Submission to the Legal and Constitutional Affairs Legislation Committee on Religious Exemptions for Religious Educational Institutions

Dear Chair and Committee Members,

A number of recent cases in Australia and overseas have highlighted an emerging tension between the human right of freedom of religion and belief, and the human right to be free from discrimination. This has manifested in conflicts between religious freedom and anti-discrimination law, particularly in relation to sexual orientation and same-sex marriage.

This submission argues legislative abilities (framed either as substantive exemptions or positive rights) allowing religious educational institutions to maintain their distinctive ethos by selecting appropriate staff and appropriately regulating students should remain for both policy and legal reasons. First, in terms of policy, the desire to promote a truly democratic and inclusive society means that religious organisations should be provided with suitable legislative protection so they can freely exercise their religion while serving the community in a public context. Second, in terms of law, any attempt to remove the exemptions at the Commonwealth level without providing at least equivalent legal rights may breach the free exercise clause of Section 116 of the Constitution by prohibiting the free exercise of religion.

Please note that this submission includes material from the following peer-reviewed publications:

- 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239.
- 'Equal Voice Liberalism and Free Public Religion: Some Legal Implications' in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Law and Religion*, Connor Court Publishing (forthcoming 2019).

This submission also draws from my previous submissions to Parliamentary Committees and Law Reform Inquiries in relation to religious freedom, including my recent submission to the Legal and Constitutional Affairs References Committee which was extensively cited by the Report released on 26th November 2018.

My research has been accepted by previous and current reviews into religious freedom in Australia, including multiple Commonwealth Government reviews. Most recently, as mentioned, my research was cited extensively by the Report released in November 2018 by the Legal and Constitutional Affairs References Committee. The Report consisted of a majority report (ALP/Greens) and a dissenting report (Coalition). I was cited by the majority report in relation to potential constitutional issues with any attempt to remove religious exemptions in Commonwealth legislation. I was cited extensively by the dissenting report on similar constitutional issues, as well as to support arguments regarding the need for the religious freedom of religious educational institutions to be maintained and substantively protected. In particular, the majority report noted my argument that removing religious exemptions in Commonwealth law would breach s 116 (p 26).

The dissenting report extensively quoted and relied on my arguments that the harm against religious educators is greater if the exemptions were removed than the harm against those discriminated against if they are retained (p 64), that international law requires legal protection for faith-based schools to positively select staff who uphold the ethos of the school (p 68), that religious freedom requires the protection of minority beliefs from the prevailing orthodoxy of uniform equality (pp 69-70), that removing exemptions actually promotes inequality by failing to take into account due accommodations for religious entities disproportionately targeted by equality legislation (pp 72-73), that removing religious exemptions in Commonwealth law for religious educational institutions would breach s 116 by prohibiting the free exercise of religion (pp 81-82), that withdrawing state support of religious educational institutions would limit pluralism and undermine democracy (p 83), and that religious educational institutions need legal protection to maintain the distinct and unique religious ethos which undergirds their approach to education (p 93). The dissenting report further quoted from two citations in my submission: The dissent in the Canadian *TWU* case

which noted that the accommodation of difference serves the public interest (p 84), and a quote from Professor Nicholas Aroney expressing religious practice as broader than just belief and worship; it also includes social, cultural, commercial, educational, medical and charitable activities (p 92).

Finally, my research was also quoted by Senator Zed Seselja during the Senate Debate on 3/12/18 on the need to maintain religious freedom for religious schools to justify Government amendments to the proposed legislation (Senate Hansard, p 2).

In regard to other materials, the Australian Law Reform Commission Freedoms Inquiry (2015) agreed with and adopted my submission that religious speech might be protected by both Section 116 and the implied freedom of political communication. The Australian Senate Select Committee Inquiry into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (2016) extensively quoted me and relied on my written submissions and expert evidence in relation to religious freedom, which helped inform the national debate and government policy on religious freedom protections during the process of legalising same-sex marriage. I was also invited to give expert evidence on the legal foundations for religious freedom in Australia, and contemporary challenges, to the Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) Inquiry into the status of the human right to freedom of religion or belief (2017).

The Inquiry released an Interim Report in November 2017. The Report extensively cited and relied on my written and oral submissions in relation to interpretation of the free exercise clause in s 116 of the Constitution, and the tension between religious freedom and anti-discrimination law. For example, the Inquiry adopted my positive characterisation of the High Court's definition of religion and accepted that definition (p 16), agreed with my submission that the constitutional protection of free exercise extends to individuals (p 20), and relied on my submission as the leading view on how the free exercise clause has been interpreted (p 32). The Report further relied on my submission as the leading authority on the tension between religious freedom and anti-discrimination (p 76). The Report specifically relied on my submissions to clarify the nature and limits of any religious freedom protections, including draft proposals for legislation (pp 79, 86).

I also made a submission to the Religious Freedom Review Panel in January 2018 and was invited to give expert oral evidence to the Panel in February 2018. The Panel's Report is yet to be publicly released at the time of writing.

Below is a **specific submission** with a very brief summary of potential issues with the bill put by Senator Wong, and proposed amendments by the Government.[1] This includes some brief recommendations. Following that is a **broader submission** which contains more detailed policy and legal analysis which argues religious freedom rights for religious educational institutions need to be substantively protected.

I apologise for the submission being rather lengthy, but I wish to give the Committee a broad, developed position and further resources (in the extensive footnotes) the Committee may find helpful. Thank you for your consideration. Please feel free to contact me if you have any questions.

Kind regards,

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https://eprints.qut.edu.au/view/person/Deagon,_Alex.html

[1] I acknowledge Associate Professor Neil Foster for his excellent analysis of the relevant issues. These can be accessed in more detail on the *Law and Religion Australia Blog* here (Wong bill) and here (Government amendments).

