlegality': the convergence of intersecting legal orders even in one site or person.[85] This is a more fruitful way to think about the *Sharīʿa* than suggesting it falls in the 'shadow' of state law. Here there is a complex dialogue and interaction of state and *Sharīʿa* legal arrangements, both of which retain an integrity.

But I want to suggest that for my interlocutors the legal aspects of this act exceed the 'meaning' attributed to it by a schema or external rule. For Hans Kelsen, emblematic of the mainline positivist jurisprudence, and further demonstrating the assumptions made within a narrow account of legal pluralism, a process or behaviour is 'legal' because of the *meaning* (in other words, the conceptual 'schema') attributed to it by a code or other instrument.[86] One can see the affinity between this way of thinking about law and the private/public dichotomy, as (crudely expressed) a meaning will usually be either a private right or a public obligation. But for my interlocutors, the legality of this act has to do with the material quality of its participation in a cosmology of excellence. Practices like receipting and financial auditing substantially *participate* in a material and cosmologically embedded legality.

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[82] On prudence (or 'phronesis') in the classical Islamic tradition, see Salvatore, *The Public Sphere: Liberal Modernity, Catholicism, Islam* (n 82).
[83] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) sub-div 60-C.
[84] Michel Foucault, *The Hermeneutics of the Subject: Lectures at the Collège de France, 1981-1982* (Picador, 2006).
[85] Santos (n 45).
[86] 'That which makes the process into a legal (or illegal) act is not its factuality, not its natural, causal existence, but the objective significance which is bound up with it, its meaning. Its characteristically legal meaning it receives from a norm whose content refers to it. The norm functions as a schema of meaning': Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts' (1934) 50 *Law Quarterly Review* 474, 479.

A *khums* receipt physically traces the flow of finance and *Sharīʿa* trust that constitutes the global Shia clerical hierarchy. It moves from hand to hand, from *marjiʿ* through intermediary to the *khums* payer, and so marks the refracting context of money, rules, authorisation, and hierarchy. The receipt exemplifies the *khums* exhaustion of the idea of a 'private' *Sharīʿa*: it moves through a pathway of legal roles, recognising individual choices, jurisprudential and moral excellence, transnational institutions, and national regulatory bodies. Davies makes the theoretical point like this: 'Plural legality is… not simply a reflection of plural human subjectivities and their constructions… but the consequence of law being intrinsically a material social dialogue in process'.[87] The empirical point is this: the Shia *nomos* holds these characters, these actions, and these physical artefacts (receipts, accounting books, and the *khums* money itself) to be existentially 'better'. This is why Zain and others argued that the *marājiʿ* of the future will adopt the highest standards of accounting and auditing practice. These practices will register who is the most just and knowledgeable cleric.

I have outlined elsewhere how the language and practices of *khums* administration and handling betrays a teleological orientation towards the 'better', 'higher level', and 'more perfect', an orientation that guides my interlocutors' practical reasoning.[88] Here I describe this orientation as one aspect of the *nomos* of the Shia tradition. These terms are not reducible to rhetorical devices or ideological fronts. Instead, they should be understood as indexes of the arrangement of Islamic legal authority. They denote a cosmology where materiality and actions are defined as more or less spatially close to God. Thus, the occupation of the lower level cleric, whose job is to respond to petitions for *fatawa* (legal opinions) on behalf of a *marjiʿ*, is a higher 'level' job than that of a street cleaner or labourer. Thus, a seminarian who collects the *khums* must display the necessary moral behaviour, and must 'always be better, more perfect, go further'. And for Zain, a lower risk of waste for his *khums* meant that it was 'better to send the money directly. The shorter the route the better'. And so the *marjiʿ*, although to a lesser degree than the Imams themselves, who are 'after God, the most perfect (*kāmiltarīn*)', is considered by many an embodiment of 'higher level'. He is, again, the most knowledgeable (*ʿārif*) and most just (*ʿādil*). This telos gives order to the refracting authorities, norms, and practices of legal interpretation and adjudication in the pious Shia community.

The same point can be made in a different way. As mentioned, the *Sharīʿa* offers a spectrum of responses to every possible question of law ranging from prohibited to obligatory. This spectrum organises the famous adage of enjoining the good and forbidding the wrong.[89] On the one hand, this spectrum can be seen as a way of using rules to attribute legal meaning to human action. For example, and prototypically, in Joseph Schacht these categories serve the same function as valid/invalid in a 'mature' (Western) legal system. Yet the *Sharīʿa* categories lack the legal formality and rational simplicity of the latter.[90] Their religiousness makes them rationally deficient. On the other hand, this spectrum might be seen as a way of arranging all actions according to their relative excellence, whereby the law is essentially concerned with effecting movement towards this excellence. With that in mind, consider again the structure of *taqlīd,* the *Sharīʿa* deference that I mentioned earlier. The doctrine of *taqlīd* is the opening issue and chapter in the key legal documents of the *marājiʿ*. It is functionally equivalent to a prolegomenon or to an analytical or definitional foreword. But instead of outlining the epistemological premises of a subsequent representation of legal knowledge, it sets out

[87] Davies (n 51) 7.
[88] Samuel D Blanch, 'Is the Subject the Locus of Muslim Ethics? Relocating the Ethics of Tithing in the Transnational Shi'i Community' (2022) 33 *Islam & Christian Muslim Relations* 145.
[89] See Cook (n 78).
[90] Schacht (n 3) 200–3.

deference as the mode of the law's projection, and a hierarchy of jurisprudential capacity as the structuring order of law. There is no ideology of transparency here.[91] Instead there is an organisation of legal knowledge according to relative capability. *Taqlīd* sets out the materiality of a hierarchy *inside* the law.

IV. CONCLUSION

The critical utility of legal pluralism for the study of Islamic law in Australia and other common law jurisdictions goes well beyond the analysis of the conflict of norms. Studies of Islamic law must look more closely at different sites of incommensurability, tension, and overlap. In this article I have showcased two such sites. I have shown refractions of legal authority and knowledge that do not coalesce around the state but rather around dispersed logics of practical excellence culminating in the most senior Shia jurists. That is, I have discussed the Shia legal tradition in terms of a different 'projection'. In this I have also described the logic of a legal tradition inclined towards excellence rather than representational compliance. I have shown, that is, the lineaments of legal civilization sustained by a different *nomos*. Questions of the justice and desirability of Islamic legal traditions, and the analytical question of a compatibility or modus vivendi between traditions, are important questions indeed. But in order to address them one needs a clear-eyed view about the nature of the encounter between these traditions. It is an encounter that will be misunderstood if approached through the terms of one side only.

[91] Compare to law's so called 'desiderata' in Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969).

Congregational Religious Trusts in Victoria's Churches of Christ

David Goodwin*
Paul Reynolds**

The leaders of 21st Century church organisations face the challenge of how to revitalise and rationalise their property holdings for contemporary usage while simultaneously respecting the history and sensibilities of congregations. In an increasingly secular society, many congregations have dwindling memberships and are no longer financially viable. The real estate portfolios amassed by Christian church movements and denominations, scattered around the metropolitan areas and country towns of Australia at prominent locations on main streets, are massively valuable. But who 'owns' the properties of churches in a religious denomination? Do the organising bodies of movements have the power to divest particular congregations of their church properties in service of the broader movement? These are questions that arouse passions and that have real contemporary significance for the 'business' of church. Answers differ depending on the characterisation of a church movement as hierarchical, presbyterian, or congregational. This article examines these questions by focusing on the case of the Churches of Christ in Victoria, a congregational movement whose properties are generally held under a variety of forms of trust. Relevant case law is reviewed. The implications of the history of the movement and its foundational principle of congregational autonomy are explained.

I. INTRODUCTION

In the early days of the congregational religious movements that flourished in the State of Victoria from the late nineteenth century onward, trusts were established to hold church properties. Nowadays the properties of these movements, dotted around the metropolitan areas and country towns of the State on main streets and prominent corner allotments, have a combined value of many hundreds of millions of dollars.[1] At the same time, in an increasingly secular society, many congregations have dwindling memberships and are no longer financially viable. This has led to the central organising bodies of these movements or denominations seeking to take hold of the properties of these dwindling congregations and to apply them to the purposes of the broader church.

But whether they can do so is another question. Unlike hierarchical churches such as the Roman Catholic Church, authority in congregational movements was structured to reside with the disparate Elderships of the various congregations, not in one central organisation. The autonomy of congregational movements is sometimes reflected in the trusts established to hold their property, which in many cases remain in effect.

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[1] For example, the land and buildings of the Brighton Church of Christ were estimated by the Board of that church in early 2021 to have a commercial value of $10 million. As of November 2021, the Churches of Christ movement in Victoria comprised 122 affiliated churches and agencies (excluding interstate affiliates).

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Disputes can arise when the legal owner of church property seeks to seize control of a congregation's land and buildings against the wishes of a congregation. Who 'owns' the properties of churches in a congregational church movement? Do the central organising bodies of congregational movements have the power to divest particular congregations of their church properties in service of the broader movement? These are questions that arouse passions and that have real contemporary significance for the 'business' of church.[2]

Over the decade from 1930 to 1941, the Victorian parliament established bodies corporate to hold the real property of the four main congregational religious movements active in the State at that time. It enacted the *Baptist Union Incorporation Act 1930* (Vic), the *Congregational Building Association Incorporation Act 1930* (Vic), *The Salvation Army (Victoria) Property Trust Act 1930* (Vic), and the *Churches of Christ Property Act 1941* (Vic) ('*1941 Property Act*').[3] This article focuses on the arrangements of the Churches of Christ in Victoria as a case study. It examines the *1941 Property Act*, which established the statutory body corporate known as the Properties Corporation of the Churches of Christ in Victoria ('Properties Corporation') to hold church property.

It will be argued that, where the Properties Corporation holds church property on the trusts established by the First Schedule of the *1941 Property Act*, it holds it for the purposes of the particular congregation of the Churches of Christ in question, not for the purposes of the Churches of Christ conceived as a whole. It will be noted that there are at least seven distinct pathways by which properties could fall under the First Schedule trusts of the *1941 Property Act*. Although this article examines a particular congregational movement, the same essential questions can arise in the context of denominations such as the Presbyterian and Baptist churches.

Interpreting the trusts applicable to the Churches of Christ in Victoria requires an understanding of four things: the history of the Churches of Christ movement, including the adherence of its members to the principle of congregational autonomy; the implications of a congregational — rather than presbyterian or hierarchical — polity; familiarity with the legislative scheme of the *1941 Property Act*; and the nature of the terms of relevant trust instruments. These topics are examined in Parts II, III, and IV below. In Part V, the interpretation of the First Schedule trusts of the *1941 Property Act* is addressed.

The research that underpins the article has been conducted in liaison with five congregations of the Churches of Christ located in Victoria, each of which has granted access to their archives, historical trust deeds registered with Victoria's Register of Successory Trusts, and detailed files of recent correspondence.

Where there is a trust instrument, the purposes of the trust depend on the intention of the settlor or settlors as manifested by the trust instrument at the time of the creation of the trust. But if there is no trust instrument, a Court can 'act on evidence of long practice in the relevant

[2] The Executive Officer of the Churches of Christ in Victoria & Tasmania Inc ('CCVT Inc') [the movement's coordinating religious body in Victoria] called for 'prayerful discernment to release the resources God has given us where they are most needed' and noted that 'we have all the resources needed to be obedient to God's call to be a 21st Century movement of the people of God': Churches of Christ in Victoria and Tasmania Inc, *Annual Report 2017*: *Stories and Statistics from 2016* (Report, 2017) 4. This message foreshadowed that 'the season CCVT [Inc] is now entering will at times call us to make difficult choices and decisions': at 4.

[3] These four statutes were described in summary in Victoria Legislative Assembly, *Parliamentary Debates*, 2 July 1941, 95 (Henry Bailey, Attorney-General) ('Bailey').

religious body'.[4] In the case of a congregational church, as Chief Justice Young of the New South Wales Supreme Court said in *Radmanovich v Nedeljkovic*, 'it is usually necessary to resort to what has been the custom in the church over a period of years in order to see what the original consensual compact must have been'.[5] Accordingly, this article begins with an outline of some history.

II. THE HISTORICAL CONTEXT

A. A Brief Early History of the Churches of Christ

The Churches of Christ in Australia are a product of the British Churches of Christ and the American Disciples. Both movements owe a common indebtedness to the visionary Thomas Campbell (1763–1854) and his son Alexander Campbell (1788–1866), whose theology was dominated by a vision of a reunited Church and the cause of Christian unity. Thomas Campbell's *Declaration and Address* became the charter of a new movement of non-denominational Christian churches that stressed reliance on scripture and few essentials.[6] Their approach was based on the entire abandonment of everything in religion for which there could not be produced a divine warrant. Encapsulating this approach, Thomas Campbell said: 'Where the Scriptures speak, we speak; and where the Scriptures are silent, we are silent.'[7]

Churches of Christ in Britain came into being in 1842 at a meeting of over fifty separate congregations.[8] The enduring governance of these congregations sat with their own self-taught, unpaid Elderships.

The Churches of Christ movement was established in Victoria in 1854, with ten members.[9] It gained a toehold in the midst of the population boom and social foment of gold rush Melbourne, driven by a staunch commitment to turn people from wayward lives bent on earthly riches.[10] Members aimed to live moral lives in accordance with the Scriptures, offering an example to those around them and doing good works in local communities. They disdained central authority, just as they objected to the consumption of alcohol or organ music in church.[11] Churches jealously guarded their local autonomy, disallowing any control beyond the local congregation.[12]

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[4] *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641, 667 (Young CJ in Eq). See also *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Dobrijevic* (2017) 94 NSWLR 340, 387 (Payne JA).

[5] *Radmanovich v Nedeljkovic* (n 4) 670 (Young CJ in Eq).

[6] Lester McAllister and William E Tucker, *Journey in Faith* (Bethany Press, 1975).

[7] Graeme Chapman, *One Lord, One Faith, One Baptism: A History of Churches of Christ in Australia* (Vital Publications, 1979) 22.

[8] David M Thompson, *Let Sects and Parties Fail: A Short History of the Association of Churches of Christ in Great Britain and Ireland* (Berean Press, 1980) 17–20. See also Chapman (n 7) ch 3; Gordon Stirling, *Churches of Christ: Reinterpreting Ourselves for the New Century* (Vital Publications, 1999) 9. Some of the congregations that came into association had previously existed, for decades, as Scotch Baptist or independent churches.

[9] Bailey (n 3) 93–5.

[10] Chapman (n 7) chs 4, 6.

[11] The Surrey Hills Church of Christ congregation finally relented to pressure from some members to purchase its first organ in about 1920. The purchased item was sardonically described in a Jubilee Souvenir Programme published in 1940 as 'the accursed thing' — although seen as 'a mark of fidelity with some for many years'. The social issues that disturbed Churches of Christ at the start of the twentieth century included 'smoking, prize fighting, the football mania, card playing, gambling, the theatre, dancing, sexual impurity and divorce': Chapman (n 7) 103.

[12] Chapman (n 7) 16.

The initial incarnation of Victoria's Churches of Christ movement in the mid-nineteenth century was as a 'lay religious organisation without centralised authority' having 'deep roots in Nonconformist anti-clericalism' as practised in Great Britain at that time. Members of the British Churches of Christ who came to Victoria in the 1850s as individuals seeking business and personal opportunities brought with them 'the primitivist lay practice and congregational polity of their home churches.'[13]

The movement experienced strong growth in its early decades. Although Australian Churches of Christ were set up by migrants from British Churches of Christ, they were nurtured by evangelists from the United States.[14] Membership grew nearly twentyfold in the forty years to Federation to the point that, in the 1901 Australian census, Churches of Christ had more adherents than the Salvation Army, Brethren, and Seventh-day Adventists.[15] Between 1907 and 1930 the number of members in Victoria jumped from 7,441 to 13,122.[16] The movement was severely challenged by the Depression of the 1930s, but by 1941 the membership had stabilised at more than 12,000 dispersed across 115 congregations, with property holdings to match.[17]

Early fundraising for the acquisition of land and construction of church buildings occurred via the exertions and generosity of individual congregation members. There was no central resource upon which to draw. When new congregations were 'seeded' in (then) outer suburbs of Melbourne such as Surrey Hills in 1889 and Hartwell around 1920, this occurred via the patronage of older, already-established congregations.[18]

B. 'Unity in Diversity' and the Principle of Congregational Autonomy

While not always being of the same mind in matters of theology and practice, the network of congregations that comprised the early Churches of Christ movement in Victoria believed that unity based on some 'simple' foundational principles was more important than homogeneity of thought and practice. Affirmation of these foundational principles enabled congregations to hang together as a movement despite their awareness they would not always hold the same opinions on matters of scripture or theology, and not always follow the same practices in matters of church life, worship, and governance. Churches of Christ championed the principle of 'unity in diversity' and came to regard their differences as enriching and their ability to hang together as a strength.

In practice, this unity in diversity was manifested on the basis of another foundational value, the autonomy of the local congregation. Echoing the cry 'in essentials, unity; in non-essentials, liberty; in all things charity (grace)', the founding leaders forged a movement anchored in values of personal faith (status of faith is between the individual and God and not subject to determination by or judgement of other individuals or church councils), individual interpretation of scripture (each person, with due regard to the traditions of the Church and the wisdom of fellow believers, has the right to discern their own understanding of scripture in its

[13] Kerrie Handasyde, 'Pioneering Leadership: Historical Myth-Making, Absence, and Identity in the Churches of Christ in Victoria' [2017] (June) 41(2) *Journal of Religious History* 235, 236.
[14] Stirling (n 8) 4.
[15] Handasyde (n 13) 237.
[16] Chapman (n 7) 111,141.
[17] Bailey (n 3) 93.
[18] Patronage for the formation of the Surrey Hills church came from the Carlton and Hawthorn congregations.

application to their life), communal discernment of the mind of God (the mind or will of God is best discerned in a community of the faithful where diverse opinions and understandings are welcomed, respected, and heard in seeking a common mind), and congregational autonomy (communities of faith have the right to order their own life and determine their own local practices).[19]

Thus, congregational autonomy is a long-held and deeply anchored tenet of the Churches of Christ. This was not 'independence' of the local congregation in a literal sense — it was recognised that the autonomous congregations were, in fact, interdependent. They may not have thought alike or acted or looked alike — diversity was championed — but they held together on the basis of the aforementioned 'essentials'. The principle of unity in diversity was asserted as a core value of the movement.

Congregations were resourced to shape their own lives and practices by an interplay of rigorous scholarship, attention to tradition, dialogue within the community of churches, and individual discernment. This rarely resulted in homogeneity of thought and practice, but it set foundations for diversity, as congregations were afforded the right to order their own lives.

The founders of the Churches of Christ believed a congregational polity to be consistent with New Testament practice and viewed denominational bodies as an ungodly innovation. In lingering accord with this sentiment, a majority of congregations of the Churches of Christ in Victoria in the first half of the twentieth century were fiercely opposed to 'denominationalism'.[20]

Over the years, the autonomous congregations came to recognise that there were some functions and responsibilities that could best be exercised in cooperation with others, so 'conferences' were formed to undertake, on behalf of and with accountability to the congregations, joint ventures such as ministry education, local and overseas mission, group insurance, and regulatory compliance. The conferences so formed were always appointed by and accountable to the congregations, and their *raison d'etre* was understood as being to resource the mission of the local church. These were not easy steps for the movement to take — the 1842 meeting which created the Churches of Christ in Britain had debated whether cooperation between congregations was ever justified, but decided that solely for the purposes of evangelism, it was justifiable for a committee to be formed. The conferences were required to report to the congregations at least annually.