Specific Submission

Issues with Senator Wong's Bill

- The Bill removes the ability of religious educational institutions to directly take into account marital status, pregnancy, sexual orientation and gender identity when dealing with students and providing education to students (repeal of s 38(3) and insertion of s 37(3))
- **This will not only unduly impact the religious freedom of schools, but also have the unintended consequence of impacting the religious freedom of all religious bodies providing 'education'**
- First, Schools will only be able to 'indirectly' regulate students if it is 'reasonable in the circumstances' (7B(1)). However, unless it is made clear that this determination is up to the school, it gives secular courts effective theological power to determine if a particular school policy based in religion is 'reasonable'. This is an unwise intrusion of the state in the church and undermines religious freedom.
- Second, a uniform rule imposed on students which regulates student conduct may be interpreted to be directly discriminatory. For example, a rule that a student cannot bring a same-sex partner to a school social is directed at conduct, not orientation (it applies to heterosexual students as well as homosexual ones). But courts have not made this distinction between orientation and conduct, stating that the conduct is indissolubly linked to the orientation. As such schools may not be able to impose reasonable rules on students based on the religious ethos of that school.
- Third, the amendments are much too broad. The s 38 amendment extends to any educational institution where education or training is provided, including tertiary theological colleges with an explicitly religious approach. The s 37 amendment extends to any body established for religious purposes – including churches! This means it plausibly covers church sermons, Sunday schools, mosques and synagogoues, and would prevent these bodies from freely providing religious education and training.

Issues with Government Amendments

- Deleting new s 37(3) would remove one aspect of the broadness problem identified above.
- Addition of new s 7E which provides that students may be regulated by a uniform rule in accordance with the religious ethos of the school if done so in good faith and in the best interests of the child. However, this still puts the determination of 'best interests' in the hands of a secular court, which does not address the above issue. The religious community must be free to determine 'best interests' in accordance with their belief. Furthermore, this still does not address the problem of courts seeing conduct as indissolubly linked to orientation in the event of a dispute.
- Insertion of s 7F which allows any religious educational institution to engage in any teaching activity which is done in good faith according to the doctrine of that religion. This is a positive step which should be passed in conjunction with a more general provision which allows religious educational institutions to impose uniform rules of behaviour and conduct in good faith according to the doctrine of that religion. This would protect the freedom of religious educational institutions to educate in accordance with their religious ethos without fear of being subject to direct or indirect discrimination claims. It is worth noting this change would not protect other religious bodies such as churches, mosques and synagogues as mentioned above, and must go further in that respect.

Recommendation

Based on the above summary and the below context, the following recommendations are provided in order of preference:

First, at this stage there should be no change and the existing exemptions should be retained. It would be sensible to wait until the Ruddock Report (which considered all these issues in depth over time) is released, digested and debated so sensible, considered policy can follow. It is dangerous to rush the passage of ill-considered bills like this which will significantly impact religious freedom. No evidence was provided of these exemptions being relied on to 'expel students for being gay' so there is time to develop a more thoughtful approach.

Second, if this bill is to proceed then further amendments should be made. Section 38(3), rather than being removed, should be amended to allow religious educational institutions to apply standard policies as to acceptable student behaviour, advocacy and conduct which are in accordance with their faith commitments as determined by the institution. Section 37(3) should be amended to make it clear that these amendments are just designed to affect religious educational institutions, not religious bodies in general.

Third, given both LGBT advocates and religious schools seem reluctant to maintain the exemptions in their current form, one other option is to remove the exemptions completely and in their place pass a positive right for religious educational institutions to select staff consistent with their religious and institutional ethos as determined by the religious educational institution, and a positive right for religious educational institutions to enforce generally applicable procedures and rules with regard to student advocacy, behaviour, conduct, dress etc., in good faith, as considered to be in the best interest of students according to the religious educational institution.

Broader Submission

General Principles

Article 18 of the *International Convention on Civil and Political Rights*, ratified by Australia in 1980, states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

This indicates freedom of religion is a right exercised by individuals and institutions, both privately and publicly.[2] In particular 18(4) obliges states to have respect for the liberty of parents to educate their children in conformity with religious convictions. One significant method of achieving this obligation is facilitating the ability of faith-based schools to educate in accordance with their faith-based ethos as parents may wish to choose this. Whether framed as exemptions to discrimination or as a legal right to select, allowing faith-based schools to select staff designed to consistently uphold this ethos is an essential aspect of maintaining this ability. Though there are no limitations to this requirement in the instrument, religious freedom generally is subject only to legal limitation which is *necessary* (not merely reasonable) to protect public safety, order, health, morals or fundamental rights and freedoms

[2] See Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153.

of others. This is a high threshold which requires substantive proof before any legal limitation is appropriate. In the absence of substantive proof, Australia may be in breach of its international obligations if it removes religious exemptions for faith-based schools to choose staff in accordance with their religious convictions.

In the 2017 Frank Walker Memorial Lecture, Federal Labor Senator Penny Wong argued that one of the foundations of liberal democracy is that human beings are equal to each other, and 'discrimination against people on the basis of an innate characteristic, like sexual orientation, is anti-liberal and anti-democratic'.[3] The implication is religious freedom should not be used as an excuse to discriminate in a secular liberal democracy. In this context some have advocated reducing anti-discrimination exemptions for religious organisations because religion should not be a reason to discriminate in a secular state.[4] However, this approach could undermine fundamental freedoms of religion and association by failing to properly consider how anti-discrimination laws might unfairly compel religious educational institutions to receive staff or students who actively undermine the religious ethos of the school. This, in turn, allows actions which violate their religious convictions, preventing them from holistically participating in a democratic society and undermining freedom and equality for these citizens and communities.[5] Thus, broad anti-discrimination exemptions for religious organisations are necessary to preserve religious freedom and religious diversity in a liberal democracy.[6]

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[3] Penny Wong, (2017). The Separation of Church and State – The Liberal Argument for Equal Rights for Gay and Lesbian Australians. *Frank Walker Memorial Lecture.* Retrieved from https://www.pennywong.com.au/speeches/the-separation-of-church-and-state-the-liberal-argument-for-equal-rights-for-gay-and-lesbian-australians-nsw-society-of-labor-lawyers-frank-walker-memorial-lecture-2017/

[4] E.g. Evans, C., & Ujvari, L. (2009). Non-Discrimination Laws and Religious Schools in Australia. *Adelaide Law Review*, 30, 31; NeJaime, D. (2012). Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination. *California Law Review*, 100(5), 1169.

[5] See e.g. Thomas Berg, (2010). What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common. *Northwestern Journal of Law and Social Policy*, 5(2), 206.

[6] Charlotte Baines, (2015). A Delicate Balance: Religious Autonomy Rights and LGBTI Rights in Australia. *Religion & Human Rights*, 10(1), 45; Patrick Parkinson, (2011). Accommodating Religious Beliefs in a Secular Age: The Issue of Conscientious Objection in the Workplace. *University of New South Wales Law Journal*, 34(1), 281.

Policy Reasons to Maintain the Exemptions

Political theorist Veit Bader develops an argument that 'associational governance' of religious diversity is the most appropriate mechanism of governance in conditions of increased religious pluralism and fragmentation of organised religion, especially compared to the more traditional secularist model which strictly separates 'state and politics from organised religions'.[7] This associative democracy is a 'specific variety of liberal-democratic institutional pluralism' which involves power-sharing through formally recognising and integrating the existing plurality of groups and organisations into the political process, along with a principle of decentralisation and self-determination. It supplements representative democracy and is 'driven by the conviction that all those relevantly affected by collective political decisions are stakeholders, and thus should have a say'.[8] 'This promotes strong interpretation of associational freedoms and the proposals to represent the interests of different minority groups in the political process'.[9] For example, all states (including those with strict-separation ideologies such as the US and France) 'recognise organised religions either legally or administratively, finance them either directly or indirectly (tax exemptions), and privilege freedoms of religion by granting them, and not others, many exemptions. They also finance faith based organisations in all sorts of care and social services and also in education, either directly or indirectly'.[10] Bader's fundamental point is secularist separation is neither desirable nor practical. A truly democratic society needs a system of governance which promotes equal representation of religious and non-religious perspectives in accordance with constitutional prescriptions.

The basic arguments for removing religious exemptions stem from fundamental ideas of human dignity and equality, especially when public religion might discriminate against people of particular identities. As Trigg laments, 'when religion is pitted against [other] rights, religion is often sidelined'.[11] Of course, what is often forgotten is religion too is a

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[7] Veit Bader, 'Post-Secularism or Liberal-Democratic Constitutionalism?' (2012) 5(1) *Erasmus Law Review* 5, 18-19.
[8] Ibid 18-19, footnote 85.
[9] Ibid 19, footnote 85.
[10] Ibid 19. See also Veit Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam University Press, 2007) 175-262.
[11] Roger Trigg, *Equality, Freedom and Religion* (Oxford University Press, 2012) 8.

fundamental human right; but when two rights such as 'religious freedom' and 'equality' are put in conflict this way, 'there seems little appetite from the standpoint of law for any reasonable accommodation. The views of the state have to be applied regardless of any conscientious dissent'.[12] If there is a clash of these fundamental rights, it appears 'the solution is for one to win, and not for any attempt to be made to satisfy both sides'.[13] But religious freedom is a basic right which cannot be simply discarded because it competes with other rights. The idea of religious freedom is to protect religious belief and practice from any prevailing orthodoxy (e.g. equality) which might oppose it. The idea is 'worthless' if it is allowed only when it fits in with that particular orthodoxy.[14]

This exigency makes finding some kind of reasonable balance between religious freedom and equality all the more pertinent. After all, freedom of religion 'arises in its most acute form when unpopular, or unfashionable, minority positions are in question. Freedom is safeguarded only when the majority allows beliefs to be manifested of which it disapproves'.[15] It is easy to talk about the freedom of those who think and act as we do. The problem is when there is fervent disagreement. Defending the right to disagree is 'important for the future of democracy', not least because one day we might be in the minority.[16] As Trigg powerfully observes, 'the essence of religious freedom is that people are allowed to follow their religion, even if it is a different one from that of the majority. The accommodation of minority beliefs is what distinguishes democracy from a totalitarian state'.[17] We must consider whether we are willing to 'take account of conscientious objection' and 'find room for accommodation'.[18] Though it is always simpler to have a law which applies uniformly, important principles are at stake. Without exemptions, unreasonable burdens can be placed on religious communities which are not operative on non-religious communities. Trigg provides the stock example of a law requiring cyclists to wear helmets. Such a law is eminently sensible and neutral, not targeting any particular group. But for Sikhs the law is unduly burdensome because of their requirement to wear a turban, and the law has

[12] Ibid.
[13] Ibid.
[14] Ibid 38-39.
[15] Ibid 8.
[16] Ibid 9.
[17] Ibid 146, 151-152. Trigg alludes to the fact that secular thinking with its focus on 'equality' has now become the orthodox view in liberal societies, with the implication that religion is now a genuine minority (133).
[18] Ibid 9.