Churches of Christ have never had a written 'creed'. However, 'those things most surely believed among us' included: 'biblical baptism' via the immersion in water of penitent believers; the observance of the Lord's Supper weekly; and 'the church's ministry as a mutual ministry of all believers'.[21] Throughout their history, Churches of Christ have pleaded for the unity of all Christians by restoring 'New Testament Christianity'. Their 'threefold reason for existence' was the belief that world evangelism was being seriously hindered by the divided state of the church, the belief that this division was contrary to the will of God so that

[19] The description of the 'Unity in Diversity' principles outlined in this section has drawn upon (with permission) an unpublished essay, written in 2020 by David Brooker, a former State Minister of Churches of Christ in South Australia and the Northern Territory and current Senior Minister of The Avenue Church of Christ, Surrey Hills.
[20] Chapman (n 7) ch 9.
[21] Stirling (n 8) 8.

denominationalism must be ended, and belief in the need to set aside traditions and divisive creeds and get back to 'primitive Christianity' as found in the New Testament.[22]

One of the clearest expositions of the central principles underpinning mid twentieth-century Churches of Christ thought was an interpretation stated in 1980 by E Lyall Williams, an eminent former Principal of The College of the Bible and State President of Churches of Christ in Victoria and Tasmania:

> Churches of Christ hold regular conferences and appoint conference committees to care for co-operative enterprises. In keeping with the congregational principles these committees may act in an advisory capacity only, and make recommendations to a local congregation without exercising any legislative power. … The great principle of congregationalism appears to be self-determination in local enterprise. However, congregationalism should not be confused with absolute independency, much less with irresponsible individualism. … The whole community never overrides the local community and the latter never ignores the former, the congregation being conditioned by the consideration of the good of the whole community and the latter being conditioned by the rights of the congregation.[23]

The Australian Churches of Christ movement has maintained overt adherence to the principle of congregational autonomy throughout the majority of its history. Debates within Churches of Christ about whether it is a 'movement' or a 'denomination' have waxed and waned but the available evidence suggests that at the key points of significance to this article, such as around 1917 and 1941, the anti-denomination view was strong in Victoria.

The sentiment gained expression in the trust deeds of particular congregations, such as that of the Surrey Hills church, which provides in its cl 15:

> In all matters relating to the internal government of the said church the same shall be conducted on congregational principles namely the members for the time being shall have full and uncontrolled power to manage and arrange all their internal or church affairs whether regarding the suspension or exclusion of members, the election suspension or dismissal of Elders Deacons, or otherwise howsoever (except only in cases by these presents otherwise specially provided after) according to their own interpretation of the Holy Scriptures.[24]

III. *RADMANOVICH V NEDELJKOVIC* AND THE SPECTRUM OF CHRISTIAN CHURCHES: HIERARCHICAL, PRESBYTERIAN, CONGREGATIONAL

In the 1871 United States Supreme Court case *Watson v Jones*,[25] Miller J saw that church trusts might be of three types: (1) where the founder expressly laid down the rules of a new church; (2) where the donor gave funds to an existing independent congregation owing fealty to no higher authority; or (3) where the gift was to an ecclesiastical body which was sub-ordinate to some general church organisation.

[22] Stirling (n 8) 3.
[23] E L Williams, *Churches of Christ: An Interpretation* (Vital Publications, 1980) 47.
[24] Surrey Hills Trust Deed (1917). This deed, which remains on foot, was declared over the properties of the Surrey Hills church on 17 June 1917 and registered on Victoria's Register of Successory Trusts on 25 April 1918.
[25] *Watson v Jones* 80 US 679 (1871).

The Supreme Court of New South Wales case *Radmanovich v Nedeljkovic* concerned a dispute between two factions of members of the Serbian Orthodox Church over control of property for church and school buildings at Elanora Heights in Sydney. One faction (the defendants) was aligned to the church hierarchy and sought declarations the property was held on trust 'for the religious and charitable purposes of the Serbian Orthodox Diocese of Australia and New Zealand being part of the Serbian Orthodox Church having its See in Belgrade, Yugoslavia.' The other faction (the plaintiffs) sought declarations they were entitled to hold that property on trust for the First Serbian Orthodox Church School Community St Sava Warriewood-Mona Vale 'without being bound by directions made under the power and authority of the Bishop of the Diocese of Australia and New Zealand of the Serbian Orthodox Church'.[26] Chief Justice Young observed that the judgment of Miller J in *Watson v Jones* led to a classification of churches into three broad categories: hierarchical, presbyterian, and congregational, with the classification representing a sliding scale of autonomy.[27]

The basic question for determination in *Radmanovich v Nedeljkovic* was whether the trusts affecting the relevant land were for the purposes of the Serbian Orthodox Church as a whole, or solely for the purposes of the local Church community, or otherwise. His Honour held that the trust was for the purposes of the Serbian Orthodox Church, rather than the Church community of Warriewood-Mona Vale, based on his interpretation of the particular Church constitution and trust arrangements that applied.

Earlier, in 1989, in *Attorney-General (NSW) ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association*, referring to *Watson v Jones,* Young J (as he then was) said:

> By hierarchical, Miller J meant a church which has superior clergy and in which the government of the church is committed to those superior clergy. Ordinarily a church which has bishops will fall into this class and this will be so notwithstanding that some governmental powers are given to clergy of inferior rank or to laity. … With a congregational model, the local congregation is the body which makes or unmakes the rules. … With [a hierarchical] church American courts would apply their 'neutral principles' one of which is that a strong presumption operates in favour of the property being the property of the national church not of a local parish. The fact that the physical property of the local church was purchased by the local congregation without any financial assistance from the parent body has no effect on this rule.[28]

Thus, Young CJ observed, there is a very large difference between a trust for a congregational church and a trust for an hierarchical church.[29] Within congregational movements, local congregations have the power to govern themselves; by contrast, in a hierarchical church the government of the church is vested in superior clergy and 'a court may presume a local church has relinquished all power to a hierarchical body which may, in some instances, frustrate the

[26] *Radmanovich v Nedeljkovic* (n 4) 646.
[27] *Radmanovich v Nedeljkovic* (n 4) 669–70 (Young CJ in Eq). See also *A-G (NSW) ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association* (1989) 37 NSWLR 293, 314–15 (Young J); *His Grace Metropolitan Petar v Kostovski* (Supreme Court of Victoria, Byrne J, 27 October 1997) 20.
[28] (1989) 37 NSWLR 293, 315. His Honour noted that the principles expounded in *Watson* had been reinforced in 1923 by *Hanna v Malick* 193 NW 798, 803 (Steere J) (Mich Sup Ct, 1923).
[29] *Radmanovich v Nedeljkovic* (n 4) 670.

actual intent or goals of the local church and deprive the local church of legal remedies that otherwise would or should be available to it.'[30]

Presbyterian churches are some way in between: local congregations enjoy some autonomy, but are subject to some level of control by the presbytery. The decision by members of the Congregational Church to integrate with Methodists and Presbyterians to form the Uniting Church of Australia in 1977 required the embrace of a more collective or Presbyterian polity. In *Wylde v Attorney-General (NSW) ex rel Ashford*, Dixon J (as he then was) said:

> Ultimately of course the question whether strict adherence to the formularies and ceremonies of the Church is involved in the performance of the trusts of property must depend upon the trusts themselves. These are to be ascertained from the trust instruments and from an examination of the history, doctrines and organization of the community or body whose religious purposes they serve.[31]

It can be difficult to ascertain the purposes of a trust for a congregational church, as they often commenced informally. In cases where it is problematic to ascertain the purposes it is usually necessary to resort to what has been the custom of the church over a period of years in order to see what the original consensual compact must have been.[32] Young CJ saw that it was necessary to 'determine the fundamental principles of the trust': 'What must be discovered is the intention of the founders … If there is evidence as to the founder's intention, that prevails. If there is insufficient evidence, then the court can act on evidence of long practice in the relevant religious body and from that deduce what the founders' intention was.'[33] An example was given of this principle in operation:

> [I]f one finds that the founders' intention was to have a church which was completely free from any control by the Pope, yet otherwise accepted the doctrine and tenets of the Church of Rome, there might well be a valid charitable trust to that end but even if there had been evidence of 30 to 50 years recent practice whereby the hierarchy in Rome in fact appointed priests and otherwise controlled the Church that would not be enough to displace the original trust.[34]

Thus, whilst recent practice and usage in a church movement may have some relevance in determining disputes, as Romilly MR said in *Attorney-General v Gould*, 'usage is only important [in a legal point of view] where there is an absence of any instrument of endowment, or where the words of the instrument produced are ambiguous[;] in such cases[,] usage constitutes presumptive evidence of the trusts on which the charity was established; but when the deed of foundation is produced, and is precise, that presumption is excluded.'[35]

The typology of churches outlined by Young CJ in *Radmanovich v Nedeljkovic* has important implications for the ownership and control of church properties. In a hierarchical church there is a strong presumption that property is held on trust for the purposes of the broader church and

[30] *Aglikin v Kovacheff* 516 NE (2d) 704, 708 (McMorrow J) (Ill Ct App, 1987).
[31] (1948) 78 CLR 224, 289–90.
[32] *Radmanovich v Nedeljkovic* (n 4) 670 [171] citing *A-G v Pearson* (1817) 3 Mer 353; 36 ER 135 and *A-G v Murdoch* (1852) 1 De G M & G 86; 42 ER 484.
[33] Ibid 642, 667.
[34] Ibid 667 [152]. These principles were said to be deduced from cases such as *Craigdallie v Aikman* (1813) 1 Dow 1; 3 ER 601 and *Foley v Wontner* (1820) 2 Jac & W 245; 37 ER 621.
[35] *Attorney-General v Gould* (1860) 28 Beav 248; 54 ER 452 [485].

not for those of a local 'parish' or congregational unit. Implicitly, the opposite presumption obtains for a congregational church.[36]

IV. THE LEGISLATIVE SCHEME OF THE *1941 PROPERTY ACT*

A. The Rationale for Legislation Establishing a Churches of Christ Properties Corporation

Over the first ninety years of their existence in Victoria the Churches of Christ came to hold properties on a variety of trusts. In the Second Reading speech for The Churches of Christ in Victoria Property Bill in 1941, Attorney-General Bailey said that the Churches of Christ at that time consisted of '54 church properties in the metropolitan area, and 61 church properties in country districts, valued in the aggregate at more than £200,000' and that 'some of these properties are held by the committee which is proposed to be incorporated, and others by various other trusts'.[37]

By 1941 the properties of a sizeable bloc of 53 congregations were vested in the trusteeship of a Church Extension Properties Trusts and Bequests Committee, which had been formed to act as the trustee for 'Church property on behalf of such of the Churches of Christ in Victoria as might desire such Committee to act in such capacity'. The Committee oversaw a 'Churches of Christ in Victoria Church Properties' trust deed put in place in 1914 and registered as a Successory Trust in 1915.[38] Essentially, this provided a mechanism for new churches to be seeded from donations and bequests of the faithful.

Additionally, as of 1941, there were 62 churches (30 in metropolitan locations and 32 in country towns) whose properties were held under a range of trust deeds which tended to install esteemed Elders from within their own congregations to act as trustees.[39]

With so many disparate trusts in existence, problems with succession of title began to arise. The Elderships of most congregations were ageing and many early Elders had passed away. In addition, it was difficult to borrow money on church securities unless the trustees personally became liable for loans, and many church members were unwilling to expose their personal assets to liability for mortgage debt. The administration of trusts required sophisticated skill sets on the part of trustees. The principal purpose of the *1941 Property Act* was to avoid inconveniences arising from the succession of trustees and to facilitate dealings with church properties (especially given the need for trustees to become personally liable for loans secured against church properties).[40]

The experience of the Baptists and Salvation Army had shown that an Act of Parliament could overcome the ongoing need to register the deaths and resignations of trustees and appointments of new trustees in the office of the Registrar-General. It was observed in Attorney-General Bailey's Second Reading speech that there were well-established precedents for seeking

[36] *A-G (NSW) ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association* (1989) 37 NSWLR 293, 315 (Young J).
[37] Bailey (n 3) 93–4.
[38] See *Churches of Christ Property Act 1941* (Vic) Preamble ('*1941 Property Act'*).
[39] These calculations were arrived at by comparing the overall number of churches referenced in the Second Reading speech of Attorney-General Henry Bailey (n 3) with the listing of congregations and properties set out in the Second Schedule of the *1941 Property Act*.
[40] Bailey (n 3) 94.

parliamentary action to procure the establishment of a corporation to deal with the properties of a religious movement.[41]

B. The *Baptist Union Incorporation Act 1930* and *1941 Property Act* Compared

There are similarities, but also two notable differences, between the structure and wording of the *1941 Properties Act*, as eventually enacted, and the *Baptist Union Incorporation Act 1930* (Vic).

The first difference is that, unlike the Churches of Christ, the Baptists moved early to prescribe doctrines and tenets and to depict themselves as a denomination. The Preamble to the 1930 Act commenced with the characterisation of the Baptist Union constituents as:

> [C]ertain persons being members of the religious denomination called Baptists in the State of Victoria and holding as their general tenets the doctrines set forth in the declaration of Baptist Union Trusts 1892 which is deposited with the Registrar-General of Victoria at Melbourne and … [who] have formed an Association called 'The Baptist Union of Victoria'.

By contrast, the distinctive contributions of the Churches of Christ movement were seen (from a 1938 example) to be 'their stress on the sinfulness of division, their opposition to creedal inflexibility, the priority they give to personal loyalty to Jesus Christ over assent to doctrine, and their belief in the need for an historical study of the Bible.'[42] The Churches of Christ were known in their early years for speaking out against Pentecostal revivalism, 'being unhappy with the Calvinistic doctrine of the spirit's irresistible influence' believing instead, 'that a resurgence of religion would result from the faithful propagation of the original gospel, rather than through the intense prayer of men who were unwilling to publish the whole evangel.'[43]

A second difference is that the entity which was incorporated by the *Baptist Union Incorporation 1930* Act in order to deliver succession of titles for the Baptists was their umbrella Association itself, the Baptist Union of Victoria ('BUV'). This entity performs a myriad of other functions beside property management, including administration of religious matters; unlike the Churches of Christ Properties Corporation, which is charged with specific responsibilities for property protection and property dealings.

The BUV, which has been assiduous in its efforts to centralise control of the properties of its movement, has highlighted its success in transitioning virtually all its properties to what it terms 'Schedule B' trusts. According to the BUV website in 2021: 'Currently only three of the BUV churches own property directly or have it held by trustees other than the BUV.'[44]

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[41] Bailey (n 3) 95.

[42] C Irving Benson, Minister of the Wesley Church, writing of the Churches of Christ movement in the *Melbourne Herald* in September 1938, quoted by Chapman (n 7) 153.

[43] Chapman (n 7) 152.

[44] The modern-day expression of the approach of the Baptist Union on their website has reflected concerns about the kinds of decisions that may be made by individual congregations: 'Schedule B restrictions on property are designed to ensure that the fruit of the labours of past generations is protected from misuse by the current generation in order to ensure provision of property for future generations.' Baptist Union Victoria, 'Incorporation and Property Ownership' (Web Page, June 2021) See <www.buv.com.au/resources/incorporation-properties/>.

C. The Mechanisms of the *1941 Property Act*

The *1941 Property Act* came into effect on 30 September 1941. The preamble recited some of the relevant history of property holding in the Victorian Churches of Christ, including that an umbrella association named 'The Churches of Christ in Victoria' was formed in 1913, and that a pre-existing committee named the 'Church Extension Committee' (subsequently re-named in 1925 the 'Church Extension Properties Trusts and Bequests Committee') was the holder of real and other properties for some churches.[45]

The immediate effect of the *1941 Property Act* was to convert the Church Extension Properties Trusts and Bequests Committee to a corporate body with perpetual succession, re-named as the Properties Corporation of the Churches of Christ. This was distinct from the Association of the Churches of Christ in Victoria. Section 3(1) of the Act, under the heading 'Incorporation', provided:

> There shall be a body corporate by the name of 'The Properties Corporation of the Churches of Christ' consisting of the Trustees appointed by or under this act; and the body corporate shall have perpetual succession and a common seal and under that name may sue and be sued, prosecute and defend, and take and suffer all other proceedings in all courts civil or criminal and it shall be lawful for the body corporate to take, purchase, receive, hold, and enjoy real and personal property of any description whatsoever and also to sell, grant, exchange, convey, demise, reserve, or grant easements over or otherwise dispose of or deal with either absolutely or by way of mortgage, charge, lien or other encumbrance any of the property real or personal which may at any time belong to the body corporate and generally to exercise subject to the provisions of this Act all powers incidental to a body corporate.

The new Corporation was empowered to perform the trusts previously performed by the Church Extension Property Trusts and Bequests Committee. It was provided that all real property formerly held upon the 1914 Church Extension Committee trusts would in the future be 'held by the body corporate upon the trusts set forth in the First Schedule'.[46]

There were three Schedules to the Act. In addition to the First Schedule, which detailed the terms of trust, there was a Second Schedule which contained 'a list of all the real property now held by the present trustees of the said Successory Trust upon the trusts set forth in the said Deed of Trust'.[47] The 53 congregations whose properties were held under the Church Extension Deed of Trust were listed (24 in metropolitan and 29 in country areas), with 67 individual property deeds itemised.[48]

Section 4 of the *1941 Property Act* headed 'Vesting of Property' provided that:

> Immediately after the passing of this Act all real property set forth in the Second Schedule to this Act shall vest in the body corporate for an estate in fee simple without the necessity for any conveyance transfer or other assurance of such property and all such real property shall subject to the provisions of this Act be

[45] *1941 Property Act* (n 38) Preamble.
[46] See ibid.
[47] See ibid.
[48] Bailey (n 3) 93–4.

> held upon the trusts set out in the First Schedule to this Act and the Register of Successory Trusts shall thereupon as to such real property be closed and the Registrar of Titles shall upon production to him of any documents of title indorsed under section sixteen of the *Religious Successory and Charitable Trusts Act 1928* [(Vic)] cancel such indorsement.

The actual wording of the First Schedule trusts, for the most part, closely mirrored the provisions of the predecessor 1914 Church Extension Trust Deed.[49] However there were two significant deletions. These are discussed in Part V below.

Section 8 of the First Schedule trusts was headed 'Churches Enabled to Appoint Corporation Despite Terms of Trust Deed'. This addressed the possibility of additional existing congregations deciding at a later date to bring their properties under the trusteeship of the Properties Corporation on the terms of the newly established First Schedule trusts, rather than their own pre-existing terms of trust. For this significant step to occur explicit actions needed to be taken by the congregations requesting such a trusteeship. A resolution was required to be passed at a Special Meeting by a two-thirds majority of the members of the congregation after following prescribed notice procedures and utilising a particular form of words detailed in the Third Schedule to the Act. The resolution needed to specify the details of any real property being brought under new trusteeship and state that the body corporate incorporated by the 1941 Act should be the trustee and that 'such real [*or* personal *or* real and personal (*as the case may be*)] property should forthwith be vested in such body corporate to be held by it upon the trusts set forth in the First Schedule to the said Act.'[50]

Section 7 of the *1941 Property Act,* headed 'Churches enabled to appoint corporation to act as trustee under existing trusts', offered a more straightforward procedure if a congregation decided to appoint the Properties Corporation as trustee under the congregation's pre-existing trust terms. It provided that:

> It shall be lawful for the trustee (if only one) or the trustees (if more than one) of any Church of Christ in Victoria or the members of any such Church in all cases with the consent of the body corporate to appoint the body corporate to act as trustee of any real or personal property held by such trustee or trustees or held on behalf of such members and upon acceptance by the body corporate of any such appointment the real or personal property shall be transferred, conveyed, assigned or otherwise assured to the body corporate and such real or personal property shall thenceforth be held upon the same trusts as those upon which such property was previously held but so far as such trusts *do not extend to or are not inconsistent with* the trusts set forth in the First Schedule to this Act such property shall be held by the body corporate upon such last-mentioned trusts.[51]

The italicised words 'do not extend to or are not inconsistent with' indicate that, to the extent that the terms of a pre-existing trust deed that remains on foot are inconsistent with the First Schedule trusts, the terms of the trust deed prevail over the First Schedule.