generally granted exemptions to them.[19] Therefore, 'if we really value religious freedom, including the right to deny all religion, we should be concerned if its claims are simply overridden'.[20] As Trigg explains, uniform treatment can make 'religious people feel like they are marginalised in their own society' because they alone are subject to an unequal burden through generally applicable legislation.[21] So religious people may resent their 'commitments being ignored and that they are being treated unfairly and unequally. A concern for equality can visibly diminish religious freedom'.[22]

It is becoming well known that social divisions, differences and fragmentation along religious and cultural lines can lead to conflict which undermines democratic freedom and equality. But this is only if the state fails to 'recognise and accommodate the various ethnicities, religions, languages and values in a particular country'.[23] Ten Napel proceeds to note that since 'religion is of profound importance to one's identity, from the point of view of cultural liberty, guaranteeing religious freedom in the best possible way is of foremost importance'.[24] Consequently ten Napel contends that all civil society organisations, including religious educational institutions, ought to enjoy a considerable degree of autonomy. Negotiation, reasonableness and accommodation is needed. This 'reasonable accommodation' is the way forward, including a 'proportionality principle' to 'weigh the seriousness of a particular infringement of a right against the importance of the conflicting private or public interest in precisely infringing upon this right', as opposed to an 'inadequately blunt' hierarchy of rights.[25] In this framework freedom is preserved by granting reasonable autonomy to religious organisations. Equality is preserved by providing religious bodies with accommodations (as a function of autonomy) to remove unreasonable burdens, while ensuring any discrimination which occurs is a proportional and reasonable exercise of that autonomy in a liberal democracy.

[19] Ibid.
[20] Ibid.
[21] Ibid 31-32, 87-88, 114.
[22] Ibid 32, 116, 119-120, 128-132.
[23] Hans-Martien Ten Napel, *Constitutionalism, Democracy and Religious Freedom* (Routledge, 2017) 98.
[24] Ibid 99.
[25] Ibid 126.

All this entails 'both the existence of rules and the provision of accommodations' for religion.[26] Sadly, as Ten Napel incisively observes, 'what the fact that [the provision of religious accommodations] is becoming more controversial really demonstrates, therefore, is that the idea of liberal democracy as such is losing support'.[27]

This must not continue. Obviously there is no doubt equality legislation is an essential aspect of liberal democracy. But if administered in a coercive fashion without due attempts at accommodation and proportionality, it will burden some in society unnecessarily and inequitably.[28] It should be noted that associative religious freedom is a special right in the context of liberal democracy, outweighing freedom of opinion and expression. 'Before one is able to express an opinion, one first needs to develop an idea, often in community with others. This idea, moreover, is likely to originate in a religious or non-religious worldview, which must thus be protected in order to make freedom of expression substantial'.[29] So religious associations in particular need legal protections to maintain their distinct identity such that they can continue to develop their ideas to inform opinions and expression in the public sphere. However, at the same time, this does not mean religious freedom should be pursued at the expense of other fundamental rights such as equality. Believers must recognise and respect opposing interests in a liberal democracy, especially if these are protected as fundamental rights.[30] That is why a proportionate, reasonable accommodation of difference is appropriate rather than unfettered religious freedom or pure mandated uniformity.[31]

This implies an accommodationist approach in the context of religious freedom should include reasonable accommodations and exemptions for religious entities. These accommodations and exemptions provide the autonomy and freedom necessary for religious

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[26] Ibid.
[27] Ibid. See e.g. Paul Horwitz, 'Against Martyrdom: A Liberal Argument for Accommodation of Religion' (2016) 91 *Notre Dame Law Review* 1301.
[28] Ten Napel, above n 22, 127. See also Thomas Berg, 'What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common' (2010) 5(2) *Northwestern Journal of Law and Social Policy* 206.
[29] Ten Napel, above n 22, 127.
[30] Ibid.
[31] See also the discussion in Trigg, above n 10, 91-96, 151-152 on the need to identify religious belief and practice as an area of right which needs to be specially safeguarded from state coercion to accepted majority views and practices. 'Democracy must tolerate the claims of conscience, because deeply felt moral and religious convictions provide the basis on which responsible decisions should be made. Morality has to constrain democratic discussion, so as to provide a vision for the kind of society to be achieved. Claims of conscience are the wellspring of democracy itself'. (97)

individuals and organisations to maintain distinct identities which form the basis for developing unique perspectives and modes of public expression, which is essential for religious freedom. The principle has particular utility in the associational context, where there is a tendency to characterise the religious freedom of associations as existing merely as a function of individual rights rather than as a right attaching to the group itself.[32]

However, as Professor Nicholas Aroney cautions, 'much is at stake in the question whether freedom of religion is understood, in essence, to be an individual, associational or communal right'.[33] If it is purely an individual right such a conception 'has the tendency to suggest that the rights of religious groups must always be subordinated to the rights, not only of their individual members, but the rights of individuals that do not belong to such groups but nonetheless make claims against them, such as through the universalising application of antidiscrimination and other regulatory laws'.[34] This assumption can result in 'massive and illegitimate' state intervention in the internal affairs of religious organisations, even in issues of core belief and practice.[35] Rather, Aroney claims that when this 'false and unarticulated' assumption is abandoned and the organisation or group itself is deemed as a bearer of rights, 'a more balanced assessment of the interaction between those rights and the rights of others can then be undertaken'.[36]

So religious freedom is not merely individual.[37] There is a general consensus among specialist scholars in the field that the right to hold and practice religion has personal,

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[32] See e.g. Jane Norton, *Freedom of Religious Organisations* (Oxford University Press, 2016).
[33] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 154.
[34] Ibid. See also Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart, 2011) 13-27.
[35] Bader, Liberal-Democratic Constitutionalism, above n 6, 23.
[36] Aroney, above n 32, 154-155. See also Mark E Chopko and Michael F Moses, 'Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy' (2005) 3 *Georgetown Journal of Law & Public Policy* 387.
[37] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2013) 317-318.