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[49] Clauses 1 to 10 of the 1914 Trust Deed and the First Schedule of the *1941 Property Act* broadly map to one another. Clauses 12, 13, 14, 15, 16, 18, 19, and 20 of the 1914 Deed were largely functional and were therefore not repeated in the *1941 Property Act*. Clause 8 of the 1914 Trust Deed became s 10 of the *1941 Property Act*.
[50] See 1941 *Property Act* (n 38) ss 8 (1)–(6), Third Schedule.
[51] Ibid s 7 (emphasis added).

Section 9 allowed the Properties Corporation to act as trustee for the property of 'any committee, organization or department of Churches of Christ in Victoria or … the Federal Conference of Churches of Christ in Australia'.

Other provisions of the *1941 Property Act* were more mechanical. For example, s 3(2) provided that the maximum number of individual trustees comprising the Properties Corporation should be seven, and s 3(9) specified that the power of appointment of trustees of Properties Corporation should reside with the annual general meeting of the 'Conference' (i.e., the Association). Sections 18 and 19 conferred powers to borrow, mortgage, charge, sell, and convey trust properties. Section 10 provided a mechanism for the Properties Corporation, with the consent of the Conference, to transfer, convey, or assign property to defined persons, subject to relevant trusts.

D. Ascertaining the Applicable Trusts for a Given Property: Seven Pathways

The regime of the *1941 Property Act* established, or permitted, at least seven distinct ways in which properties could be subject to trusts of various forms. Under four of these pathways, properties could fall under the First Schedule trusts of the Act.

First, by virtue of s 4, there were the properties of the cluster of churches named in the Second Schedule to the *1941 Property Act*, which had formerly been subject to the trust administered by the Church Extension Properties Trusts and Bequests Committee. The transition of their trusts to the terms set out in the First Schedule was immediate, although it was incumbent on the new trustee (under s 4 of the *1941 Property Act*) to liaise with the Registrar of Titles to attend to closure of indorsements on documents of title under s 16 of the *Religious Successory and Charitable Trusts Act 1928*. As noted earlier, out of the total of 115 congregations active in 1941, 53 congregations had properties itemised in the Second Schedule of the Act (24 metropolitan and 29 rural), representing a little less than half the Churches of Christ operating in Victoria at the time.

Second, a mechanism was created in s 8 of the Act to allow, by passing special resolutions adhering to the form of words prescribed by the Third Schedule, for congregations which had been in existence prior to 1941 to 'opt in' to making their properties subject to the First Schedule trusts. For the trust arrangements of these 62 congregations to alter, and for their properties to become subject to the First Schedule trusts, it was necessary for the steps delineated in s 8 of the Act, including adoption of the special resolution wording specified in Schedule Three to the Act, to be followed. Although numerous congregations elected to appoint the Properties Corporation to be their trustee in the years following 1941, it is unclear how many of them took the step of abandoning their pre-existing trust deeds. Congregations within the Churches of Christ had an historical predisposition towards maintaining control of their own affairs. A likely factor in the initially slow take-up of the opportunity to appoint Properties Corporation as trustee was that suspicion of central authority persisted within the movement.

Third, properties acquired for committees, organisations, or departments of the Churches of Christ were placed under the First Schedule trusts by means of s 9 of the Act.

Fourth, congregations becoming new Affiliates of the Churches of Christ have, since 1941, been able to elect to place their properties under the First Schedule trusts.

At least three additional pathways exist by which the properties of affiliated churches can be subject to trusts, or alternative ownership arrangements, other than the First Schedule trusts.

Category five consists of congregations which have become new affiliates of the Churches of Christ in recent decades but which have been permitted to participate in the Conference of Churches of Christ without being required to subject their properties to the First Schedule trusts. In recent times, CCVT Inc has articulated policies that 'new Affiliates holding property under their own legal structure may continue to hold property titles and not transfer the titles to Prop Corp' and that 'new Affiliates that transfer property titles to Prop Corp can elect to take the property back should disaffiliation occur within five years'.[52]

Sixth, there are congregations whose properties were subject to pre-1941 trust deeds that never moved to appoint Properties Corporation as their trustee and have continuously preferred to maintain other trustee arrangements.[53]

A seventh category is the group of congregations that, in the decades after 1941, chose to appoint the Properties Corporation to be their trustee under the s 7 mechanism of the *1941 Property Act* which provides for properties thereafter to be held 'upon the same trusts as those upon which such property was previously held'.[54]

Although there is an absence of definitive information, it can be reasonably surmised that the majority of properties of Churches of Christ congregations in Victoria now fall into one of the first, second, or seventh categories above. The applicable terms of trust will be a matter for detailed analysis in each particular case.

V. FIRST SCHEDULE TRUSTS: FOR CONGREGATIONS OR THE MOVEMENT?

For those congregations whose properties have become subject to the First Schedule trusts of the *1941 Property Act* (via the first or second pathways referred to in Part IV(D) of this article), a question arises whether the First Schedule establishes a trust for the purposes of the congregation of the Churches of Christ only, or for the purposes of the Churches of Christ in Victoria.

CCVT Inc and the trustees of the Properties Corporation have asserted in recent years that properties held by Properties Corporation in trust are held for the purposes of 'the movement'. A 'Guide to Churches of Christ Trusteeship' published on the CCVT website in early 2023 illustrated the differences of viewpoint that can arise between central organising bodies and congregations. This document contended that 'historical issues' such as 'inherent difficulties of churches holding titles and raising finance to secure and develop property' are 'still inherent in the nature of church trusteeship today'. The Guide outlined a particular interpretation of the *1941 Property* Act. It stated 'Prop Corp is the incorporated trustee under the Act on the basis that church titles are held for the Churches of Christ in Victoria under the terms of trust

[52] CCVT Inc Circular to Affiliates dated 16 August 2021 communicating 'an Affiliation policy which was recently approved by the CCVT board', at p 8. See June 2021 CCVT Affiliation Policy. See <https://churchesofchrist.org.au/wp-content/uploads/2022/11/CCVT-Affiliation-Policy-approved-June-2021.pdf> (Accessed 4 August 2023).

[53] At least one of the Churches of Christ established in the Victorian goldfields region in the 1850s has taken this approach.

[54] Available evidence suggests there are strong arguments that three of the churches consulted in the development of this article, though they appointed Properties Corporation to be their trustees in 1944, 1947, and 1952 respectively, could be considered examples of the use of this mechanism.

contained in the Act, which is different to holding assets as a fixed beneficial trust directly for respective churches.'[55]

However, as noted earlier in Part III, in the absence of a trust instrument, a presumption arises in the case of a congregational church that property is to be held on trust for the purposes of a particular congregation, not the broader church but, where there is a trust instrument, the question must ultimately be resolved by reference to the terms of that instrument. Of course, construing the terms of the First Schedule involves the construction of a legislative instrument. The characterisation of the Churches of Christ as congregational is reflected in the remarks of Attorney-General Bailey in the Second Reading speech for the Bill that became the *1941 Property Act.* Consistently with the purposes of the *1941 Property Act*,[56] the Attorney-General said:

> The Bill does not attempt to incorporate the religious body as has been done with other denominations …. All churches and all members of the churches are free to continue their mode of worship and to conduct their own church affairs in the same manner as previously; the Bill does not in any way interfere with or restrict the rights of any church or the members of any church.[57]

Against that background, cl 2 of the First Schedule of the *1941 Property Act* provides that the Properties Corporation holds property on trusts:

> To permit and suffer any such church, chapel, or place of religious worship or religious teaching or other buildings erections and improvements with the appurtenances to be used, occupied, and enjoyed as and for a place of religious worship or religious teaching *by a congregation* of the religious body known as the Churches of Christ in Victoria and for public meetings and services held according to the general rules and usages for the time being of the Churches of Christ in Victoria and for Sunday or other school purposes and for such other purposes as may from time to time be determined by the body corporate. *The congregation of any church may be allowed to manage its own internal affairs*.[58]

The italicised parts of cl 2 suggest that each congregation is intended to enjoy a significant degree of autonomy in the management of its own affairs, consistent with a trust for the objects of a specific congregation. However, cl 5 of the First Schedule empowers the Properties Corporation to deal with land 'in such manner as the body corporate shall think fit'. Clause 5 also provides that '[t]he body corporate shall apply the money to arise from any such sale, disposition, or exchange as aforesaid … for such purposes of the Churches of Christ in Victoria as the body corporate may decide'. The power does not appear to be limited, in terms, to the purposes of the congregation in question.

The wide powers for the disposition of property conferred by the First Schedule, and cl 5, should be construed in the light of the purposes of the Act as disclosed in the Second Reading Speech.[59] So construed, cl 5 gives wide powers to the Properties Corporation as legal owner

[55] See CCVT Inc, 'Trusteeship' <https://churchesofchrist.org.au/for-churches/property-and-finances/property-management/trusteeship/> (Accessed 4 August 2023).
[56] See Part IV(A) of this article.
[57] Bailey (n 3) 94.
[58] Emphasis added.
[59] *Interpretation of Legislation Act 1984* (Vic) s 35(a). See Part IV(A) of this article.

of the properties to deal with them. That is consistent with the Act's purpose of facilitating the management of property. However, those powers should not be construed as enlarging the charitable and religious purposes of the trust on which the properties are held, consistently with the Act's purposes of allowing each congregation to conduct its own affairs in the same manner as previously, and not to interfere with the existing rights of any congregation or its members. This interpretation is consistent with the principle of legality: that the legislature is not to be taken to infringe rights without clear words.

As foreshadowed earlier, when in 1941 the Churches of Christ's 1914 Church Extension Trust Deed was replaced by the First Schedule trusts,[60] there were two significant clause deletions. The first of these was cl 17 of the 1914 Trust Deed, which had said:

> Any conference of the Churches of Christ in Victoria shall with respect to any properties for the time being subject to the trusts hereof have power by special resolution to make, alter, add to, or rescind and vary all or any resolutions or regulations as to:-
>
> a. The doctrine to be taught in the said chapels or places or public … [words lost].
> b. … [words lost].
> c. All matters appertaining to the selection, remuneration and removal of Evangelists, preachers or ministers.
> d. Meetings of congregations and proceedings and powers thereof and the management of the internal affairs of churches.

The omitted cl 21 of the 1914 Trust Deed had said:

> The trustees may with respect to any church properties for the time being subject to this trust (but without obligation so to do) take cognisance of any breach or non-observance of the doctrines or regulations or resolutions of a conference of the Churches of Christ in Victoria and the said Conference may remove from any office in connection with the said religious body any person or persons responsible for or participating in or conniving at any such breach or non-observance.

The non-inclusion of these former trust terms, cls 17 and 21, would have reflected dialogue as to key principles amongst church leaders during 1941. Their absence from the First Schedule (likely a conscious decision of the leaders at the time to not have these terms incorporated in the new First Schedule trusts) suggests that, in 1941, it was considered inappropriate by the majority of the movement for doctrinal and related conditions to be placed around properties the Bequests Committee was making available for congregational use. These clause deletions, which reflect the principle of congregational autonomy, are relevant in construing the First Schedule trusts.[61]

For the reasons set out above, the better view is that the First Schedule establishes a trust for the purposes of the local congregation in question, not the Churches of Christ broadly speaking (if it can be said that the Churches of Christ *have* a set of consistent purposes).

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[60] See above (n 38) and accompanying text; above (n 46) and accompanying text. The scanned copy of the 1914 Trust Deed accessed from Victoria's Register of Successory Trusts has not preserved the words noted below as '[words lost]'.

[61] As to the significance of the original consensual compact, see the passage from *Radmanovich v Nedeljkovic* (n 4) 670. See above (n 5) and accompanying text.

VI. CONCLUSION

The real estate portfolios amassed by Christian church movements are massive. An understanding of how such properties are held, and in particular of the scope of the religious and charitable purposes on which they are held, is therefore of the utmost importance. Ignorance of the charitable trusts on which church properties are held is a potential source of significant legal risk: both for the trustees of those properties and for the congregations themselves.[62] Depending on the trust in question, a local church might unlawfully refuse to hand over church property to a central church body, or a central church body might unlawfully seize property that belongs to a local congregation.

It has been observed that the scope of charitable purposes will be informed by whether the church denomination or movement in question is hierarchical, presbyterian, or congregational. In the case of hierarchical churches, it is presumed that church property is held for the purposes of the wider church. The reverse presumption obtains in the case of congregational churches. Against that background and the history of the Churches of Christ movement, it has been argued that the church properties held on the trusts established by the First Schedule to the *1941 Property Act* in Victoria are held for the purposes of the particular congregation, and not those of the broader Churches of Christ.

[62] For the implications of trustees of church property misapplying trust assets in breach of trust, see *The Presbyterian Church of Victoria Trusts Corporation v Anstee, Nuske, Evans, Holman, Kerss & Ors (No. 1)* [2016] VSC 297 (7 June 2016). The Supreme Court of Victoria found that beneficiaries had been 'impoverished' through various breaches of trust by the trustees in relation to unauthorised expenditure of over $11 million. They were entitled to bring a personal claim against the trustees and to assert beneficial ownership in the assets acquired in breach of trust.

Is Leaving God to Make the Choice an Answer to a Charge of Murder by Reckless Indifference to Human Life or Manslaughter? A Case Study of Queensland Criminal Law

Andrew Hemming*

The criminal law punishes persons who commit a guilty act with the requisite guilty mind. This article considers the criminal responsibility of parents and other persons who claim not to have possessed a guilty mind but instead left the choice to God as to whether a child survived the withdrawal of medication. The critical question is whether a jury can infer actual knowledge that death would probably result when a person consciously avoids considering the ramifications of withholding lifesaving medicine, such as insulin to a child with diabetes, and instead hands moral responsibility to God. This article explores whether murder under the circumstance of reckless indifference to human life, defined as an act committed with an awareness that death will probably arise from that act or omission, encompasses a defendant whose awareness is affected by a religious belief that his or her religious faith required God to make the decision of life or death. To avoid the need for the jury to infer actual knowledge from the objective circumstances of the case, the argument is made for an objective test for recklessness based on the natural and probable consequences test. The Crown's options in framing the charges to be laid and the reasons why a particular choice may be made are considered, particularly in relation to manslaughter. In addition, this article examines the reach of criminal responsibility where the parents of the child are joined in prayer in their own home by members of the religious group to which the parents belong.

I INTRODUCTION

This article explores whether murder under the circumstance of reckless indifference to human life, defined as an act committed with an awareness that death will probably arise from that act or omission, encompasses a defendant whose awareness is affected by a religious belief that his or her religious faith required God to make the decision of life or death. This article will not focus on broad moral, philosophical, and theological matters, as in Australia there is no general common law or constitutional exemption for criminal acts done with religious motivations. Whether public policy should weigh religious values in determining criminal liability is outside the scope of this article. Instead, the article is concerned not only with the outcome of an on-going high-profile set of prosecutions in Queensland, the Elizabeth Struhs case (discussed below), but also the implications the Struhs case has for similar future cases where a sincere religious belief is invoked as a defence to criminal charges, particularly as it relates to unlawful child killings.

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In the Struhs case, a young girl with diabetes died after her parents (with support from their religious group) refrained from providing her with insulin due to the belief that God should determine whether the girl should live or die. The Struhs case is particularly noteworthy as a case study because until the definition of murder in the *Criminal Code 1899* (Qld) was widened in 2019 to include reckless indifference to human life, the only available charge for denying insulin to a dependent child with diabetes and delegating the moral responsibility of whether the child survived to God would have been manslaughter or an offence relating to the preservation of human life. This case will be used as a demonstration of the difficulty the Crown faces with a subjective test of proving the defendant had actual knowledge that death would probably result, especially where the defendant's subjective religious belief is that God will decide. There is an intersection between the facts in the Elizabeth Struhs case and the question of objectivity in the offence of reckless indifference to human life. The jury will have to determine whether, in the face of evidence that Elizabeth's parents (as well as members of the religious group to which they belonged) knew Elizabeth had diabetes and could die without insulin, their continued belief that God would decide whether or not to save Elizabeth amounted to conscious avoidance of the ramifications of their inaction.

At the heart of this case is the proposition that criminal law is concerned solely with earthly matters and that spiritual beliefs should play no part in determining the mental element of a crime. In other words, the argument is that religious beliefs are irrelevant in determining criminal responsibility. The counter argument is that the accused's beliefs about leaving God to decide whether or not to intervene affects whether the religious group was recklessly indifferent to human life, bearing in mind the test for the mental element of murder by reckless indifference is not an objective one such as the response of an ordinary reasonable person under the same circumstances.

However, the test for criminal negligence manslaughter is objective and probably reflects the decision by the Crown to downgrade the charge of murder to manslaughter for 12 of the 14 members of the religious group between the committal hearings in November 2022 and the court appearances in April 2023, which in turn adds weight to the argument that objective recklessness, meaning a reasonable person would have recognised the risk and avoided the behaviour, should be the test for murder by reckless indifference to human life, at least for murder or manslaughter offences against vulnerable children. This argument is reinforced when the admissions made by various members of the religious group at their committal hearings as to their knowledge that Elizabeth could die without insulin are taken into consideration (discussed in Part II below).

While it is acknowledged that objective recklessness blurs the distinction between the fault elements of recklessness and negligence, a striking feature of the *Criminal Code 1899* (Qld) is that in *Widgee Shire Council v Bonney*[1] Griffith CJ, the Code's architect, famously observed that 'under the criminal law of Queensland, as defined in the *Criminal Code*, it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which was the subject of much discussion'. Consequently, in the absence of any definitions of fault elements in the *Criminal Code 1899* (Qld), the legislature can insert an explicit fault element for any specific offence, unless it chooses to leave the interpretation to the courts.

[1] (1907) 4 CLR 997, 981.

As Goode has pointed out, 'the Griffith Codes did not, and do not, deal with the (for them) entirely novel idea of recklessness'.[2] This means that the judiciary is obliged to turn to the common law for an interpretation of recklessness. The leading case is *Crabbe v The Queen*[3] where the High Court held that for common law reckless murder it was necessary for the prosecution to prove that the accused was aware of the probability of death and not merely the possibility of death. This is why the test for recklessness in Queensland is subjective and involves probable foresight of harm rather than possible foresight of harm, which is further discussed in Part III below.

The distinction between probable and possible foresight of death may assist the reader in understanding the title of this article, namely, whether leaving the choice to God is an answer to a charge of murder by reckless indifference to human life. The question reduces to the meaning of an awareness of the probability of death in the context of the Crown having to prove such an awareness beyond reasonable doubt. The concern is that wilful blindness, which is equated to actual knowledge, may be used to shield an accused from the Crown being able to prove the fault element of subjective recklessness beyond reasonable doubt.

The jury may reason either: (1) that the accused did *not* have a probable foresight of death, because otherwise he or she would not have left the choice to God (which may amount to wilful blindness), or (2) that the accused *did* have the foresight to recognise death was a probable or possible outcome and therefore decided to place the human outcome in God's hands. In the former case the Crown must prove actual knowledge beyond reasonable doubt, while in the latter case the Crown must prove the fault element of subjective recklessness beyond reasonable doubt.

As will be discussed in Part III and Part IV, the Crown decision to charge 12 of the 14 members of the religious group with manslaughter leaves open the prospect that the Crown will prosecute the manslaughter charges by either of two routes under the *Criminal Code 1899* (Qld)[4]: Chapter 27 'Duties relating to the preservation of human life' (specifically either s 285 'Duty to provide necessaries' or s 286 'Duty of person who has care of child') or s 303 'Manslaughter'.

In Part III, the four elements that the prosecution must prove beyond reasonable doubt to convict a person of murder by reckless indifference to human life[5] will be discussed. The focus will be upon the fourth element, namely, that in committing the acts or omissions which caused the victim's death, the defendant knew or was aware those acts or omissions would probably cause the victim's death. This is central to addressing the topic of whether leaving God to make the choice over life or death is an answer to a charge of murder by reckless indifference to human life.

As will be discussed, the requisite knowledge may be inferred from the circumstances in which death occurred and from the proven conduct of the defendant before, at the time of, or after the acts or omissions which caused death. In deciding whether the defendant possessed the requisite knowledge, the jury will be instructed that they can consider anything the defendant has said of relevance as to his or her knowledge. The prosecution will seek to prove from other relevant witnesses, such as Elizabeth's doctor (who will be able to give evidence as to her

[2] Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 159.
[3] (1985) 156 CLR 464.
[4] *Griffiths v The Queen* (1994) 125 ALR 545, 547 (Brennan, Dawson and Gaudron JJ).
[5] See s 302(1)(aa) *Criminal Code 1899* (Qld).

medical history and how long she had been dependant on insulin) that Elizabeth's parents were aware of the implications of failure to provide Elizabeth with insulin. The purpose of the evidence is to allow the jury to draw the inference from objective evidence as to their state of knowledge that her parents and members of the religious group were actually aware of the probability of Elizabeth's death.

Thus, depending on the strength of the evidence, the outcome for each defendant in the Elizabeth Struhs case may yield a different verdict. For example, during the committal hearing it was revealed that Elizabeth's mother, Kerrie Struhs, 'had served jail time for failing to get medical assistance for her child in 2019 and had been released the month before Elizabeth's death'.[6] This leaves open the likelihood that prior to the trial the prosecution will apply to the court to adduce evidence of Kerrie Struhs's previous conviction on the grounds it constitutes similar fact evidence, namely, that there is a 'striking similarity' or 'underlying unity' between the facts in the previous conviction and the facts in the case before the court.[7] The significance of introducing similar fact evidence is to buttress the Crown's case in proving beyond reasonable doubt that the accused had actual knowledge of the probability of death.

Murder and manslaughter are alternative verdicts under the *Criminal Code 1899* (Qld).[8] As will be seen in Part III, if the prosecution fails to prove the fourth element of murder by reckless indifference but can prove beyond reasonable doubt the first three elements, namely, that the defendant unlawfully (without authorisation, justification, or excuse)[9] caused the death of the victim, then the defendant will be convicted of manslaughter.[10] However, if in this case the Crown fails to secure convictions for murder by reckless indifference, this raises the question of whether a more objective test should be inserted into s 302(1)(aa) of the *Criminal Code 1899* (Qld).

In light of the subjective nature of the test for murder by reckless indifference, by virtue of the fault element of actual knowledge, the author makes the argument for an objective test for recklessness based on the natural and probable consequences test adopted in *Director of Public Prosecutions v Smith*,[11] which is similar to objective '*Caldwell*'[12] recklessness where the defendant does not foresee the relevant risk but a reasonable person would have foreseen it, or the defendant gives no thought to the relevant risk.

In Part IV, the four elements required to sustain a charge of failure to perform the duty of providing the necessaries of life under s 285 of the *Criminal Code 1899* (Qld) will be examined, an offence with which both of Elizabeth's parents were originally charged in addition to the crime of murder. This involves consideration of the elements of proof for criminal negligence

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[6] David Chen, Georgie Hewson, and Anthea Moodie, 'Fourteen People are Accused of Murdering Elizabeth Struhs: Here's What We Know about the Case Against Them', *ABC News* (online, 26 November 2022) <https://www.abc.net.au/news/2022-11-26/elizabeth-struhs-alleged-murder-and-the-14-people-to-stand-trial/101671336>.

[7] On similar fact evidence, Queensland follows the common law and the leading High Court case is *Pfennig v The Queen* (1995) 182 CLR 461. The test is that propensity or similar fact evidence is admissible if its probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused: at 485. See also *HML v The Queen* (2008) 235 CLR 334.

[8] See s 576 *Criminal Code 1899* (Qld).

[9] See ibid s 291.

[10] See ibid 303(1) which states: 'A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.'

[11] [1961] AC 290.

[12] *The Queen v Caldwell* [1982] AC 341 ('*Caldwell*').

manslaughter. The subjective nature of reckless indifference to human life means that the test for the mental element of reckless murder differs from the objective test for the mental element of manslaughter by criminal negligence. However, as will be discussed, there is a link between murder by reckless indifference to human life under s 302(1)(aa) and s 285 because s 285 may be an aid in inferring the defendant knew of the probable consequences of the omission to perform a duty to a person unable to provide the necessaries of life for himself/herself.

In Part V, the reach of criminal responsibility is discussed in the context of parties to offences, and in particular s 7 of the *Criminal Code 1899* (Qld) which deals with principal offenders and s 8 which covers offences committed in prosecution of common purpose. Both s 7 and s 8 operate by way of deeming provisions whereby persons who come within the reach of the sections are deemed to have committed the offence. It will be seen that the Crown can tailor the charges under s 7(1)(a)–(d) to account for the nature of each of the accused's participation according to whether he or she aided, enabled, counselled, or procured another person to commit the offence.

The analysis in this article would broadly apply to any jurisdiction in Australia, although it is acknowledged that the *Criminal Code 1899* (Qld) does contain distinct provisions reflecting 19th century jurisprudence.[13] Such broad application is reflected in common law reckless murder applying in South Australia and Victoria,[14] while New South Wales,[15] Queensland, and Tasmania[16] have statutorily adopted murder by reckless indifference to human life. It matters not that the person had no wish to cause death. Manslaughter[17] and accessorial criminal responsibility[18] apply in slightly different forms in all Australian jurisdictions. For example, if the case had occurred in New South Wales, the Crown would have the choice between murder by reckless indifference to human life under s 18(1)(a) of the *Crimes Act 1900* (NSW) or manslaughter under s 18(1)(b) of the *Crimes Act 1900* (NSW), which, as with s 303(1) of the *Criminal Code 1899* (Qld), is a residual section: 'Every other punishable homicide shall be taken to be manslaughter.' This analysis will also be conducted based on an examination of all possible avenues open to the prosecution under the *Criminal Code 1899* (Qld).

II FACTUAL BACKGROUND TO THE ELIZABETH STRUHS CASE

The genesis for this article was the laying of murder or manslaughter charges against a total of 14 members of a religious group in Toowoomba after the death on 7 January 2022 of an eight-year-old girl, Elizabeth Struhs. Elizabeth had Type I diabetes and Queensland police allege she was denied insulin over a period of five days by her parents in the belief God's will prevails and God makes the decision over life and death. In effect, the parents, and by association the

[13] For example, s 23 'Intention – motive', and ch 27 'Duties relating to the preservation of human life' (ss 285–290).
[14] The fault element for common law reckless murder is knowing that it was probable that death or really serious injury would result (*R v Crabbe* (1985) 156 CLR 464).
[15] *Crimes Act 1900* (NSW) s 18(1)(a).
[16] *Criminal Code 1924* (Tas) s 157(1)(c). The Tasmanian version of reckless murder extends knowledge to 'ought to have known', and the section uses 'likely' rather than probable. 'Likely' and 'probable' are synonymous and can be contrasted with something that is merely 'possible' (*R v Crabbe* (1985) 156 CLR 464).
[17] *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 18(1)(b); *Criminal Code 1983* (NT) s 160(c); *Criminal Code 1899* (Qld) s 303(1); *Criminal Code 1924* (Tas) s 156(2)(b); *Criminal Code 1902* (WA) s 280; *Nydam v The Queen* [1977] VR 430.
[18] *Criminal Code 1995* (Cth) s 11.2(1); *Criminal Code 2002* (ACT) s 45(1); *Crimes Act 1900* (NSW) s 346, s 351B; *Criminal Code 1983* (NT) s 43BG(1); *Criminal Code 1899* (Qld) ss 7–8; *Criminal Law Consolidation Act 1935* (SA) s 267; *Criminal Code 1924* (Tas) s 3(1); *Crimes Act 1958* (Vic) s 181, ss 323–5, ss 324A–324B; *Criminal Code 1902* (WA) ss 7– 8.

religious group, delegated their moral responsibility to God as they believed it was not their decision to make. All 14 persons charged do not believe they are guilty of any crime because they believe in God and that God in his wisdom knows best. They do not believe they are responsible for Elizabeth's death because they believe God chose to take her. The religious group's answer to the charges is that while they had knowledge of diabetes and insulin, God is capable of all things and is omnipotent.

Another unusual aspect of the case is that following court appearances in April 2023, in addition to murder charges against Elizabeth's father, Mr Jason Struhs, and the leader of the religious group, Mr Brendan Stevens, 12 other people have been charged with manslaughter[19] by virtue of s 7 'Principal offenders' and s 8 'Offences committed in prosecution of common purpose' of the *Criminal Code 1899* (Qld).

The Toowoomba Magistrates Court was told in November 2022 at the committal hearings for the 14 members of the religious group charged in connection with Elizabeth's death that Elizabeth's cause of death was diabetic ketoacidosis and that symptoms would have included excessive urination, thirst, abdominal pain, vomiting, weakness, lethargy, altered levels of consciousness, incontinence, and finally coma until respiratory failure and death.[20] Thus, Elizabeth's death would have been slow and painful.

As will be discussed in Part III, at trial the Crown will rely on the jury inferring actual knowledge that death would probably result from the withholding of insulin from both the objective circumstances and from comments made at the three committal hearings (held at the same time to accommodate the 14 defendants) by members of the religious group. For example, Mrs Kerrie Struhs revealed in a police statement that she knew her daughter's life depended on Elizabeth being given insulin; this was read out in court by Magistrate Kay Philipson during Mrs Struhs's committal hearing: '[Mrs Struhs] goes into detail about being told by her husband that if Elizabeth did not get her insulin, she would die.'[21] Similarly, Magistrate Kay Philipson said that the evidence supported the murder charge against Mrs Loretta Stevens, a member of the religious group, because she knew Elizabeth had diabetes and could die without insulin. '[Mrs Stevens] was aware Mr Struhs planned to and did stop giving Elizabeth insulin. She thereafter went to the Struhs's residence to care for Elizabeth and saw and could describe Elizabeth's deterioration.'[22] On the day before Elizabeth died, Ms Keita Martin, another member of the religious group, assisted in caring for Elizabeth, including taking Elizabeth to the toilet. Magistrate Louise Shephard stated at Ms Martin's committal hearing that Ms Martin had observed 'Elizabeth could not walk, was not talking and her eyes were closed'.[23]

Furthermore, at the committal hearing for Mr Brendan Stevens, the leader of the religious group, Magistrate Clare Kelly told the court: 'The religious beliefs held by the religious community include the healing power of God and the shunning of medical intervention in

[19] Padraig Collins, 'Fourteen Members of Religious Cult will Face Trial over Death of Eight-year-old Girl who was Allegedly Taken Off her Diabetes Medicine so she Could be "Healed by God"', *Daily Mail Australia* (online, 6 April 2023). At the committal hearing in November 2022 all 14 members of the religious group were charged with murder, but for 12 members the charge of murder was downgraded to manslaughter in April 2023. <https://www.dailymail.co.uk/news/article-11944629/Religious-group-face-trial-death-girl-allegedly-taken-medicine-healed-God.html>.
[20] Chen, Hewson, and Moodie (n 6).
[21] Ibid.
[22] Ibid.
[23] Ibid.

human life.'[24] For another member of the religious group, Ms Acacia Stevens, 'it was a trial of faith and they trusted God would heal Elizabeth'.[25] Lachlan Schoenfisch told the court at his committal hearing that the religious group followed the Bible which 'did not say anything about calling doctors'.[26]

Members of the religious group did not believe their actions created any criminal responsibility, as exampled by the evidence of Ms Therese Stevens at her committal hearing, because she believed Elizabeth would rise again and there was no malicious intent behind her actions. 'We did not kill her, there was no hate behind it all. She had a sickness and she died of it. We expect in his time, [God] will rise her again, and I think the charge of murder is false and does not apply to us.'[27] Another member of the religious group, Mrs Samantha Schoenfisch, told the court at her committal hearing: 'At no point was anyone intending any sort of harm to Elizabeth or any sort of pain or anything, and absolutely no indifference — the charge of indifference I find disgusting.'[28]

III Elements to be Proved for Murder by Reckless Indifference to Human Life

In 2019, the Queensland Government introduced legislation that followed the example set in New South Wales by expanding the definition of murder to include reckless indifference to human life. Understanding the elements of murder by reckless indifference to human life is the key to addressing the topic of this article, namely, whether leaving the choice to God is an answer or defence to the charge. The Explanatory Notes to the Criminal Code and Other Legislation Amendment Bill 2019 (Qld) gave the following background as to the reasons behind the proposed expanded definition of murder in the *Criminal Code 1899* (Qld).

> Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent even where the death is due to physical abuse …
>
> Including recklessness as an element of murder in section 302 of the *Criminal Code* will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill. This change, depending on the circumstances of the particular case, will apply across the board to not just include recklessness in relation to the deaths of children but will be applicable to any person, including other categories of vulnerable persons such as the disabled and the elderly.[29]

Thus, while the focus of the expanded definition of murder was to address community concerns that offenders who physically abused children were too often being convicted of manslaughter

[24] Ibid.
[25] Ibid.
[26] Ibid
[27] Ibid.
[28] Ibid.
[29] Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 (Qld) 2. <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-101>. The Bill also amended s 324 of the *Criminal Code 1899* (Qld) to increase the maximum penalty for failure to supply necessaries under s 285 of the Code from three years' imprisonment to seven years' imprisonment and to reclassify the offence as a crime.

rather than murder, the reach of reckless indifference to human life was also intended to apply to any person, including other categories of vulnerable persons.

There are four elements that the prosecution must prove beyond a reasonable doubt on a charge of murder by reckless indifference to human life: 1) That [X] is dead; 2) That the defendant caused [X]'s death; 3) That the defendant did so unlawfully; and 4) That in committing the acts or omissions which caused [X]'s death, the defendant knew those acts or omissions would probably cause [X]'s death.

The focus here is on element 4, but it is necessary to briefly comment on elements 2 and 3. For element 2, the defendant caused [X]'s death, the well-known passage from the judgement of Burt CJ in *Campbell v The Queen*[30] is often quoted in support of the view that causation is a matter of common sense for the jury to determine.

> It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter.[31]

A person's conduct causes death if it substantially contributes to the death, where 'substantially' means by more than a trivial or minimal amount[32] but it need not be the sole cause or even the main cause of the victim's death.[33] The leading Australian case on the substantial cause test is *Royall v The Queen*,[34] in which two members of the High Court approved *Hallett v The Queen*[35] where the Full Court of the Supreme Court of South Australia stated:

> The question to be asked is whether an act or a series of acts … consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the beginning of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.[36]

In *R v Sherrington & Kuchler*,[37] the Queensland Court of Appeal followed the decision in *Royall* 'that a person causes the death of another if his act or conduct is a substantial or significant cause of death, or substantially contributed to the death'. Thus, in the Elizabeth Struhs case, the prosecution will have to prove beyond reasonable doubt that the withholding of insulin substantially contributed to her death, which the jury will be directed to decide as a matter of common sense based on the facts presented in court.[38]

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[30] *Campbell v The Queen* [1981] WAR 286.
[31] Ibid 290. See also *Timbu Kolian v The Queen* (1968) 119 CLR 47, 69 (Windeyer J).
[32] See *R v Lloyd* [1967] 1 QB 175, 176; *R v Biess* [1967] QR 470, 475.
[33] *R v Pagett* (1983) 76 Cr App R 279, 288 (CA).
[34] (1991) 172 CLR 378. Toohey and Gaudron JJ favoured the substantial cause test; Brennan and McHugh JJ favoured the reasonably foreseeable consequence test; and Mason CJ, Deane and Dawson JJ favoured the natural consequences test.
[35] *Hallett v The Queen* [1969] SASR 141.
[36] Ibid 149.
[37] [2001] QCA 105 [4] (McPherson JA).
[38] For a fuller discussion on causation, see Andrew Hemming, 'In Search of a Model Code Provision for Murder in Australia' (2010) 34 *Criminal Law Journal* 81, 85–7.

For element 3, the defendant unlawfully caused [X]'s death, 'unlawfully' means without authorisation, justification, or excuse under s 291 of the *Criminal Code 1899* (Qld). Authorisation refers to police officers in the performance of their duty; justification refers to a defence such as self-defence, or sudden or extraordinary emergency (sometimes known as the defence of necessity); and excuse refers to defences such as age,[39] compulsion, mental disorder, mistake of fact, and accident, where the defendant admits the criminal act but denies any criminal intent.

Clearly, in the Struhs case neither authorisation or justification apply, and there is very limited scope to argue an excuse defence. For example, the defence of honest and reasonable mistake of fact applies only to strict liability offences, which do not require the prosecution to prove a mental element on the part of the defendant in order to find him or her guilty. The court is only required to be satisfied the accused committed the act. The defence of honest and reasonable mistake of fact will succeed if the accused can demonstrate that he or she held a positive belief in a state of affairs that, had it existed, would render the accused's act innocent. Similarly, the defence of compulsion under s 31 of the *Criminal Code 1899* (Qld) does not extend to an act or omission which would constitute the crime of murder.

As mentioned in Part I, murder and manslaughter are alternative verdicts under the *Criminal Code 1899* (Qld).[40] If the Crown can prove the first three elements of murder by reckless indifference beyond reasonable doubt, in the event the Crown fails to prove the fourth element of murder by reckless indifference, then the defendant will be convicted of manslaughter in the alternative as the jury will be asked by the judge in his or her summing up to first decide on their verdict on the more serious charge of murder. This is so because manslaughter is treated as a residual offence under s 303(1) of the *Criminal Code 1899* (Qld), which states: 'A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.'

As previously observed in Part I, the Crown has the option of prosecuting the manslaughter charges by either of two routes in the *Criminal Code 1899* (Qld): s 285 'Duty to provide necessaries' or s 303 'Manslaughter': 'the crime of manslaughter can be committed either by a voluntary act which causes death in circumstances which do not amount to murder [s 303] or by criminal negligence [s 285]'.[41] If the Crown chooses the s 303 route and the Crown can prove an unlawful killing (the first three elements above), then the Crown would only have to exclude the excuse of accident under s 23(1)(b) of the *Criminal Code 1899* (Qld) by showing that the victim's death was reasonably foreseeable.[42] The two different routes for the

[39] See s 29 'Immature age' *Criminal Code 1899* (Qld).
[40] See s 576 *Criminal Code 1899* (Qld).
[41] *Griffiths v The Queen* (1994) 125 ALR 545, 547 (Brennan, Dawson and Gaudron JJ).
[42] Section 23(1)(b) *Criminal Code 1899* (Qld) states: '(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for - (b) an event that (i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence.' Note that the first part of (1) above refers to 'subject to the express provisions of this Code relating to negligent acts or omissions' and has been interpreted to relate to the duty provisions in ss 285–290 of the Code, thereby excluding the operation of s 23(1)(b) from those duty provisions: *Callaghan v The Queen* (1952) 87 CLR 115, 119 (Dixon CJ, Webb, Fullagar and Kitto JJ). For a fuller discussion of the unsatisfactory outcome of having two different standards of proof for manslaughter under the Code, see Andrew Hemming, 'The Patel Trials: Further Evidence of the Need to Reform the Griffith Codes' (2014) 38 *Criminal Law Journal* 218.

prosecution of manslaughter result from the exclusion of s 23(1)(b) above from the duty provisions contained in Chapter 27 (ss 285–90) of the *Criminal Code 1899* (Qld).[43]

For element 4, reckless indifference to human life is the doing of an act with the foresight of the probability of death arising from that act.[44] In some cases there may be little difference in moral culpability between doing an act with an intention to kill (or to inflict grievous bodily harm) and doing an act in the recognition that it would probably cause death.[45] For example, Douglas Crabbe drove his 25-tonne Mack truck at speed into the crowded bar of the Inland Motel at the base of Uluru in the Northern Territory on 18 August 1983. Five people were killed and sixteen seriously injured. Crabbe was convicted of reckless murder at common law as, under the circumstances of the case, the jury were able to infer that Crabbe was aware of the probability of death (not merely the possibility of death) despite Crabbe having pleaded memory loss at trial.