associational, communal, organisational and institutional dimensions.[38] As Professor Carolyn Evans explains, at least at the level of international law:

> While human rights belong to individuals, the right to manifest religious freedom collectively means that it has an organisational dimension. When individuals choose to exercise their religion within an organised religious group, **the state must respect the autonomy of this group with respect to decisions such as the freedom to choose their religious leaders, priests and teachers**, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[39]

More broadly, as Cole Durham similarly observes:

> Protection of the right of religious communities to autonomy in structuring their religious affairs lies at the very core of protecting religious freedom. We often think of religious freedom as an individual right rooted in individual conscience, but in fact, religion virtually always has a communal dimension, and religious freedom can be negated as effectively by coercing or interfering with a religious group as by coercing one of its individual members.[40]

A way for the 'state to facilitate civil society associations in a democratic constitutional state' has been suggested by political theorist John Inazu through three constitutional commitments. The constitutional commitments are: first, a 'voluntary groups' requirement which forbids state interference with the membership, leadership or internal practice of a voluntary group without a 'clearly articulated and precisely defined' compelling state interest; second, a 'public forum' requirement which holds that the public forum should allow dissenting voices absent a compelling state interest; and third a 'public funding' requirement which prevents government from restricting generally available public resources for facilitating a diversity of ideas on the basis of its own orthodoxy.[41] Inazu understands a 'compelling state interest' as requiring 'an extraordinary justification (for example, "we think your claim of human

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[38] Aroney, above n 32, 168, 181. See also e.g. David Little, 'Religious Liberty' in John Witte and Frank S. Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008) 249; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2011 2nd ed) 375-377; Robert George, *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Intercollegiate Studies Institute, 2013) 76.

[39] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 35.

[40] W. Cole Durham, 'The Right to Autonomy in Religious Affairs: A Comparative View' in Gerhard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, 2001) 1.

[41] John Inazu, *Confident Pluralism: Surviving and Thriving Through Deep Difference* (University of Chicago Press, 2016),48, 64-65, 79. See also John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012).

sacrifice as liturgy is actually murder")'.[42] So it is only instances where there are gross or substantive violations, harms or threats to others that associational freedom should be limited.

Since religious groups in particular provide the associational structures (including visionary and didactic resources) for training in discourse concerning advancement of human development and the common good, it is essential for moral engagement and civic virtue (and democracy itself) that these groups be protected by and from the state.[43] As Ten Napel argues, 'it is precisely within such faith and other communities that mature visions of the good life can develop, which simultaneously contribute to the notion of the common good'.[44] Thus religious groups should be free to run according to their own rules. The state must have a role in preserving the freedom of such groups because of the natural human tendency to form groups with common interests and 'a liberal society is itself sustained and protected by such groups'.[45] The point is well summarised by Galston:

> A liberal policy guided ... by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of maximum feasible accommodation, limited only by the core requirements of individual security and civic unity. That there are costs to such a policy cannot reasonably be denied. It will permit internal associational practices (e.g. patriarchal gender relations) of which many disapprove. It will allow many associations to define their membership in ways that may be viewed as restraints on individual liberty ... Unless liberty individual and associational - is to be narrowed dramatically, however, we must accept these costs.[46]

Accepting these costs, then, the final question is what kind of specific exemptions and accommodations should exist for religious educational institutions. Answering this question turns on what religious freedom means and the particular religious convictions involved. Religious freedom extends to worship, teaching, propagation, identifying conditions of membership and standards of conduct, and appointing officers, leaders and employees. Such

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[42] John Inazu, 'A Confident Pluralism' (2015) 88 *Southern California Law Review* 587, 605.
[43] Ten Napel, above n 22, 94.
[44] Ibid 97.
[45] Ibid 123. See also Trigg, above n 10, 43-44.
[46] William Galston, 'Value Pluralism and Political Liberalism' (1996) 16(2) *Report from the Institute for Philosophy and Public Policy* 7, 7.

practices are all protected, even if the organisations are formed for broader social or commercial purposes.[47] As for religious convictions, Aroney insightfully provides:

> some people who regard themselves as religious nonetheless tend to regard their religion as one aspect of their lives among many; **others see their religion as definitive of their whole lives, so that even the most mundane activities are seen in religious terms**. Such people frequently gather together, not only for narrowly 'religious' activities such as prayer or scriptural study, but also for what might be described as social and cultural activities, such participation in games and sports, or the **provision of educational, medical or charitable services**. For many such people, **such activities are deeply religious**.[48]

These insights provide a persuasive basis for allowing, for example, religious educational institutions the autonomy to choose employees who share their doctrines as part of a proportionate, reasonable accommodation. **A religious educational institution may want to preserve their distinctive identity as religious in order to be a community which approaches questions of education from that particular religious perspective. Indeed, they may see the practice of education itself as a religious injunction which is to be performed in accordance with their religious convictions.** Maintaining this religious identity allows them to present a unique perspective in a democracy, and legally compelling them to accept employees with views or conduct inconsistent with that perspective undermines their religious identity and, consequently, their democratic position as equal and valued citizens.[49]

It is important to note the ability to 'discriminate' in this context is not only a function of religious freedom, but also preserves equality between religious and non-religious educational institutions. As I have argued previously:

> Generally applicable laws, such as anti-discrimination legislation, fall disproportionately or unequally on those whose religious practices conflict with them. Those who do not engage in religious belief or practice are not subject to the same practical restrictions resulting from the laws… the exemptions are necessary in order

[47] Aroney, above n 32, 157-158.
[48] Ibid 161 at footnote 46.
[49] See Nicholas Wolterstorff, *Understanding Liberal Democracy: Essays in Political Philosophy* (Oxford University Press, 2012) 299; Trigg, above n 10, 51, 56-57.