The High Court in *Crabbe v The Queen*[46] took the opportunity to discuss the doctrine of wilful blindness which the High Court recently confirmed in *Stubbings v Jams 2 Pty Ltd*[47] as follows:

> [165] In *R v Crabbe*, this Court defined the doctrine of wilful blindness in the following way:[48]
>
> > When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring.
>
> [166] In the same case,[49] the Court also referred with approval to the following description of the doctrine of wilful blindness by Professor Glanville Williams:[50]
>
> > A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

Thus, the High Court has not rejected the doctrine of wilful blindness or conscious avoidance but rather has equated wilful blindness with actual knowledge. For present purposes, it requires the jury to find that the accused in the Struhs case intended to cheat the administration of justice by refraining from obtaining final confirmation that Elizabeth was dying. For the defence, it

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[43] *Callaghan v The Queen* (1952) 87 CLR 115, 119 (Dixon CJ, Webb, Fullagar and Kitto JJ).
[44] *The Queen v Crabbe* (1985) 156 CLR 464; *Royall v The Queen* (1991) 172 CLR 378; *Campbell v The Queen* [2014] NSWCCA 175 [304].
[45] *Campbell v The Queen* [2014] NSWCCA 175 [311] (Simpson J) citing *The Queen v Crabbe* (1985) 156 CLR 464: 'The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm.'
[46] (1985) 156 CLR 464.
[47] [2022] HCA 6 [165]–[166] (Steward J). Footnotes have been inserted into the quotation to assist the reader.
[48] (1985) 156 CLR 464, 470 [165] (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[49] Ibid 470–1 [166] (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[50] Glanville Williams, *Criminal Law: The General Part* (Stevens, 2nd edition, 1961) 159.

will be necessary to convince the jury that the accused were not denying actual knowledge but had a religious belief that it was God's choice whether or not to save Elizabeth, at least to the extent that the Crown is unable to prove beyond reasonable doubt that the accused were recklessly indifferent to Elizabeth's deteriorating medical condition.

The following suggested judicial direction to the jury on the mental element for murder by reckless indifference to human life is taken from the *Criminal Trial Courts Bench Book* of New South Wales:[51]

> If, at the time [the accused] committed the act that caused the death of [the deceased], [he/she] foresaw or realised that this act would *probably* cause the death of [the deceased] but [the accused] continued to commit that act regardless of that consequence, then [the accused] would be guilty of murder.
>
> What is at the nub of this mental state is that [the accused] must foresee that death was a probable consequence, or the likely result, of what [he/she] was doing. If [the accused] did come to that realisation, but decided to go on and commit the act regardless of the likelihood of death resulting, and if death does in fact result, then [the accused] is guilty of murder. The conduct of a person who does an act that the person knows or foresees is likely to cause death is regarded, for the purposes of the criminal law, to be just as blameworthy as a person who commits an act with a specific intention to cause death.
>
> For this basis of murder, [the accused's] actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt. It is not enough that [he/she] believed only that really serious bodily harm might result from [his/her] conduct or that [the accused] merely thought that there was the possibility of death. Nothing less than a full realisation on the part of [the accused] that death was a probable consequence or the likely result of [his/her] conduct is sufficient to establish murder in this way.
>
> Again, you are concerned with the state of mind that [the accused] had at the time [he/she] committed the act causing death. What you are concerned about when considering the mental element of the offence of murder is the actual state of mind of [the accused], that is, what [he/she] contemplated or intended when [the act causing death] was committed.[52]

While the suggested direction uses the word 'act' rather than 'act or omission', nothing really turns on the distinction as in the Struhs case the word 'conduct' could be readily substituted. More importantly, the above suggested judicial direction to the jury uses words such as 'foresaw' or 'realised' or 'knows' or 'awareness' of the probability or likelihood of death to describe the mental element required to be proved beyond reasonable doubt for murder by reckless indifference to human life. However, there is a qualification in terms of 'nothing less than a full realisation' or 'actual awareness' on the part of the accused is required to be proved beyond reasonable doubt. This qualification refers to the mental state of the accused at the time

[51] Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (online; last retrieved August 2023) 1043 [5-6310] <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/murder.html>.
[52] Ibid 1043 [5-6310] (emphasis added). Author's emphasis to show that the use of 'probably' to interpret reckless indifference to human life in s 18(1)(a) of the *Crimes Act 1900* (NSW) is based on common law reckless murder as stated by the High Court in *Crabbe v The Queen* (1985) 156 CLR 464.

the conduct causing death was committed and reflects the subjective nature of the test for murder by reckless indifference to human life.

Following the introduction of s 302(1)(aa) 'Murder by reckless indifference' into the *Criminal Code 1899* (Qld), the *Queensland Supreme and District Court Benchbook* inserted an entry to assist judges in directing juries on this category of murder,[53] similar to the *Criminal Trial Courts Bench Book* of New South Wales. The Queensland Benchbook stressed the importance of emphasising to the jury that reckless indifference involves a subjective analysis.

> Reckless indifference to human life requires that the defendant must actually have known the death would *probably*[54] result from the defendant's acts or omissions and it is not enough that that danger may have been obvious to a reasonable person or to members of the jury.[55]

Where a subjective test[56] is applied, the Crown must prove that the accused had the requisite state of mind at the time he or she carried out the external element. Thus, the nub of the defence is that the accused did not possess actual knowledge of the probable death of [X], but as will be discussed in Part IV, the accused cannot rely on the defence of honest and reasonable mistake of fact as this is a defence that only applies to strict liability offences. However, the use of a subjective test is 'somewhat artificial as an accused, in many cases, will deny that he or she possessed the requisite state of mind necessary to commit the offence'.[57] Barwick CJ in *Pemble v The Queen*,[58] pointed out that the jury will normally have to infer the accused's state of mind from what the accused has actually done and the surrounding circumstances:

> The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind… that conclusion [as to the accused's state of mind] could

[53] *Queensland Supreme and District Court Benchbook*, Unlawful killing: Murder s 302(1)(aa) Murder by Reckless Indifference (January 2020) [No 183.1]–[No183.12] <https://www.courts.qld.gov.au/__data/assets/pdf_file/0008/641429/sd-bb-183a-unlawful-killing-murder-s-302-1-a-a.pdf>.

[54] Author's emphasis to show that the use of 'probably' to interpret reckless indifference to human life in s 302(1)(aa) of the *Criminal Code 1899* (Qld) is based on common law reckless murder as stated by the High Court in *Crabbe v The Queen* (1985) 156 CLR 464.

[55] *Queensland Supreme and District Court Benchbook* (n 53) [No 183.4], citing *Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 171 A Crim R 315.

[56] Colvin has described a subjective test of criminal responsibility as meaning that 'liability is to be imposed only on a person who has freely chosen to engage in the relevant conduct, having appreciated the consequences or risks of that choice, and therefore having made a personal decision which can be condemned and treated as justification for the imposition of punishment': Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) *Monash University Law Review* 197, 197. Colvin identified the alternative objective approach as 'measuring the conduct of an accused against that of some "ordinary" or "reasonable" person, placed in a similar situation [which] is "objective" because it does not depend on any finding that the accused's state of mind was blameworthy in itself': at 197.

[57] Jonathan Clough and Carmel Mulhern, *Criminal Law* (LexisNexis, 2nd ed, 2004) 17.

[58] (1971) 124 CLR 107.

> only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen.[59]

In Part IV, the elements of manslaughter by criminal negligence for failure to perform the duty of providing the necessaries of life under s 285 of the *Criminal Code 1899* (Qld) will be discussed. However, the *Queensland Supreme and District Court Benchbook* helpfully discusses the bridge between s 285 and murder by reckless indifference in terms of s 285 aiding in inferring whether the defendant knew of the probable consequences of the omission. This is because knowledge of a particular child's medical condition, such as insulin dependency, will aid the trier of fact to infer actual knowledge of the probability of death for the purpose of proving a reckless indifference to human life.

> If an alleged case of murder by reckless indifference by a parent or carer in respect of a child or person in care is founded upon a failure to provide the necessaries of life the potential application of s 285 (Duty to provide necessaries) may be considered.
>
> Relevant considerations might include the following:
>
> (a) Section 285 does not alter or substitute the need to prove the knowledge of probable consequence required to prove the murderous element of reckless indifference to life. It may however aid in inferring whether the defendant knew of the probable consequences of the omission, in that it was an omission to perform a duty owed to a person unable to provide himself or herself with the necessaries of life.
>
> (b) In *Koani v The Queen* (2017) 263 CLR 427 the High Court concluded a conviction for murder with intent to kill was incompatible with the unlawful killing being by way of criminal negligence per s 289 [Duty of persons in charge of dangerous things], because the requisite intent and acts or omissions did not coincide. Such incompatibility will not arise in the present context as long as the trial judge ensures … that the jury is unanimous as to which acts or omissions caused death and instructs the jury of the need to be satisfied the defendant had the requisite knowledge of probability of death in respect of every one of those acts and omissions.[60]

In the Struhs case, each of the omissions was the same, namely, the repeated failure to supply Elizabeth with insulin over a five-day period. More generally, the same logic as to the bridge between s 285 and murder by reckless indifference would apply to a parent who left a child in

[59] *Pemble v The Queen* (1971) 124 CLR 107, 120–1 (Barwick CJ). See also *R v Clare* (1993) 72 A Crim R 357, 369 and *R v Cutter* (1997) 94 A Crim R 152, 156–7 and 164–6.

[60] *Queensland Supreme and District Court Benchbook* (n 53) [No 183.5]–[No 183.6]. In *Koani v The Queen* (2017) 263 CLR 427, the appellant was charged with murder having pleaded guilty to manslaughter in accepting his failure to use reasonable care and to take reasonable precautions in his use or management of the gun was a gross omission to perform the duty imposed by s 289 'Duty of persons in charge of dangerous things' of the *Criminal Code 1899* (Qld). The prosecution declined to accept the appellant's plea in discharge of the indictment and at his trial the appellant was convicted of murder. The High Court held unanimously that the Queensland Court of Appeal erred in concluding that a criminally negligent act or omission could found a conviction for the offence of murder under s 302(1)(a) of the *Criminal Code 1899* (Qld).

a car with insufficient oxygen to breathe, or negligently (as opposed to intentionally[61]) starved a child to death.

The artificiality of the use of a subjective test referred to by Clough and Mulhern above[62] and the inference of the accused's state of mind referred to by Barwick CJ in *Pemble v The Queen*[63] above, could be readily overcome by the adoption of an objective test for recklessness based on the natural and probable consequences test adopted in *Director of Public Prosecutions v Smith*,[64] which is similar to objective *Caldwell*[65] recklessness where the defendant does not foresee the relevant risk but a reasonable person would have foreseen it. The unanimous decision of the House of Lords in *Director of Public Prosecutions v Smith*[66] adopted an objective test for criminal responsibility until replaced by statute.[67] The objective test was set out by Viscount Kilmuir who gave the sole judgment.

> [T]he sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[68]

In *Caldwell*,[69] Lord Diplock had ruled as follows:

> In my opinion, a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is 'reckless as to whether any such property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.[70]

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[61] See *The King v Macdonald and Macdonald* [1904] St R Qd 151, where Mr and Mrs Macdonald were convicted of the wilful murder of Mr Macdonald's 14-year-old daughter from a previous marriage in circumstances in which they were found to have intentionally starved the child to death, which constituted an omission to perform the duty imposed by s 285 of the *Criminal Code 1899* (Qld) to provide her with the necessaries of life. The court held that reliance on an omission to perform a duty under s 285 was not incompatible with proof of murder with intent.
[62] Clough and Mulhern, n 57.
[63] (1971) 124 CLR 107.
[64] *Director of Public Prosecutions v Smith* [1961] AC 290.
[65] *Caldwell* (n 12).
[66] *Director of Public Prosecutions v Smith* (n 64). In *Director of Public Prosecutions v Smith*, a policeman tried to prevent the defendant from driving off with stolen goods by jumping on the bonnet of the car. The defendant not only drove away at speed but also succeeded in dislodging the police officer by zigzagging. The policeman fell into the path of an oncoming vehicle and was killed. Smith's claim that he never intended to kill but only to shake the policeman off is 'a classic ruthless risk taker reaction': John Stannard, 'A Tale of Two Presumptions' (1999) 21 *Liverpool Law Review* 275, 277.
[67] *Criminal Justice Act 1967* (UK), s 8 provides that: 'A court or jury, in determining whether a person has committed an offence - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.' The decision in *DPP v Smith* [1961] AC 290 was treated as wrongly decided by the Privy Council in *Frankland v R* [1987] AC 576.
[68] *Director of Public Prosecutions v Smith* (n 64) 327, concurred in by Lord Goddard, Lord Tucker, Lord Denning, and Lord Parker of Waddington.
[69] *Caldwell* (n 12). Caldwell had done some work for the owner of a hotel as the result of which he had a quarrel with the owner, got drunk, and set fire to the hotel in revenge. The fire was discovered and put out before any serious damage was caused and none of the ten guests in the hotel at the time was injured. Caldwell was indicted on two counts of arson under s 1(1) and (2)a of the *Criminal Damage Act 1971*.
[70] Ibid 354 (Lord Diplock).

The above objective test for recklessness was overruled in *R v G*,[71] on the grounds that 'the model direction formulated by Lord Diplock is capable of leading to obvious unfairness … [which is] … the bedrock on which the administration of criminal justice … is built'.[72] Lord Bingham held that recklessness required a positive mental state of actual awareness both of the existence of the risk and of the unreasonableness of taking the risk.[73]

However, it can be seen from the cases of *DDP v Smith* and *Caldwell* that an objective test for recklessness has received powerful support in the past in the House of Lords, and such a test would serve to rehabilitate objective recklessness and avoid juries having to develop 'a split personality'[74] when weighing up combined subjective and objective tests, such as the test to be found in the definition of reckless in s 5.4(2) of the *Criminal Code 1995* (Cth).[75] Awareness of a substantial risk in s 5.4(2)(a) below is the subjective test while lack of justification to take the risk in 5.4(2)(b) is an objective test, which reflects that the definition of reckless is designed to be distinguished from negligence.

> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur;
>
> and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Thus, an objective definition of reckless indifference could be inserted into a new s 302(6) in the *Criminal Code 1899* (Qld) as follows:

> (6) For the purpose of sub-section 302(1)(aa) above, 'reckless indifference' is to be determined against the standard of what the ordinary responsible person would, in all the circumstances of the case, have contemplated as the natural and probable result of the act or omission.

Arguably, leaving God to make the choice as to whether a child lives or dies is an example of a ruthless risk taker having a 'wicked disregard of the consequences to life'.[76] This article argues that any tension between subjective and objective recklessness should be resolved objectively from the public policy perspective of meeting community expectations that defendants are not being sufficiently punished with the alternative verdict of manslaughter for unlawful child killings, especially given the level of trust between a parent and child.[77] This

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[71] *R v G* [2003] UKHL 50.
[72] Ibid [33] (Lord Bingham of Cornhill).
[73] Ibid [41] (Lord Bingham of Cornhill).
[74] Model Criminal Code Officers Committee, Parliament of Australia, *Fatal Offences Against the Person* (Discussion Paper, June 1998) assessing the ordinary person in the law of provocation: at 79.
[75] For a fuller discussion, see Andrew Hemming, 'Reasserting the Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests' (2011) 13 *University of Notre Dame Australia Law Review* 69.
[76] J H A MacDonald, *A Practical Treatise on the Criminal Law of Scotland* (W Green & Son, 1869) 89.
[77] See, for example, *Winner v The Queen* (1995) 79 A Crim R 528, a case where the appellant drove a car as close as possible to a child cyclist in order to frighten him. The appellant, having consumed a large amount of alcohol, was driving in a stolen car when he veered suddenly across two lanes of traffic and struck and killed a cyclist

policy position reflects the justification for the introduction of the reckless indifference to human life provision in s 302(1)(aa) in the *Criminal Code 1899* (Qld).[78]

Alternatively, if the concern is that objective recklessness must be weighed against the predominance of subjective fault for criminal law punishment, then one option would be to consider distinguishing between types of offences, such as the murder or manslaughter of children, as has happened with lowering the admission requirements of similar fact or tendency evidence for child sexual offences following the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[79]

IV Elements to be Proved for Manslaughter by Criminal Negligence for Failure to Perform the Duty of Providing the Necessaries of Life

Both of Elizabeth's parents were originally charged with failing to perform the duty of providing the necessaries of life to their daughter, in addition to murder by reckless indifference at the committal hearing in November 2022. Following court appearances in April 2023, Elizabeth's mother, Kerrie Struhs, now faces a manslaughter charge only. The Crown may choose to prosecute manslaughter in her case through failure to provide the necessaries of life to her daughter Elizabeth.

Section 285 'Duty to Provide Necessaries' of the *Criminal Code 1899* (Qld) is as follows:

> It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

As was explained by the High Court in *Callaghan v The Queen*,[80] the offences relating to the preservation of human life in the *Criminal Code 1899* (Qld), such as s 285 'Duty to provide necessaries', are expressed in terms of gross omission to perform that duty unconnected to criminal liability per se. For the trier of fact to arrive at a manslaughter conviction under s 303 of the Queensland Code, in conjunction with s 300,[81] following the s 285 route, a four-step process must occur.

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riding near the kerb. He then drove away. The proceedings were heard by the primary judge sitting alone. The Court of Criminal Appeal held that the trial judge was entitled to infer the requisite intent for murder on the basis of the objective evidence alone, given the relevant portion of the definition of murder in s 18(1)(a) *Crimes Act 1900* (NSW) is 'where the act of the accused … causing the death charged, was done or omitted with reckless indifference to human life'.

[78] Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 (Qld) (n 29).

[79] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) 105 [44]. As a result of these recommendations, in some jurisdictions which have adopted the uniform evidence legislation such as New South Wales, Tasmania, the Northern Territory, and the Australian Capital Territory, s 97A inserts a rebuttable presumption that tendency evidence has significant probative value for child sexual abuse prosecutions.

[80] (1952) 87 CLR 115, 119 (Dixon CJ, Webb, Fullagar and Kitto JJ).

[81] Section 300 *Criminal Code 1899* (Qld) (Unlawful homicide) states: 'Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.' The reference to the word 'kills' in s 300 leads to the definition of 'killing' in s 293: 'Except as hereinafter set forth,

First, the defendant must have caused the death of the victim under s 293. It is essential the act or omission which amounts to a failure to perform the duty is the act or omission that causes death.[82] The deeming provision in s 285 ('the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty') satisfies s 293 where the relevant question is whether the death is a consequence resulting from any omission to perform that duty.

Secondly, the defendant must have had a duty to the victim, as explained by French CJ in *Burns v The Queen*.[83]

> Criminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do. As a general proposition, the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life. Such an obligation may be imposed by statute or contract or because of the relationship between individuals. The relationships of parent and child, and doctor and patient, are recognised as imposing a duty of this kind. A person may voluntarily assume an obligation to care for a helpless person and thereby become subject to such a duty. Outside limited exceptions, a person remains at liberty in law to refuse to hold out her hand to the person drowning in the shallow pool.[84]

The duty in Jason and Kerrie Struhs's case as the parents of Elizabeth was 'to provide for that other person the necessaries of life' under s 285. Thirdly, the defendant must have omitted to perform that duty. Fourthly, the defendant must have been grossly negligent to the criminal standard in performing that duty.

In cases of manslaughter by criminal negligence, juries should be directed in accordance with *Nydam v The Queen*.[85] The test for the offence was described in *Nydam v The Queen* as follows:

> In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

The test for criminal negligence is objective.[86] In *Patel v The Queen*,[87] the High Court explained the nature of the test.

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any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.'

[82] *Justins v The Queen* (2010) 79 NSWLR 544 [97]; *Lane v The Queen* [2013] NSWCCA 317 [61].

[83] *Burns v The Queen* [2012] HCA 35.

[84] Ibid [97] (French CJ) (citations omitted).

[85] [1977] VR 430, 445 which the High Court approved in *The Queen v Lavender* (2005) 222 CLR 67 at [17], [60], [72], [136] and *Burns v The Queen* (2012) 246 CLR 334 at [19] (French CJ).

[86] *The Queen v Lavender* [2005] HCA 37 [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[87] *Patel v The Queen* (2012) 247 CLR 531.

> The test does not require that an accused have an appreciation of, or an indifference to, the risk created by the conduct in question. The only criterion necessary is an intention to do the act which inadvertently causes death or grievous bodily harm.[88]

The High Court in *Patel v The Queen* went on to discuss whether special knowledge (which is on point with the medical regime of a dependent child in the Struhs case) meant the standard of conduct was higher.

> There may be cases where the standard to be applied must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act. But that is not to use a person's knowledge to determine their guilt. A person's special knowledge may mean that the standard of conduct expected of them is higher.[89]

In assessing the comparison between the conduct of the accused person and the conduct of a reasonable person, Johnson J in *The Queen v Sam (No 17)*[90] articulated the personal attributes of the accused that may be assigned to the reasonable person and stressed the need for objectivity with regard to the reasonable hypothetical person, which in turn reflects the value placed by the law upon human life.

> [14] What is required then, is a comparison between the conduct of the accused person and the conduct of a reasonable person who possesses the same attributes of the accused (such as age, special knowledge and skills) in the circumstances in which he or she found himself, having regard to the ordinary firmness of character and strength of mind which a reasonable person has: *The Queen v Lavender* (2005) 222 CLR 67 at 72-74; *R v Edwards* [2008] SASC 303 at [416]. The accused person's own knowledge of the circumstances is relevant when considering the circumstances in which the reasonable person is placed: *The Queen v Lavender* at 88; *R v Edwards* at [417]. The need for objectivity with regard to the reasonable hypothetical person is in conformity with the other form of involuntary manslaughter, namely manslaughter by unlawful and dangerous act and, in this way, both forms of involuntary manslaughter reflect the value placed by the law upon human life: *The Queen v Lavender* at 87; *R v Edwards* at [418].[91]

In the context of the Struhs case, it should be stressed that the defence of honest and reasonable mistake of fact[92] does not apply to the offence of manslaughter by criminal negligence, as explained by the High Court in *The Queen v Lavender*.

> [58] … [T]he prosecution had to persuade the jury beyond reasonable doubt that the conduct of the respondent was not only unreasonable, but that it was 'wickedly negligent'. If the jury were not satisfied of that, the charge of manslaughter failed. If the jury were satisfied of that, how could they entertain the possibility

[88] Ibid [88] (French CJ, Hayne, Kiefel and Bell JJ).
[89] Ibid [90] (French CJ, Hayne, Kiefel and Bell JJ).
[90] *The Queen v Sam (No 17)* [2009] NSWSC 803.
[91] Ibid [14] (Johnson J).
[92] See s 24 *Criminal Code 1899* (Qld). Section 24(1) states: 'A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.'

> that the respondent held an honest *and reasonable* belief that it was safe to proceed?
>
> [59] … The belief concerning which counsel sought a direction was a (supposed) 'belief that it was safe to proceed'. Such a state of mind involves an opinion. It might be based upon certain factual inferences or hypotheses … but it necessarily involves an element of judgment. Indeed, it involves a conclusion by the respondent that his conduct was reasonable. The direction sought would be inconsistent with what has been described as the objectivity of the test for involuntary manslaughter. The respondent's opinion that it was safe to act as he did was not a relevant matter.[93]

Thus, in the absence of the defence of honest and reasonable mistake of fact and the clear omission to perform the duty under s 285, the verdict turns on whether each parental defendant was grossly negligent to the criminal standard in performing that duty, which is determined by an objective test. The withholding of the insulin was an intentional act, which will likely be judged as such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and having constituted such a high risk to Elizabeth's life, that the conduct merits criminal punishment.

V THE REACH OF ACCESSORIAL CRIMINAL RESPONSIBILITY

As previously mentioned, twelve members of the religious group, including Elizabeth's mother and brother, have been charged with manslaughter. This raises the law in relation to the reach of accessorial criminal responsibility and engages s 7 and s 8 of the *Criminal Code 1899* (Qld). While s 7 below is entitled 'Principal offenders', it really covers enabling, aiding, or counselling another person to commit the offence. By contrast, s 8 below deals with the formation of a common purpose by two or more persons to prosecute an initial unlawful purpose in conjunction with one another (here, the initial withholding of insulin), and then be deemed criminally responsible for an offence that was a probable consequence of the initial criminal purpose (here, the death after it became clear Elizabeth was in terminal decline). Significantly, both sections operate via deeming provisions whereby persons coming within the reach of the sections are either deemed to have taken part in committing the offence (s 7) or deemed to have committed the offence (s 8).

> 7 Principal offenders
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

[93] *The Queen v Lavender* [2005] HCA 37 [58]–[59] (Gleeson CJ, McHugh, Gummow and Hayne JJ) (emphasis in original).

> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> 8 Offences committed in prosecution of common purpose
>
> When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Clearly, there is considerable overlap between the two sections. For example, in the case of the religious leader, Brendan Stevens,[94] criminal responsibility could be sheeted home via either s 7(1)(d) 'any person who counsels or procures any other person to commit the offence', or s 8 'the formation of a common intention to prosecute an unlawful purpose'. Similarly, it is understood Elizabeth's father, Jason Struhs, withdrew his young child's insulin[95] which falls within s 7(1)(a) 'every person who actually does the act or makes the omission which constitutes the offence', and, despite struggling when his daughter became ill, he kept his 'faith' under the religious group's common purpose. Samantha Schoenfisch allegedly encouraged Jason Struhs to stay strong when he became upset over his daughter's condition[96] (s 7(1)(d)), and Keita Martin allegedly assisted in taking Elizabeth to the toilet when she could no longer walk, was not talking, and her eyes were closed[97] (s (7)(1)(b) and (c)).

The applicability of s 7 will depend on each member of the religious group's actual role in supporting Elizabeth's parents' purpose. In the absence of any evidence of withdrawal after it became clear Elizabeth was dying, each member of the religious group would appear to have had a common purpose, and therefore criminal responsibility for all 14 defendants comes within the reach of s 8. Judicial interpretation of s 8 has focused on the meaning of the two words 'probable consequence' within the section.

Extension of criminal responsibility is confined to only such offences as are objectively the probable consequence of the common intention. Thus, foresight of the offence is immaterial; rather, the meaning of probability varies with the context[98] and is to be contrasted with possibility and refers to the probable consequences of the common plan as opposed to what the parties might have foreseen.[99]

As to evidence of withdrawal from the common purpose, the onus of disproving termination and lack of taking all reasonable steps to withdraw rests with the prosecution, but an evidential onus[100] needs to be satisfied by the defendant.[101] There is authority for the proposition that the accessory's withdrawal must be communicated to the principal offender.[102] The well-known

[94] Chen, Hewson, and Moodie (n 6).
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] *Darkan v The Queen* (2006) 227 CLR 373, 395 (Gleeson CJ, Gummow, Heydon and Crennan JJ).
[99] *The Queen v Keenan* (2009) 236 CLR 397, 434 (Kiefel J).
[100] Satisfying an evidential onus requires the defendant to meet the standard of there being a reasonable possibility.
[101] *R v Menitti* [1985] 1 Qd R 520, 530 (Thomas J).
[102] *White v Ridley* (1978) 140 CLR 342, 350–1 (Gibbs J).

passage from the judgment of Sloan JA in *R v Whitehouse*[103] is apposite where His Honour defines 'timely communication' as serving 'unequivocal notice' that the other party proceeds without further aid and assistance from the person who is withdrawing. On the question of taking reasonable steps, in Queensland it is sufficient to have taken reasonable steps to undo previous participation.[104]

The meaning of reasonable steps was discussed by Hammond J in *R v Pink*.[105]

> [T]he withdrawal may only be affected by taking all reasonable steps to undo the effect of the party's previous actions. As with any test of 'reasonableness', it is impossible to divorce that consideration from the facts of a given case. The accused's actions may have been so overt and influential that positive steps must be taken by him to intercede and prevent the crime occurring.[106]

Thus, if at trial members of the religious group claim they withdrew from the common purpose, they will have to satisfy the evidential onus of there being a reasonable possibility they took reasonable steps to undo their previous participation (which the Crown will have to negative beyond reasonable doubt).

VI CONCLUSION

When, in 2019, the Queensland Government introduced legislation to expand the definition of murder from intention to kill or cause grievous bodily harm to include murder by reckless indifference to human life, the stated justification was to address community concerns that offenders who physically abused children were too often being convicted of manslaughter rather than murder.

As discussed in Part III above, the critical distinction between murder by reckless indifference to human life and the residual offence of manslaughter is whether the Crown can prove the mental element for reckless indifference to human life, which requires that in committing the acts or omissions which caused [X]'s death the defendant knew those acts or omissions would probably cause [X]'s death. This means that the defendant was aware or knew of the danger to life that his or her conduct represented and proceeded regardless. The danger is the probable or likely death of another person.

This article has sought to address the task of the Crown proving beyond reasonable doubt the mental element of awareness or actual knowledge of the probability of death when faced with evidence of a religious belief on the part of the defendant that it was God's choice whether or not to intervene to save [X] and an expressed lack of intention to cause death to [X]. In this regard, the Crown can call in aid anything the defendant has said of relevance as to his or her actual knowledge of the probability of death. The Crown can invite the jury to infer the requisite actual knowledge from the circumstances in which death occurred and from the proven conduct of the defendant before, at the time of, or after the acts or omissions which caused death. For example, Kerrie Struhs had been released from prison the month before Elizabeth's death for failing to get medical assistance for her daughter in 2019.[107]

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[103] (1941) 1 WWR 112, 115–16.
[104] *White v Ridley* (1978) 140 CLR 342, 350 (Gibbs J); *R v Menitti* [1985] 1 Qd R 520, 530 (Thomas J).
[105] *R v Pink* [2001] 2 NZLR 860.
[106] Ibid [22].
[107] Chen, Hewson, and Moodie (n 6).

However, this article has argued for a more objective test for murder by reckless indifference to life, namely, what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. This would obviate the artificiality of a subjective test that requires the jury to infer actual knowledge or awareness from the objective circumstances of the case. In effect, it would narrow the respective gap between the fault elements of recklessness and negligence.

The narrowing can be seen by comparing the natural and probable consequences test for objective recklessness and the objective test for manslaughter by criminal negligence which involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and constitutes such a high risk to another person's life that the conduct merits criminal punishment. The latter is the test the Crown must meet to convict Kerrie Struhs of failure to perform the duty of providing the necessaries of life under s 285 of the *Criminal Code 1899* (Qld) if that is the manslaughter route the Crown chooses.

Finally, this article has discussed the law in relation to accessorial liability of the 12 members of the religious group who attended Elizabeth's home in the five days prior to her death. Individual criminal responsibility under s 7 of the *Criminal Code 1899* (Qld) will fall to be determined by the role each member played in supporting Jason and Kerrie Struhs. However, the reach of s 8 would cover all members of the group who shared a common purpose to test their faith that it was God's choice whether or not to intervene to save Elizabeth's life.

In conclusion, this article has sought to address the topic of whether leaving God to make the choice is an answer to a charge of murder by reckless indifference to human life or manslaughter from a legal rather than a philosophical perspective. As was mentioned earlier, at the heart of this case is the proposition that the criminal law is concerned solely with temporal or earthly matters and that spiritual beliefs play no part in determining the mental element of a crime. If the jury accepts this proposition, then leaving God to make the choice of life or death is no answer to any murder or manslaughter charge.

However, the outcome of the Struhs case has wider implications for similar future cases where a sincere religious belief is invoked as a defence to criminal charges, particularly as it relates to unlawful child killings. If the jury does not convict the two defendants charged with murder by reckless indifference to human life but instead returns manslaughter verdicts, this raises the question of whether the present requirement that the Crown prove subjective recklessness, namely, actual knowledge that death would probably result, should be replaced with a more objective test for recklessness based on the natural and probable consequences test, at least for unlawful child killings.

Book Review

A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination

A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination. By Alex Deagon. Hart, 2023. Pp. 264. ISBN: 978-1-50995-063-8.

Review by Myriam Hunter-Henin*

In his beautifully written and well-researched monograph, Alex Deagon develops a 'peaceful coexistence approach', based on Christian foundations, to bolster the autonomy of religious communities and ensure more conciliatory ways to deal with current tensions between religious autonomy and equality interests. Deagon's monograph offers a valuable contribution to our understanding of both the conceptual underpinnings of religious freedom and the complexities of the case law in that area. Grounded in three jurisdictions — Australia, the United States, and England — the analysis revisits well-known clashes between equality and religious interests in the case law as well as constitutional debates over state–religion arrangements. Thanks to the chosen structure, Deagon demonstrates what his approach would concretely change in the existing case law but also, why these amendments would be consistent with the respective legal/political/cultural traditions of each of the jurisdictions under scrutiny. To scholars of comparative law, this functional approach focused on cases, combined with an exploration of debates 'from within' each jurisdiction, will be appealing. To scholars of law and religion, Deagon's innovative framework for religious freedom cases will also be of great interest. In this brief review I will focus on two aspects which I have found of particular importance: one relates to the pluralism which Deagon seeks to foster and the other relates to the Christian foundations of his project.

The goal of pluralism

Contrary to what his explicit Christian foundations might suggest, Deagon does not seek to systematically favour religious (Christian) interests, but to open the way for compromises, 'for the pursuit of the good of pluralism and diversity through a proportionate, reasonable accommodation of difference'.[1] Deagon thus rejects arguments excluding religious interests outright for the mere reason that they feature in the commercial sphere or are made by individual, rather than collective, religious vendors. Since religious commitments extend to every activity and every aspect of the believer's life, any abstract predetermined filters would draw arbitrary lines of exclusion. Reciprocally, Deagon acknowledges that competing interests must be considered: same-sex couples who are denied a particular service because of the vendor's religious objection will always suffer a harm, albeit of varying intensity depending on circumstances. Solutions to these conflicting interests, Deagon argues, should be sought in a spirit of compromise, in accordance with theological values of dignity and love. For example,

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[1] Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart, 2023) 6.

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in the American *Hobby Lobby* case,[2] in which religious employers objected to federal regulations requiring corporate entities to provide their employees with insurance coverage for contraceptive services, a compromise might be to allow exemptions from contributions pertaining only to abortifacient contraceptives.[3] In relation to religious vendors, Deagon suggests that exemptions could be limited to marriage-related services, on the condition that the goods and services are reasonably available elsewhere and that the sincerely-held religious objections had been clearly publicised in advance.[4] Many undoubtedly would strike the balance differently — arguing either that the preference in favour of certain objections (abortion, same-sex marriage) interferes with religious beliefs or that the interests of same-sex couples are insufficiently protected. As part of this debate on the best way to foster pluralism, Deagon's concrete proposals for conciliation in hard cases merit attention.

It is precisely for the sake of the pluralism that religious groups bring to society that, in regard to disputes involving the internal beliefs of a religious organisation and discrimination against an individual, Deagon argues in favour of the religious groups. As long as a religious reason is put forward by the religious organisation: 'the standard should be a presumption of deferral to the religious organisation, but with an opportunity for the party discriminated against to present evidence that the discrimination was not related to the religious ethos (beliefs and behavioural standards) of the organisation'.[5] Given the difficulties for victims of discrimination to adduce evidence in support of their claim, the position of the group will consequently almost inevitably prevail. One may wonder whether the protection owed to collective religious ethos, for the sake of pluralism, warrants precluding pluralism within religious groups themselves. It is not clear whether the preference to groups will automatically align with theological values. Can religious groups always be trusted to implement virtues of love and compassion in the absence of any meaningful judicial oversight? This debate over the meaning of pluralism may hide deeper controversies over the foundations of religious freedom.

Christian foundations

According to Deagon, Christian virtues can resonate with everyone, Christian or non-Christian, religious or non-religious. That is because 'Christian virtues are universally desirable and universally achievable regardless of one's particular perspective'.[6] Besides, Christian virtues should be particularly appealing to inclusive liberals committed to democratic pluralism since 'a religion-friendly secular approach which has the objective of a shared harmonious space is actually just the secular outworking of the theological peaceful coexistence approach'.[7]

However, the historical complicity between the liberal framework and Christian theological values also raises challenges. Given the embeddedness of the liberal framework in Christian values (at least in the three selected jurisdictions), might such renewed emphasis on Christian foundations not risk reinforcing the exclusion of non-Christian voices? Besides, if the liberal framework is just the reworking of theological values, one may query how the latter would fare better than the former in fostering harmony. More fundamentally, the overlapping of values between the liberal and Christian approach need not lead to equating one with the other. Deagon states that his approach is post-secular but not post-liberal, explicitly rejecting the secularism

[2] *Burwell v Hobby Lobby Stores*, 573 US 682 (2014).
[3] Deagon (n 2) 102.
[4] Ibid 89.
[5] Ibid 99.
[6] Ibid 21.
[7] Ibid 20.

of Rawlsian liberalism.[8] The whole purpose of Rawlsian liberalism however was, having characterised *both* secular and religious belief systems as comprehensive doctrines, to derive a common freestanding framework from an overlapping consensus, on terms acceptable to all as free and equal.[9] The question here remains how the peaceful coexistence framework (derived from a comprehensive doctrine) can be acceptable to all — a question admittedly that Deagon explicitly leaves outside of the scope of the present book[10] but which the reader is bound to raise nonetheless.

The debate is not merely theoretical. One key distinction between a 'religion-friendly liberal approach' based on a deliberative conception of democracy,[11] and one founded on Christianity, resides in the role given to the principle of revision according to which citizens, individually and collectively, are expected to revise their commitments as they engage in the shared project of living together. Under a deliberative democratic approach, the principle of revision will be core to a conception of liberty, tied to the horizon of change and to a dialogical account of democratic debate. On the contrary, revision need not feature under a theological reading. Another key difference is the role of courts. Under a deliberative democratic approach, courts, as democratic actors, are to contribute to a dialogical understanding of religious freedom by intervening to ensure a balancing of competing interests where contestations emerge. But they are also bound by it, compelled to resist the urge to obliterate one set of those competing interests. In that respect, it would have been interesting, for example, for Deagon to explore recent pro-religious originalist interpretations by the United States Supreme Court[12] and explain how his own 'peaceful coexistence approach' differs from and might help counter it.

It is the attribute of innovative approaches to prompt further questions. The ones I have raised here are testimony of the richness of Deagon's analysis. To anyone keen to overcome the current dichotomous narratives and foster pluralism, I would highly recommend this important and timely book.

[8] Ibid 24.
[9] John Rawls, *Political Liberalism* (Columbia University Press, 2nd ed, 1996) 133.
[10] Deagon (n 2) 5.
[11] Which I put forward in *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Hart, 2020).
[12] *Dobbs v Jackson Women's Health Organization*, 597 US __ (2022).

Book Review

Christianity and Constitutionalism

Christianity and Constitutionalism. Edited by Nicholas Aroney and Ian Leigh. Oxford University Press, 2022. Pp. 496. ISBN: 9780197587256.

Review by Benjamin B Saunders*

Christianity has had an immense impact on constitutionalism in the West; this impressive volume aims to explore and unpack that impact. It is organised into three sections: the first explores the historical influence of Christianity on constitutionalism; the second offers Christian perspectives on constitutional doctrines (sovereignty, the rule of law, democracy, the separation of powers, judicial review, liberty, rights, freedom of conscience, and federalism); the third examines the implications of theological doctrines (revelation, the Trinity, justice, Christology, natural law and rights, subsidiarity, and eschatology) for constitutional thought.

The chapters are written by leading scholars and are of uniformly high quality, with an impressive breadth and depth of learning on display. Familiar names line the pages: the towering legacy of Augustine and Aquinas on Christian political and legal thought is apparent; the contemporary writer most frequently referred to is Oliver O'Donovan. One strength of the book is that many of the chapters bring Christianity into conversation with contemporary and non-Christian legal theory, casting fresh light on well-worn territory.

It is difficult to summarise tidily a rich, complex, and nuanced book of this length. If one main theme is to be discerned from the various chapters, perhaps it is the fruitful tension between the two main poles of Christian political theology, namely the recognition of the legitimacy of civil power on the one hand, and on the other the profound ambivalence of Christianity towards civil power and law. Not only are civil rulers frequently depicted in scripture as in opposition to God, but the establishment of the kingdom of Christ eclipses civil rule, placing its concerns into the background of history.