> to preserve equality…specific exemptions are required to address this specific situation where there is an unequal or disproportionate application of law.[50]

In other words, such exemptions are a proportionate, reasonable accommodation of difference because they mitigate the effect of anti-discrimination laws that apply unequally to (in this case) religious educational institutions.[51] And as Trigg emphasises, 'the idea of reasonable accommodation highlights the need to adjust rules when they bear down unfairly on some categories, including religious believers'.[52] As such the need to accommodate religious practices can be traced to equality itself. The need to respect diversity and manage peaceful co-existence of difference requires respecting religion.[53] This proposition might well sit awkwardly with those who do not adhere to the doctrines of the particular religious institution. Nevertheless, if we desire a healthy democracy which genuinely and equally tolerates freedom to differ, we must allow associations the freedom to publicly conduct themselves in such a way as to maintain their unique identity on their terms.[54] Only this will facilitate a robust, collective political encounter of perspectives for consideration and critique by citizens so they are fully informed to pursue the public good.

A recent case illustrating this point has come out of the Supreme Court of Canada: *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33. In this case Trinity Western University, a private Christian college seeking accreditation of its law school, had a community Covenant prohibiting sexual activities outside heterosexual marriage in accordance with traditional Christian doctrine. The Law Society denied accreditation on the basis the covenant was discriminatory against LGBT persons and TWU eventually appealed to the Supreme Court. The Court held 7:2 that the denial was reasonable and proportionate. The scathing joint dissent identified the problem:

> The only proper purpose of a Law Society of Upper Canada ("LSUC") accreditation decision is to ensure that individual applicants who are graduates of the applicant institution are fit for licensing. As a consequence, the only defensible exercise of the LSUC's statutory discretion would have been to accredit TWU's proposed law

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[50] Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 276-278. C f. Evans and Ujvari, above n 3, 42.
[51] See Trigg, above n 10, 3-4, 31-32, 87-88, 114.
[52] Ibid 124.
[53] Ibid 124, 151-152.
[54] Wolterstorff, Understanding Liberal Democracy, above n 48, 299, 304; Trigg, above n 10, 43-44.

> school. The decision not to accredit TWU's proposed law school is, moreover, a *profound interference with the TWU community's freedom of religion*. Further, even were the "public interest" to be understood broadly as the LSUC and the majority contend, accreditation of TWU's law school would not be inconsistent with the LSUC's statutory mandate. *In a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference.* In our view, only a decision to accredit TWU's proposed law school would reflect a proportionate balancing of *Charter* rights and the statutory objectives which the LSUC sought to pursue.[55]

The dissent expressly concurs with the point this submission is making, which is associations are entitled to strong autonomy as part of freedom of religion. Trinity Western University, like any private religious educator, is a private institution which is entitled to set a standard by which its community members will abide, as a function of religious freedom. The decision to not accredit them interferes with their religious freedom by effectively preventing them from running a law school in accordance with their religious convictions. No LGBT person, or any other person, is compelled to attend the institution and there are many other options; the accommodation of allowing accreditation of a private Christian law school with a 'discriminatory' Covenant is reasonable and proportionate. The presence of such a school and its ensuing graduates allow for the development and articulation of distinct views which will enrich the democratic process. As the dissenting justices so aptly put it, 'the unequal access resulting from the Covenant is a function not of condonation of discrimination, but of accommodating religious freedom, which freedom allows religious communities to flourish and thereby promotes diversity and pluralism in the public life of our communities'.[56] The fact the majority of the Supreme Court did not see this is concerning for the future of liberal democracy.

Therefore removal of exemptions for religious bodies is not fair for religious bodies. To eliminate such exemptions is to imply that religion should not be connected to public services, and this imposes a considerable burden on those who wish to integrate their lives and identities.[57] For example, the same features which supported the legalisation of same-sex marriage also support exemptions for religious bodies, particularly the common desire for

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[55] *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [57] Cote and Brown JJ (my emphasis).
[56] Ibid [81].
[57] Thomas Berg, 'What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common' (2010) 5(2) *Northwestern Journal of Law and Social Policy* 206, 227–28.

religious bodies and same-sex couples to express their commitments (which are fundamental to their identity) in a public, holistic way. For the same-sex couple it is their love and fidelity to their partner, and for the religious body it is the love and fidelity to the object of their religion, but in both cases the parties are claiming a right beyond private behaviour which extends to all aspects of their public lives, including the provision of education.[58] When religious bodies are prevented from publicly expressing their religion through conduct related to their social and business interactions, and when same-sex couples are prevented from publicly expressing their orientation and relationship, both are being 'told to keep their identities in the closet. [Therefore a]nyone who takes the claims of same-sex couples seriously must also give substantial weight to the religious objectors'.[59]

To give another illustration from Federal Politics: former Labor party Senator Joe Bullock retired and quit the party after revelations that support for same-sex marriage would no longer be a conscience vote from 2019. If Bullock's opposition to same-sex marriage was based on religious beliefs would it be fair to force the Labor party to support a member which disagreed with their fundamental policy platform by not allowing them to have exemptions through which they can discriminate in who they accept as members? If yes, how can the Labor party remain distinctively Labor? It would lose all its potency if it allowed persons espousing non-Labor principles into a prominent position in the party. If no, then the same principle applies for religious bodies.