This ambivalence places the pretensions of civil law and constitutionalism into their proper perspective. If Christ is Lord, then no merely human institution or officeholder can truly be sovereign. One important theme, therefore, is that power must be constrained, and its exercise held accountable. Rulers themselves are subject to the law. Constitutions ought to provide for power to be exercised by different institutions and levels of government. There must be areas of freedom where civil laws cannot transgress. Civil rule can be justified only insofar as it promotes justice and the common good. Themes of authority, justice, and sovereignty recur many times throughout these pages.

Christianity has a lot to say on these matters, but its key text, the Bible, is not and is not intended to be an encyclopaedia of constitutional thought. Recognising both the prophetic insights to be drawn from Christian reflection as well as the limitations of those insights is a crucial feature of any successful Christian approach to constitutionalism. The book does well at maintaining this balance, leaving many fruitful threads for the reader to ponder.

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Some of the most important contributions of Christianity to constitutionalism are given surprisingly short shift. While there are references to natural law scattered throughout the book, on the whole, it is underplayed; the chapter dedicated to natural law is subsumed within a discussion of the question of whether natural law includes natural rights. The parallels and differences between civil and ecclesiastical power have been the source of some of the most productive developments in constitutionalism given that developments in one realm often spill over into the other. Further reflections on things such as natural law, conciliarism, and human nature would have been welcome. Of course, the book amounts to nearly 500 pages and expressly disclaims any attempt at comprehensiveness; it may therefore be unreasonable to criticise the book for sins of omission.

The book is an excellent volume and is highly recommended for anyone interested in exploring the relationship between Christianity and constitutionalism.

Special Topic Forum: Indigenous Spirituality and the Law

The Voice and Religious Freedom

Darshan Datar*

I INTRODUCTION

Extensive scholarly and media attention has been directed toward the impending referendum for an Aboriginal and Torres Strait Islander Voice to Parliament ('Voice'). The Voice is a referendum on a proposed constitutional amendment to create an advisory body comprised of Indigenous Australians which can make advisory 'representations' on laws that impact the Indigenous community. Twenty-five years after the High Court's landmark decision in the case of *Kruger v The Commonwealth* ('*Kruger*'),[1] the upcoming referendum concerning the Voice allows us to pause and reconsider how the judicial interpretation of s 116 of the Australian Constitution impacts the rights and protections afforded to Indigenous Australians. Through this article, I will demonstrate that the doctrine of s 116 does not confer on Australian citizens, including Indigenous citizens, the right to freedom of religion in the same way as other countries. Accordingly, this paper will argue that the Voice could provide an important political mechanism to help offset some of the analytical infirmities of the High Court's interpretive approach to s 116 and help better protect Indigenous religious, cultural, and spiritual beliefs. Notably, this article will suggest that the Voice could achieve this by disaggregating the protection of religious freedom into the political process.[2]

II HIGHLIGHTING THE SHORTCOMINGS OF THE JUDICIAL INTERPRETATION OF S 116

The heading of s 116 is 'Commonwealth Not to Legislate in Respect of Religion.'[3] The heading clarifies the purpose of s 116, namely that s 116 was intended to be a safeguard against the passing of religious laws by the Commonwealth. However, the section exclusively applies to the Commonwealth and not to the States. Therefore, the functions of the States, which include areas such as education, health, and aspects of welfare, are not limited or constrained by s 116. Despite these limitations, on its face, s 116 of the Australian Constitution imposes significant limits on the Commonwealth. Section 116 states that:

> 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, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[4]

The text of s 116 separates church from state through an exhaustive set of four limitations on the Commonwealth. Section 116 prevents the Commonwealth from establishing a state church, protects the freedom of religion of citizens, prevents the Commonwealth from imposing a

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[1] (1997) 190 CLR 1 ('*Kruger*').

[2] Cecile Laborde, *Liberalism's Religion* (Harvard University Press, 2017).

[3] *Australian Constitution* s 116.

[4] Ibid.

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religious observance on citizens, and prohibits the Commonwealth from creating a religious test as a qualification for public office.[5] However, as I will discuss later in this article, the protection afforded by the section is not exhaustive and resembles a narrow limitation on government power more than a right.

The Court imposes a two-stage limitation on the 'free exercise clause'. The first limitation is that for any statute to be struck down under s 116, it must have the express intention of violating the free exercise clause.[6] In other words, only a law with the express 'purpose of achieving an object which s 116 forbids' violates the provision.[7] If the Court determines that a law has the purpose of violating the free exercise clause, it will then consider whether the law amounts to an undue infringement of religious freedom.[8] To determine whether a law unduly infringes religious freedom, the Court engages in what may be a form of proportionality analysis.[9]

In the case of *Kruger,* by drawing on previous precedent, the Court affirmed the purposive test.[10] In this case, the applicants challenged the *Aboriginals Ordinance 1918* (NT), which was applicable only in the Northern Territory. The Ordinance authorised the removal of Indigenous children for placement in foster care.[11] The Ordinance was enacted under s 122 of the Australian Constitution, which gives the Commonwealth government 'power to make laws for the government of territories.'[12] Even though the Ordinance was repealed, if the petitioners could prove 'contemporaneous illegality' the *Ordinance* would provide 'no authority for the actions taken under it'.[13] A ruling in favour of the petitioners would therefore have opened the door for legal actions against those who acted under the authority of the Ordinance. The petitioners challenged the law on numerous grounds, including s 116. The petitioners claimed that the Ordinance prohibited the free exercise of their Indigenous religion by separating them from the land with which they had a spiritual connection.[14] The Court unanimously held that the Ordinance did not violate s 116 of the Constitution.[15] However, there was significant diversity in each judge's reasoning for their decision.[16] Justice Toohey with whom Brennan CJ and Gummow J agreed, engaged with the purpose of the law.[17]

Justice Toohey held that to determine the purpose of a law for s 116 claims, the Court must look at law-making and not the administration of the law.[18] Accordingly, an anti-religious purpose must be evidenced from a reading of the statute and not its application.[19] Additionally, Toohey J sided with the position taken by the Court in *Krygger* and held that to show that a law was in contravention of s 116, the purpose of the law must directly operate to prohibit the

[5] See Luke Beck, 'The Constitutional Prohibition on Imposing Religious Observances' (2017) 41(2) *Melbourne University Law Review* 493.
[6] Carolyn Evans, *The Legal Protection of Religious Freedom in Australia* (Federation Press, 2012).
[7] *Kruger* (n 1) 40.
[8] *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth of Australia* (1943) 67 CLR 116, 131.
[9] Evans (n 7) 92.
[10] *Kruger* (n 1).
[11] Ibid.
[12] *Australian Constitution* s 122.
[13] Sarah Joseph, '*Kruger v the Commonwealth* and the Stolen Generations' (1998) 24 *Monash Law Review* 486, 487.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Evans (n 6) 91.
[18] Joseph (n 13) 488.
[19] Kruger (n 1) 86.

right to free exercise.[20] In this case, Toohey J determined that the purpose of the law did not directly operate to prohibit free exercise and, accordingly, held that there was no violation of s 116.

The limitations imposed on the application of s 116 make it an ineffective provision for rights protection. This is apparent when the doctrine of s 116 is compared to the US Supreme Court's jurisprudence on the Religion Clauses of the First Amendment. While the Australian and American constitutions share many textual similarities concerning the constitutional regulation and protection of religion, the US Supreme Court has held that the First Amendment regulates any state action that affects religion, including policy that does not expressly restrict religious freedom.[21] In other words, the United States Constitution protects religious citizens from the unfair effects of laws regardless of the legislature's intent. In order to protect the religious freedom of citizens from the disparate impact of laws, the First Amendment of the United States Constitution further provides avenues for religious communities to claim conscientious objections to generally applicable laws, and to assert their right to autonomy concerning the internal functioning of their church.[22] This makes the provision significantly more effective than s 116. The narrow protection afforded by s 116 means that it cannot operate to restrict state action effectively, and there are numerous avenues for the government to curtail religious freedom.

III Concluding Remarks about the Voice and Protecting Indigenous Spirituality

While the scope of protection afforded by s 116 is narrow, the High Court defines religion broadly for the purpose of s 116. Accordingly, Indigenous practices, sensibilities, and belief structures would qualify as being religious for the purpose of the Australian Constitution. This position was clearly stated in the case of *Kruger*. An analytical assessment of the High Court's cases also yields the same conclusion. In the case of the *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*,[23] which concerned whether Scientology was a religion, Acting Chief Justice Mason and Justice Brennan rejected the trial judge's decision, which held that Scientology was a 'sham religion'.[24] Instead, Justices Mason and Brennan adopted a wide definition of religion which included within it non-theistic beliefs.[25] Justices Mason and Brennan held that religion is: 'First, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.'[26] While the definition of religion is subject to

[20] Ibid 86.
[21] See Dan Meagher and Benjamin Saunders 'Taking Seriously the Free Exercise of Religion under the Australian Constitution' (2021) 43(3) *Sydney Law Review* 287; Alex Deagon, 'The Influence of Secularism in Free Exercise Jurisprudence: Contrasting US and Australian Interpretations' (2020) 13(1) *International Journal for Religious Freedom* 123.
[22] For a judicial account of religious autonomy in the United States Constitution, see generally *Kedroff v St. Nicholas Cathedral* 344 US 94 (1952). See also Alex Deagon, 'The Religious Questions Doctrine: Addressing (Secular) Judicial Incompetence' (2020) 47(1) *Monash University Law Review* 60. For a detailed account of conscientious exemptions, see generally Stijn Smet, 'Conscientious Objection through the Contrasting Lenses of Tolerance and Respect' (2019) 8(1) *Oxford Journal of Law and Religion* 93.
[23] (1983) CLR 120.
[24] Ibid 141.
[25] Ibid 136.
[26] Ibid 136.

some variation in the judgments, the majority of judges concur that religion includes a broad range of theistic, non-theistic, and atheistic beliefs.

Accordingly, in the case of *Kruger*, it was clarified that Indigenous practices and spiritual beliefs qualify as religious for the purpose of rights protection. However, as demonstrated earlier in this article, regardless of the breadth of protection afforded by s 116, the narrow interpretation of the provision means that it is very unlikely that the Constitution can limit laws which impact Indigenous belief structures. Unlike in other constitutions, notably the European legal order and US constitutional jurisprudence, Indigenous communities cannot rely on freedom of religion to provide an exemption to the effect of a generally applicable law that restricts their religious freedom.[27] Due to the nature of religious sensibilities and their corresponding need for special accommodations, this function is critical for religious minorities who are underrepresented in the political process.

Despite the ineffective nature of s 116, the Voice provides an avenue for Indigenous communities to assert their objections, clarifications, and requests to Parliament more effectively. The Voice could have the impact of disaggregating the protection of religious freedom into the political process.

Cecile Laborde has extensively analysed the merits of disaggregating religious freedom. Laborde argues that due to the analytical difficulties in protecting religious freedom, the right is better protected by several different rights instead of being protected uniquely by one purpose-built provision.[28] Laborde argues that religion can be split into seven constituent features: '1. Religion as a conception of the good life; 2. Religion as a conscientious moral obligation; 3. Religion as a key feature of identity; 4. Religion as a mode of human association; 5. Religion as a vulnerable class; 6. Religion as a totalising institution; 7. Religion as inaccessible doctrine.'[29] Once the key features of the concept of religion are explained, Laborde argues that each feature can be individually protected under different constitutional provisions.[30] Laborde then proceeds to demonstrate how some of the features of religion can be accurately protected by freedom of speech, freedom of association, non-discrimination laws, and the democratic process.[31] While the disaggregation approach has not been tested practically, it has received a lot of theoretical attention. Speaking to the merits of this approach, Winnifred Sullivan observes that:

> Forsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities. Such a change would end discrimination against those who do not self-identify as religious or whose religion is disfavoured.[32]

When applying the framework of disaggregation to Australia, it is important to note that due to the absence of a Bill of Rights in the Australian Constitution, any disaggregation of religious freedom must happen through the political process.

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[27] Smet (n 22).
[28] Cecile Laborde, 'Religion in the Law: The Disaggregation Approach' (2015) 34(6) *Law and Philosophy* 581. See also James Nickel, 'Who Needs Freedom of Religion?' (2005) 76(4) *University of Colorado Law Review* 941, 964.
[29] Laborde, 'Religion in the Law: The Disaggregation Approach' (n 28) 594–5.
[30] Ibid.
[31] Ibid.
[32] Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005) 28.

The Voice provides an avenue to disaggregate the protection of religious freedom of Indigenous Australians into the political process. Through its 'representations', the newly formed constitutional body could advocate for some Indigenous practices and beliefs that qualify as religious to be protected more effectively through legislation. This form of political dialogue is a critical component of preserving the principle of representative democracy, which is a central part of the values of the Australian Constitution.[33] Cheryl Saunders notes that the significance of representative democracy lies in its capacity to act as 'a foundation for an approach to the protection of rights that so far has relied almost entirely on the allocation of power between institutions of government, rather than on rights instruments that limit what the institutions collectively may do …'[34]

As such, in certain situations where minority communities, due to their unique cultural and religious heritage, exist outside the standard vocabulary of political discourse, special accommodations can help highlight their needs more effectively in political decision-making.[35] The Voice provides this avenue to Indigenous Australians. It will go a long way in ensuring that their right to religious freedom, amongst other rights, is better protected under the system of representative democracy enshrined in the Constitution.

[33] Cheryl Saunders, *The Australian Constitution: A Contextual Analysis* (Cambridge University Press, 2010).
[34] Ibid 110.
[35] Ibid 113.

Special Topic Forum: Individual Spirituality and the Law

Cultural and Spiritual Loss in Native Title

Ivan Ingram*

Aboriginal and Torres Strait Islander Peoples have an inextricable connection to the lands and waters of their ancestors. First Nations' spirituality in this sense can be described as a symbiotic relationship that has existed since time immemorial. This connection to lands and waters is one that gives life to the identities of Aboriginal and Torres Strait Islander Peoples and their nations. The impacts of colonisation; the policy periods of termination, protection, assimilation, and integration; and the ways in which Aboriginal and Torres Strait Islander Peoples have been controlled and marginalised in society have impacted greatly upon the continuity and vitality of that connection to lands and waters. The very essence of the spiritual nature of the connection has been diminished, and in some instances, largely decimated, due to the work of non-Indigenous actors. This harm and loss through the native title system is capable of being recognised and compensated for, albeit, in limited ways.

Native Title is a term legally defined by reference to the content of the traditional laws and customs of an Aboriginal or Torres Strait Islander People, specifically those relating to lands and waters, which gives rights and interests in those lands and waters. At its core, this definition can be described as the legal recognition of Indigenous systems to law and governance that are protected and can be exercised under the traditional western system of law. This recognition first occurred through the High Court decision in *Mabo v Queensland [No 2]*[1] and subsequently legislated through the *Native Title Act 1993* (Cth).

This enshrinement in statute created the legal infrastructure that gives rise to the native title regime we operate in today. Through the Act, there are several primary mechanisms created to facilitate applications for recognition (native title determinations) and applications for compensation (native title compensation applications). I oversimplify the complexity of the system to be able to fast track to the discussion at the heart of these two limbs of recognition and compensation. The former seeks to recognise and validate the continuity of the identity, laws, customs, and traditions of a People; the latter seeks to identify the harm to those aspects and compensate what can be legally compensated. This context is important to understand the kinds of evidence that are required to prove the recognition of native title, and consequently, to prove the amount of loss and harm suffered by determined native title holders.

Following the handing down of the first litigated compensation decision in *Northern Territory v Griffiths* ('*Timber Creek*'),[2] there was an eager anticipation in the native title sector that there would be a renewed wave of native title applications: a Phase Two, where already determined native title holders would be able to seek compensation for the acts of the Crown that have caused an extinguishment, diminution, or impact upon the exercise and enjoyment of their native title. This turns on whether there is evidence of the act which has impacted native title and evidence of the loss and harm suffered by the native title holders in respect of such acts. Since the *Timber Creek* decision, there has been limited progress on the development of the

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[1] (1992) 175 CLR 1.
[2] *Northern Territory v Griffiths* (2019) 26 CLR 1.

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compensation jurisprudence, with the most recent decision of *Yunupingu v Commonwwealth*[3] further exploring the scope of acts that are compensable at the hands of the Commonwealth. However, many other matters have deviated away from a litigated outcome, and many have progressed towards mediations and negotiations to settle the litigation by agreement.

The evidentiary requirements in compensation applications are that of the loss, harm, and impacts that historical and contemporary actors have had on their culture and spirituality. This requires Aboriginal and Torres Strait Islander witnesses to directly confront and relive traumas. The evidence of the harm is in the form of the loss of cultural knowledge, showing the lack of depth that has been retained, loss of language, loss of knowledge of song lines, loss of the ability to protect and be on country, to share and transmit such knowledge to future and successive generations, and the loss and impacts on the practice and knowledge of rituals and ceremonies. The sharing of such intimate loss and tragedy, after being required to prove identity with such knowledge, is a difficult, drawn out, and traumatic process to navigate. It places the essence of one's identity under the scrutiny of non-Indigenous actors who may not have a true appreciation and understanding of the cultural and spiritual elements they are required to engage with through legal and anthropological lenses.

Questioning the very matters that make a People's identity so personal and unique, and then interrogating every aspect of that identity to determine if they know enough to justify recognition, places individuals in a difficult situation. Then, for compensation applications, such Peoples must also have suffered and lost enough to be capable of being compensated for such loss. But for those who have lost and suffered even more, to the point where the first hurdle of recognition is no longer a possibility, there is simply no result other than a determination that there has been *no* continuity of law, custom, traditions, knowledge, or semblance of an identity the law is able to recognise in the contemporary sense. It is a sad outcome for Australia, and a moment that should be mourned for the validation of the acts of the colonisers, to the complete dismantling of a People's identity.

While there are positive outcomes through the native title system, there are many outcomes that are not. Our national identity is enhanced and enriched by honouring and respecting the oldest continuing culture in the world and by recognising the unique spiritual connection to lands and waters that Aboriginal and Torres Strait Islander Peoples have. It is my hope that through the goodwill of the Australian people, there are reasonable and sensible approaches for those engaged in native title to reach agreement where possible, to safeguard this unique aspect of our national identity, and to safely handle and manage the cultural and spiritual knowledge of those Aboriginal and Torres Strait Islander Peoples engaged in the native title system.

[3] *Yunupingu v Commonwealth* [2023] FCAFC 75.

Special Topic Forum: Indigenous Spirituality and the Law

Indigenous Religious Freedom: A Goal to Pursue in Indonesia

Samsul Maarif*

INTRODUCTION

The legal term for indigenous religions in Indonesia is *kepercayaan* (Indonesian for 'belief'). *Kepercayaan* may include what some scholars call new religious movements, Javanese mysticism, syncretic movements, and *adat* (indigenous customary practices and traditions). For the purposes of official state recognition of citizens' religions, *kepercayaan* may even include world religions not otherwise officially recognized by the government such as Judaism, Baha'ism, and others. Prior to 2017, *kepercayaan* was regulated as relating to culture and did not qualify as (and was differentiated from) *agama*, the legal term for one of the six religions officially recognised by the State: Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism.

The politics of official religions are legally based in the Explanation to art 1 of Law No 1/PNPS/1965 ('The Prevention of the Misuse and/or Blasphemy of Religion')[1], which says: 'the religions that were *embraced* by the people of Indonesia are Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism.'[2] Although the other part of the explanation also says: 'This does not mean that the other religions … are banned in Indonesia. They also have the full guarantee as stated in art 29(2) [of the Constitution] …'.[3] The government does not provide any citizenship services such as ID cards, marriage registration, education, and so on, to anyone who does not convert to one of the recognised six. Prior to 2017, followers of *kepercayaan,* which was governed as culture, were no exception to this rule. Such individuals were required to embrace one of the recognised six religions in order to access their citizenship rights. As Indonesian citizens, they declared their identities as followers of a recognised religion, but practiced *kepercayaan*.

Since 2017, followers of *kepercayaan* may declare *kepercayaan* as opposed to one of the six "official" religions in their ID cards. The State's amended policy was based on the Decision of the Constitutional Court No 97/PUU-XIV/2016,[4] approving the Judicial Review of two articles of the

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[1] Penetapan Presiden Republik Indonesia Nomor 1/PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama [Presidential Decree No 1 of 1965 on the Prevention of Misuse and/or Blasphemy of Religion] (Indonesia) art 1. The presidential decree was codified as law through Undang-Undang Republik Indonesia Nomor 5 Tahun 1969 Tentang Pernyataan Berbagai Penetapan Presiden dan Peraturan Sebagai Undang-Undang [Law No 5 of 1969 on Statements on Presidential Decree and Presidential Regulations as Law] (Indonesia) art. 1

[2] Penjelasan atas Penetapan Presiden Republik Indonesia Nomor 1/PNPS TAHUN 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama [Explanation on Presidential Decree No 1 of 1965 on the Prevention of Misuse and/or Blasphemy of Religion] (Indonesia) art 1 (emphasis added).

[3] Ibid.

[4] Mahkamah Konstitusi [Constitutional Court of Indonesia], Nomor 97, PUU-XIV, 22 November 2016.

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Law on Civic Administration that did not allow followers of anything other than one of the six religions to declare their religion or *kepercayaan* in family and ID cards. The Decision states that for legal purposes, religion must include *kepercayaan.* The government followed up this Decision with a policy with two different forms of ID cards. The first form was for the six religions, and the second was for *kepercayaan.*

In addition to ID cards, followers of *kepercayaan* may also have their own *kepercayaan* education as opposed to the religious education which is compulsory for all students. Each of the six recognised religions has its own form of religious education. Islam is taught by Muslims to Muslim students, and the situation is parallel for the other five religions. *Kepercayaan* education is based on the regulation of the Ministry of Education and Culture No 27/2016[5] on services for *kepercayaan* education. Due to the structure of an educational system that divides authorities of education governance, the regulation has not been effective in fulfilling the educational rights of *kepercayaan* followers. The Ministry of Education and Culture is authorized to govern higher education, whereas the elementary to high school levels are under the authority of local governments. If a school refuses to provide *kepercayaan* education, then the regulation, which is a legal directive on the implementation of *kepercayaan* education in schools, may not be used to sanction the refusal. Two thousand two hundred and eighty-eight students have now enjoyed *kepercayaan* education, but their 213 teachers have mostly taught voluntarily. Local governments may claim no responsibilities for budgeting on *kepercayaan* education. Due to such issues, many followers of *kepercayaan* reluctantly declare one of the six religions on their ID cards in order to provide their children with religious education.

After the Constitutional Court Decision No 97/PUU-XIV/2016, no laws were adjusted except the new Law on Criminal Code[6] which will be effective in 2026. The law reflects the Decision protecting both freedom of religion and *kepercayaan.* Many other laws still refer to the 'official' six religions and exclude *kepercayaan.* Given that fact, the rights of *kepercayaan* followers are still being litigated.

LEGAL OPPORTUNITIES FOR THE RIGHTS OF FOLLOWERS OF INDIGENOUS RELIGIONS

It must be recognized that the Decision of the Constitutional Court No 97/PUU-XIV/2016 was a breakthrough to dismantle the established politics of official religions.[7] Since the establishment of the Ministry of Religious Affairs in 1946, the concept of official religions has been inherent in Indonesian politics. The Indonesian Constitution,[8] especially after the 2002 amendment, lays out the foundation of the rights of freedom of religion or belief and other rights in arts 28 and 29, but the government misuses Law No 1/PNPS/1965 to limit freedom of religion or belief to followers of only six religions. A Petition against the Law was brought to the Constitutional Court for judicial

[5] Peraturan Menteri Pendidikan Dan Kebudayaan Nomor 27 Tahun 2016 Tentang Layanan Pendidikan Kepercayaan Terhadap Tuhan Yang Maha Esa Pada Satuan Pendidikan [Regulation of the Ministry of Education and Culture No 27 of 2016 on Education Services Belief in God Almighty in Education Units] (Indonesia).
[6] Undang-undang Republik Indonesia Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana [Law No 1 of 2023 on the Criminal Code] (Indonesia).
[7] Samsul Maarif and Asfinawati, 'Toward a (More) Inclusive FORB: A Framework for the Advocacy for the Rights of Indigenous People' (2023) 6(2) *Interreligious Studies and Intercultural Theology* 205, 205–12.
[8] Undang-undang Dasar Negara Republik Indonesia Tahun 1945 [Constitution 1945] (Indonesia).

review due to its misuse in 2009,[9] but the Court disapproved it. The main argument of the judges was, however, that the Law of PNPS upholds norms reflecting that freedom of religion or belief is the natural right of every citizen, and the state has no authority to officially 'recognise' citizens' religions but is instead obliged to *protect* freedom of religion or belief. The judges argued that the Explanation of the Law on PNPS must not be understood as the State's recognition, because the word 'embraced' must be understood in a sociological rather than in a normative sense.

The two Court Decisions, which are final and binding, clarify and strengthen an inclusive understanding of freedom of religion or belief, but the government nonetheless perpetuates the political notion of 'official' religions. The Presidential Regulation No 12/2023 on the Ministry of Religious Affairs[10] ignores the two Decisions and restrengthens the political notion of there being officially recognised religions. In this Regulation, any religious affairs are under the authority of the Ministry, and the only religions recognised in the regulation are the traditional six. In 2022, the government proposed a draft law on the national education system to the House of Representatives, and it excluded *kepercayaan* education.[11] Should the House of Representatives pass the Bill, the Ministry of Education and Culture Regulation No 27/2016 on *keperayaan* education would be invalidated because its legal standing is on the Law No 20/2003 on National Education System[12] that the government's draft is meant to replace or invalidate. These are only a few examples of how the politics of official religions is reproduced.

Again, rights of freedom of religion or belief are being litigated. The rights of freedom of religion or belief for followers of indigenous religions, guaranteed in the Constitution, should not be taken for granted as absolute, but qualified, meaning they are in the process of being investigated and considered for how they should be respected, protected, and fulfilled by the State.[13] The constitutional rights should be utilized as a legal opportunity for followers of indigenous religions and other non-official religions to push for their implementation. Judicial review of the Law on Civic Administration and the Constitutional Court Decision No 97/PUU-XIV/2016 was the result of litigation. The result provided a stronger legal opportunity to dismantle the existing limits created by the politics of official religions, and thus to engage the state branches and apparatus for implementation. Only by understanding these constitutional rights as a legal opportunity would followers of indigenous religions enjoy their rights of freedom of religion or belief.

LEGAL MOBILIZATION ON FREEDOM OF RELIGION OR BELIEF FOR FOLLOWERS OF INDIGENOUS RELIGIONS

In 2019, significant numbers of activists of civil society organizations, academics, practitioners, community members, as well as the state apparatus, who were involved in advocating the rights of followers of indigenous religions agreed to consolidate and establish a coalition for further

[9] Mahkamah Konstitusi [Constitutional Court of Indonesia], Nomor 140/PUU-VII/2009 19 April 2010.
[10] Peraturan Presiden (PERPRES) Republik Indonesia Nomor 12 Tahun 2023 Tentang Kementerian Agama [Presidential Regulation No 12 of 2023 on the Ministry of Religious Affairs] (Indonesia) 26 January 2023.
[11] Rancangan Undang-Undang Tentang Sistem Pendidikan Nasional Tahun 2022 [Draft Law on National Education System] (Indonesia) August 2022.
[12] Undang-Undang Republik Indonesia Nomor 20 Tahun 2003 Tentang Sistem Pendidikan Nasional [Law No 20 of 2003 on National Education System] (Indonesia).
[13] Cf Beata Huszka, 'Minorities as Citizens: The Legal Advocacy of Language Rights by the Hungarian Minority in Romania' (2022) 28(4) *Nations and Nationalism* 1340, 1340–55.

advocacy. They observed that the legal rights were continually violated by the government even after the Constitutional Court Decision No 97/PUU-XIV/2016. The Court mandated the government to serve *agama* and *kepercayaan* equally, but the government's different ID cards for *agama* and *kepercayaan* have perpetuated discrimination.

The coalition had also long observed that the State's discrimination was interrelated with social exclusion by other citizen groups against followers of indigenous religions. Soon after the Constitutional Court announced its Decision No 97/PUU-XIV/2016 in November 2017, the Council of Muslim Ulama led a public protest against the Decision and insisted the government differentiate *kepercayaan* from *agama*. The government accepted the insistence, despite its (already manifesting) potential for discrimination.

The coalition deemed their legal rights should be enforced in the courts and agreed that advocacy of legal mobilization must continue. Legal mobilization must, however, be broadened. In their advocacy framework, the followers had to deal with three interrelated arenas: policies, state services, and social exclusion.[14] For the coalition, legal mobilization should therefore go with political and social mobilization to deal with the three arenas.[15] They established a consortium called Intersectoral Collaboration on Indigenous Religions ('ICIR')[16] to consolidate a broader advocacy strategy for the rights of followers of indigenous religions and other discriminated groups.

For legal mobilization, they worked across 25 state branches to establish a coordinating team mandated to provide services for followers of indigenous religions. Through the coordinating team, they could increase the speed of implementing existing legal rights. They published a guideline of effective services of rights for followers of indigenous religions. Some cases of services such as *kepercayaan* education, marriage administration, job seeking, and so on that needed quick responses were resolved. They reviewed several existing conflicting and overlapping laws and regulations that prevent effective services for followers of indigenous religions.[17] This last issue has been the most challenging, and so needs long-lasting legal mobilization.

ICIR, a voluntarily organized consortium, organized two main programs to initiate and consolidate a social movement. The first is an annual conference on indigenous religions that invites scholars, especially the young, civil society organisation ('CSO') activists, and community members. The conference consolidates knowledge production disseminated by academia and public discourse. Consolidation facilitates CSOs coming from all over Indonesia to coordinate and synergize their advocacy on issues affecting the followers of indigenous religions. The second is Forum Kamisan Daring ('FKD', Online Thursday Forum) that facilitates 2-3 main speakers drawn from representatives of followers of indigenous religions along with discussants drawn from academics,

[14] Samsul Maarif, Husni Mubarak, Laela Fitriani Sahroni, Dyah Roessusita, *Merangkul Penghayat Kepercayaan melalui Advokasi Inklusi Sosial: Belajar dari Pengalaman Pendampingan* (2019) Yogyakarta: CRCS UGM, Yayasan Satunama Yogyakarta, dan Pusad Paramadina.
[15] Cf Huszka (n 13).
[16] See Intersectoral Collaboration for Indigenous Religions, 'ICIR Rumah Bersama' (Web Page, 2023) <https://icir.or.id/>.
[17] Tim Perumus. *Review Terminologi dan Strategi Pemenuhan Hak Penghayat Kepercayaan Terhadap Tuhan Yang Maha Esa dan Masyarakat Adat* (2022) Jakarta: Direktorat Kepercayaan dan Masyarakat Adat, Kemendikbud Ristek RI.

activists, or the State apparatus. The FKD facilitates followers' engagement with the public sphere and its discourses.

In addition to ICIR, there are other coalitions or CSOs that work on community empowerment as a strategy to push legal rights to implementation. As a result, some followers of indigenous religions found no issues to complain about, but many others are still reluctant to declare their identity as indigenous religion followers. They are not yet convinced that the breakthrough policy discussed above will last, that follow-up policies for inclusive freedom of religion or belief will be effective, and that everyday socio-religious participation will be safe.

CONCLUSION

Due to the politics of 'official' religions (and other related forms of discrimination), enforcing the right of freedom of religion or belief for followers of indigenous religions remains challenging. Legally speaking, freedom of religion or belief, at least the way it is currently implemented by the state, remains limited. The legal rights of followers of indigenous religions as guaranteed by the Constitution are still vulnerable. These legal rights should therefore be viewed as an opportunity for further legal, political, and social mobilization.

Special Topic Forum: Indigenous Spirituality and the Law

Country, Tradition, and Christianity in the Law

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In a May 1984 speech in Canberra, mining magnate Hugh Morgan made a theological claim about Aboriginal people and the law. 'For a Christian aborigine,' he declared, 'land rights or the proposed [*Aboriginal and Torres Strait Islander*] *Heritage Protection Act* is a symbolic step back into the world of paganism, superstition, fear and darkness.'[1] The Aboriginal and Torres Strait Islander Heritage Protection Bill would enable the Commonwealth to intervene to protect 'areas of particular significance to Aboriginals in accordance with Aboriginal tradition.'[2] But for Morgan, these protections based in Aboriginal tradition were anti-Christian. The Hawke Government passed the Bill the following month.

It was not only miners who speculated if Christianity was incompatible with First Nations People's connection to Country and the legal entitlements that might flow from this. Peter Carroll was a missionary linguist in West Arnhem with strong sympathies for the Bininj land rights. Only a few years prior, hoping to help sure up Bininj claims, he had assured the commissioners of the Ranger Uranium Inquiry that Christianity had 'very little effect' on Bininj spirituality.[3] His superior, Alan Cole, later queried whether 'the spiritual nature of the relationship between Aborigines and the land [is] compatible with Christianity'[4] and concluded that 'the religious attachment of Aborigines to their tribal land … is of necessity something different in the case of the Christian Aborigine.'[5] This ambiguity raised a legal question: could First Nations Christians hold a spiritual connection to Country that would entitle their sites to special protection, and them to land rights, under Australian law?

As Miranda Johnson demonstrated from the late 1960s, arguments for Aboriginal land rights hinged on the validity of land tenure based in a spiritual rather than economic or political attachment to land. Churches were at the forefront among those arguing for First Nations' rights to their lands on the grounds of Indigenous spirituality.[6] Evolving legislation around land rights subsequently emphasised 'Aboriginal tradition' and the 'sacred site'.[7] Native title law in Australia is unusual for the way it is grounded in the continuation of 'traditional' beliefs and practices of First Nations people.[8] Would settler law recognise land rights of First Nations people who held to religious beliefs (apparently) brought by the colonisers?

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[1] Hugh Morgan, 'Australian Mining Industry Council, Minerals Outlook Seminar' (Speech, 2 May 1984) 5 (State Library New South Wales, MLMSS 10168/10, c14).

[2] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 4 ('*Heritage Act*').

[3] Russell Walter Fox, Graeme Kelleher, and Charles Baldwin Kerr, 'Ranger Uranium Environmental Inquiry: Second Report' (Australian Government Publishing Service, 1977) 266.

[4] Alan Cole, 'Questions and Comments Gleaned from Various Preliminary Submissions Received by the Federal Secretary' (Internal memo, 10 December 1981) (State Library New South Wales, MLMSS 6040/20).

[5] Alan Cole, 'Church Missionary Society Aboriginal Commission Report' (Research Report, Christian Missionary Society, February 1984) (State Library New South Wales, MLMSS 6040/44).

[6] Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler* (Oxford University Press, 2016) 52.

[7] *Aboriginal Land Rights Act 1976* (NT).

[8] Elizabeth Povinelli, *The Cunning of Recognition*: *Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press, 2019) 156.

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This question was all the more pertinent because the status and rights of First Nations people under settler legal systems in Australia has, at times, hinged on conversion to Christianity. Through most of the 19th century, non-Christian Aboriginal people were barred from testifying in court.[9] In 1840, the Colonial Secretary blocked a bill in New South Wales that would enable the admission of Aboriginal evidence; writing that to admit evidence from a witness 'ignorant of the existence of a God' contravened British jurisprudence.[10] This was, supposedly, all the more reason to 'impart to them the truths of Christianity and prepare them for the reception of their legal rights', according to George Augustus Robinson in 1842.[11] Under subsequent assimilationist policies and missionary regimes, First Nations People were expected to adopt Christianity as part of their preparation for 'full citizenship'. Designated as 'wards of the state', Christian conversion was a means to exhibit citizenly behaviour. Though Christianity was not a legal requirement, Christianity and the rights of citizenship were closely associated in the first half of the 20th century.[12]

Morgan's 1984 speech was met with outrage, particularly from the Uniting Church.[13] Yolngu leader and Uniting Church minister, Djiniyini Gondarra labelled it 'demonic'. 'God has given the Aboriginal people … knowledge of the land and the ceremonies' he retorted.[14] Charles Harris, an Aboriginal and Torres Strait Islander minister, also hit back, turning settler categories against Morgan.

> What is more pagan than the western culture in its lust for greed and wealth [?] … Mr Morgan has no knowledge of Aboriginal spirituality to make a statement like that. Aboriginal Christians do have a concern for land and do have a concern for sacred sites.[15]

First Nations People themselves argued for the harmony of Christianity and their connection to Country, insisting on both.[16] In later years, similar statements to those of Harris and Gondarra were made by native title claimants. Anthropologist Peter Sutton, for instance, recalled Wik claimant Jean George Napranum explaining in Canberra that 'the land was given to us by God'.[17]

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[9] Nancy E Wright, 'The Problem of Aboriginal Evidence in Early Colonial New South Wales,' in Diane Elizabeth Kirkby and Catharine Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (Manchester University Press, 2001) 140.
[10] Quoted in Russell Smandych, 'Contemplating the Testimony of "Others": James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839-1849' (2004) 10(1-2) *Legal History* 97, 113.
[11] Ibid 116.
[12] Laura Rademaker, *Found in Translation: Many Meanings on a North Australian Mission* (University of Hawai'i Press, 2018) 42–9.
[13] The Uniting Church's Commission for World Mission issued an immediate press release. John Brown, 'Aboriginal ministers attack mining chief's statement' (Commission for World Mission, Uniting Church in Australia, Press Release, 5 June 1984) (State Library New South Wales, MLMSS 10168/10, c14).
[14] Response from Charles Harris and Djiniyini Gondarra to Hugh Morgan, 1984 (internal memo, no date, State Library New South Wales, MLMSS 10168/10, c14).
[15] Ibid.
[16] Ian McIntosh, 'Anthropology, Self-Determination and Aboriginal Belief in the Christian God' (1997) 67(4) *Oceania* 273, 285. See also Djiniyini Gondarra, *Father, You Gave Us the Dreaming* (Uniting Church in Australia, 1988); George Rosendale, et al, *Rainbow Spirit Theology: Towards an Australian Aboriginal Theology* (ATF Press, 1997); Anne Pattel-Gray, *Aboriginal Spirituality: Past, Present, Future* (Harper Collins, 1996).
[17] Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2004) 130.

Morgan's warnings and missionary anxieties about a conflict between Country and Christianity never eventuated. In the years since the passage of the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth) and the subsequent decisions of the 1992 case of *Mabo v Queensland* [*No 2*][18] and in 1996, *Wik Peoples v Queensland*,[19] it seems the courts have not found Indigenous Christianity to affect the recognition of sacred sites, land rights, or native title. David Triger and Wendy Asche found only one native title case in which Aboriginal claimants faced cross-examination around whether their connection to Country was given by the Christian God or Dreaming Ancestors.[20] In most cases, the fact that many claimants and key witnesses were Christians (including ministers in various churches) was not addressed in legal assessments of their continuous spiritual affinity to Country, nor were they invited to share their theological insights on these matters.[21] Instead Christian spirituality has been largely assumed not to interact with 'tradition'. Given this silence, it seems Morgan's binary of 'pagan' as opposed to 'Christian Aborigines' implicitly continued in the legal frameworks imposed on First Nations Peoples and their spiritualities; spiritualities which have proved to be more complex and nuanced than settler categories and assumptions.[22]

[18] (1992) 175 CLR 1.
[19] (1996) 187 CLR 1.
[20] David S Trigger and Wendy Asche, 'Christianity, Cultural Change and the Negotiation of Rights in Land and Sea' (2010) 21(1) *Australian Journal of Anthropology* 90, 100.
[21] Ibid 94, 95, 105.
[22] Ibid 104–5.