Furthermore, removal of exemptions for religious bodies is not inclusive. **Removing exemptions would effectively prevent religious bodies from operating to provide education in accordance with their convictions.** The religious body then has a choice either to continue operating in accordance with their convictions and risk suffering legal penalty, compromise their convictions, or remove themselves from the area completely. The untenable nature of the first two options for many religious bodies may well produce a greater proportion choosing the third. **Legislation which has the effect of excluding religious bodies from the public square is not inclusive, and from a purely pragmatic perspective, the closing down or religious schools would cause significant logistical and**

[58] Ibid 207–208, 215–16.
[59] Ibid 218.

financial stress for the Commonwealth and the States seeking to find new places for students and staff in the public system. In most circumstances there are other equivalent options reasonably available for those discriminated against, such as employment or enrolment in the public system or in private/independent schools which do not have incompatible religious convictions.[60] **The harm against religious educators is therefore likely to be much greater than that suffered by discriminated persons**, which reiterates the first point – it is actually the religious bodies which are receiving unfair treatment.

Legal Reasons to Maintain the Exemptions

Any attempt to remove the exemptions for religious educational institutions in the Commonwealth *Sex Discrimination Act* is likely to breach Section 116 of the Constitution and consequently be invalid. The relevant clause of Section 116 of the Constitution states 'The Commonwealth shall not make any law… for prohibiting the free exercise of any religion.'

Chief Justice Latham in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* ('*Jehovah's Witnesses*')[61] argued that since the 'free exercise' of religion is protected, this includes but extends beyond religious belief or the mere holding of religious opinion; the protection 'from the operation of any Commonwealth laws' covers 'acts which are done in the exercise of religion' or 'acts done in pursuance of religious belief as part of religion'.[62] Subsequent cases noted these acts must be religious conduct, or 'conduct in which a person engages in giving effect to his [sic] faith in the supernatural'.[63] Religious conduct protected by s 116 extends to 'faith and worship, **to the teaching and propagation of religion**, and to

[60] See Deagon, above n 49, 285.
[61] *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.
[62] Ibid 124–25 (Latham CJ). This follows Griffith CJ in the 1912 case of *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ), indicating that s 116 not only protects religious belief/opinion or the private holding of faith, but also protects 'the practice of religion – the doing of acts which are done in the practice of religion'. For further discussion and questions regarding the current applicability of this 'action-belief dichotomy', see Gabriel Moens, 'Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.
[63] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

the practices and observances of religion'.[64] Since staff and students of religious educational institutions engage in or receive, at the very least, the teaching and propagation of religion, the ability of these institutions to select staff consistent with their religious convictions and regulate their teaching of students comes within the ambit of free exercise.

Furthermore, Latham CJ noted that not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom.[65] At a minimum, only the narrowest limitations on the free exercise of religion are appropriate – that required for the 'maintenance of civil government' or 'the continued existence of the community'.[66] More precisely, freedom of religion should extend to protect all external actions which are not dangerous to society or democracy, even if those views or actions are deemed unpopular according to community values.[67] As Latham CJ observes, 'section 116 is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities'.[68] Given the argument above that exemptions for religious educational institutions are unpopular according to community values (whether this unpopularity is warranted or not), this supports the argument that they should be protected by s 116.

The last time the High Court considered the free exercise clause was the 1997 case of *Kruger v Commonwealth* ('*Kruger*').[69] In *Kruger*, the plaintiffs argued that a Northern Territory ordinance which authorised the forced removal of Indigenous children from their tribal culture and heritage was invalid as a law prohibiting the free exercise of religion. Leaving aside the Court's discussion of whether s 116 applies in the territories, the majority held that the impugned law did not mention the term 'religion' and was not 'for' the purpose of prohibiting the free exercise of religion in its terms, and so the law was upheld. Only laws could breach s 116, not the administration of laws. Chief Justice Brennan, Gummow and McHugh JJ (in separate majority judgments) stated that to be invalid under s 116 the impugned law 'must have the purpose of achieving an object which s 116 forbids', and

[64] Ibid 135–36 (Mason ACJ and Brennan J).
[65] See generally *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.
[66] *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126, 131 (Latham CJ), 155 (Starke J).
[67] See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149–50 (Rich J).
[68] Ibid 124 (Latham CJ).
[69] (1997) 190 CLR 1.

upholding the law on the basis that 'no conduct of a religious nature was proscribed or sought to be regulated in any way'.[70]

Any proposal to remove religious exemptions for religious educational institutions directly targets these institutions and restricts their free exercise in its terms by preventing them from selecting staff consistent with their religious convictions. Section 116 does extend to protect acts done in the practice of religion by religious bodies, and this includes teaching of students, and staff selections, of educational institutions.[71] Professor Reid Mortensen articulates the relevant principles:

> [O]ne inherent paradox in *all* discrimination laws is that, although they aim to protect social pluralism, the principles of equality they usually promote also present a threat to the protection of religious pluralism in the political sphere. This occurs when, despite the traditional recognition of rights of religious liberty, the discrimination laws apply to religious groups that deny the moral imperatives of, say, racial, gender or sexual orientation equality. In this respect, Caesar has generally been prepared to render something to God through the complex exemptions granted in the discrimination laws to religious groups and religious educational or health institutions.[72]

Mortensen therefore claims that **to 'honour rights of religious liberty, religious groups are probably entitled to broad exemptions from the operation of sexual orientation discrimination laws**'.[73] More emphatically, the right to free exercise in the Constitution '**does not suggest a "balance" to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty**'.[74]

Evans and Ujvari consider this controversial question of the extent to which religious schools, as examples of religious organisations, should be exempt from non-discrimination laws that

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[70] *Kruger v the Commonwealth* (1997) 190 CLR 1, 40, 161 (Gummow J).
[71] See *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116; Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153.
[72] Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 231.
[73] Ibid 228–29.
[74] Ibid 231.

would apply to state schools.[75] Their work also raises important broader points about discrimination, religious freedom and generally applicable laws which are worth considering. They agree that what is most relevant is the situation where discrimination occurs on the basis of conflict with religious teachings, such as where a staff member is gay or lesbian, or in a same-sex marriage.[76] In considering arguments for allowing exemptions from non-discrimination law, Evans and Ujvari discuss religious freedom in the context of international conventions, but interestingly do not raise the free exercise clause in s 116.[77] It could, perhaps, be accepted that 'schools generally fall under the jurisdiction of state and territory laws', and therefore s 116 is inapplicable and not mentioned for that reason.[78] However, as Evans and Ujvari specifically state, the fact that 'some educational institutions are subject to Commonwealth law' and 'Commonwealth statutes prohibit specific forms of discrimination' means that Commonwealth jurisdiction should be discussed 'for the sake of completeness'.[79] It is problematic that analysis of s 116 is inexplicably omitted, particularly given what follows.

In noting arguments against allowing exemptions from non-discrimination law, Evans and Ujvari make the point (again without mentioning s 116) that the right to religious freedom is limited.[80] The existence of exemptions indicates an attempt to balance the competing interests of freedom of religion and non-discrimination. Resolution of this tension and the precise point of balance reached will depend upon the 'assumptions of various proponents about which value should prevail'.[81] With respect, though balancing the value of freedom through a right to free exercise against the value of equality through a right to non-discrimination is certainly a significant consideration, in a Commonwealth context it is also necessary to consider the Constitutional framework provided by the free exercise clause in s 116.

More emphatically, as mentioned above, the right to free exercise in the Constitution 'does not suggest a "balance" to be struck between anti-discrimination standards and rights of

[75] Evans and Ujvari, above n 3, 33.
[76] Ibid 35.
[77] Ibid 36–40.
[78] Ibid 44.
[79] Ibid.
[80] Ibid 40–42.
[81] Ibid 53–54.

religious liberty, but a constitutionally required preference for religious liberty'.[82] It appears that Evans and Ujvari are not the only analysts to neglect the influence of s 116 in this context of religious exemptions to non-discrimination provisions. Writing of the discussions that occurred as part of the drafting process for the *Sex Discrimination Act 1984* (Cth), Mortensen mentions that 'it is… disturbing to find that, when advising the Commonwealth on this very problem, both the Sex Discrimination Commissioner and the Law Reform Commission failed even to mention the possible impact of s 116'.[83]

To recapitulate, Mortensen notes that if the free exercise clause were 'given a more substantive operation', this would have an impact on Commonwealth discrimination laws, particularly given the exemptions are often untested and ambiguous.[84] At the very least, s 116 would seem to require discrimination laws to have some sort of religious exemption for religious bodies. In particular, based on United States case law, Mortensen asserts that to 'honour rights of religious liberty, religious groups are probably entitled to broad exemptions from the operation of sexual orientation discrimination laws'.[85] Though proposed reforms to the Act overlooked the possible constraints in s 116, preferring to focus on international conventions, they did possess generous exemptions of the kind envisaged by s 116.[86]

However, Evans and Ujvari contend that even the present exemptions go too far, acknowledging that religious schools 'play an important role' and are 'deserving of some protection of their distinctive worldview', but stating that such protection is 'consistent with the idea that that they should be subject to more aspects of discrimination law than is currently the case in Australia'.[87] In particular, they criticise permitting discrimination to avoid 'injuring religious susceptibilities' on the basis that the phrase is 'rather vague', 'provides little guidance', and that 'religious freedom does not normally protect religious sensibilities'.[88]

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[82] Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 231.
[83] Ibid.
[84] Mortensen, above n 71, 219.
[85] Ibid 228–29.
[86] Ibid 225–26.
[87] Evans and Ujvari, above n 3, 56.
[88] Ibid 53.

It does seem fair to say that the terms 'sensibility' and 'susceptibility' are ambigious as applied to religion. For this reason, religious 'convictions' or 'beliefs' may be more clear terms, at least insofar as religious beliefs of organisations or individuals can be compared with established religious doctrine to see if these convictions are injured (that is, if free exercise is restricted). That will be a question of fact in any given situation and Courts should accept the testimony of the schools on this rather than acting as a secular arbiter of a theological dispute, which would be beyond their remit. Nevertheless, if we assume the claim of Evans and Ujvari that religious freedom does not protect religious sensibilities also applies to the protection of religious convictions, such a claim represents a comprehensive failure to take into account the operation of the free exercise clause. Even the narrowest view of free exercise involves the protection of religious convictions or beliefs, and actions consequent on those beliefs.[89] It also involves a constitutional preference for freedom of religion over anti-discrimination.[90]

It follows from the constitutional preference for the free exercise of religion over anti-discrimination that the current anti-discrimination exemptions for religious organisations are justified, and any attempt to remove them is likely to breach the free exercise clause of s 116.

Conclusion

As a function of a proportionate, reasonable accommodation of difference in a democracy, education requires strong legal protection of associational freedoms and associational autonomy through, for example, exemptions in equality legislation for religious educational institutions. Though there is no doubt a cost to equality through allowing such exemptions, the cost to democracy is far greater by not allowing them. Reasonable accommodations of difference are part of a flourishing, pluralist community, and we must learn to live together harmoniously with our differences if the idea of liberal democracy is to retain currency today. Furthermore, Section 116 was designed precisely to prevent the direct targeting of religious practice by religious entities by Commonwealth laws, and since the provision of education by

[89] *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 124–25 (Latham CJ).
[90] Mortensen, above n 71, 231.

a religious institution is a religious practice in accordance with religious convictions, and any removal of exemptions would directly prohibit that practice in accordance with those convictions, it follows that the removal of exemptions would be likely to breach the free exercise clause.

Thank you for your consideration.