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# Litigation, liberty, and legitimation: the experience of the Church of Scientology in Australian law

Bernard Doherty and James T. Richardson

Freedom of religion, the paradigm of freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.<sup>1</sup>

The foregoing quotation appears in the opening pages of the 2018 *Religious Freedom Review: Report of the Expert Panel* (the Ruddock Review). It is drawn

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from one of the most cited decisions in Australian legal history: the High Court appeal by the Church of Scientology against the Commissioner of Pay-Roll Tax in the State of Victoria—*Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40 (Scientology case). In opening its discussion of the domestic legal framework for the protection of religious freedom in Australia, the Panel went on to note how the Full Bench of the High Court in this decision was “particularly concerned to ensure the inclusion of religions that were not well established or were yet to find broad acceptance in the community.”<sup>2</sup> The import of the Scientology case was much wider than a dispute over tax liability involving a numerically small religious group and touched on important questions including who—both individually and communally—is entitled to religious liberty? What criteria might be used to qualify or disqualify an individual or a group as “religious” for the purposes of religious protections or exemptions? And, thirdly, a wider social question, why is being considered a “religion” so important for some minority religious groups?

To some observers these might seem absurdly preliminary questions. Surely it is common sense what constitutes a religion and, moreover, such a definition must already apply in law. Besides, in an enlightened Western democracy like Australia, discrimination against minority religious groups is rare. From a majoritarian perspective, this might appear to be the case. Compared to the heyday of sectarian conflict in Australian history, religious prejudice in Australia certainly has declined considerably, though not entirely, and as the Ruddock Review found, some groups—particularly minority religions like Islam and Judaism—are still subject to what the Panel referred to as “troubling examples of social hostility.”<sup>3</sup> The issues addressed by the High Court, however, are anything but simple, and continue to have potentially wide implications for a variety of religious groups in Australia today—particularly those whose belief systems appear to be novel or unpopular and who may need to avail themselves of the courts to secure their rights before the laws.<sup>4</sup>

How a society and its institutions define religion for various legal purposes and the strategies used to exclude certain groups from consideration is a vitally important question in discussing religious liberty, particularly in an increasingly pluralist environment.<sup>5</sup> However, a cursory glance at Australian and international jurisprudence—not to mention debates amongst scholars of religion—shows that a legally inclusive approach to defining “religion”

cannot be taken for granted. The very definition of religion employed by courts in assessing this question can be easily used as a way of delegitimising certain religious groups who might otherwise be viewed as socially undesirable by the majority and curtailing their activities by administrative means whilst bypassing religious liberty concerns.<sup>6</sup>

A group in Australian history that shares the dubious honour of being one of only a handful of organizations to be explicitly proscribed in statutory law is the Church of Scientology.<sup>7</sup> In the late 1960s, the practice of Scientology was banned in Victoria, South Australia, and Western Australia in what even critics of the group have conceded were draconian measures.<sup>8</sup> As a result of these bans—which were all eventually overturned—Scientology, which had hitherto represented itself more as a self-help therapy, became emphatic (one might even say zealous) in pointing to its *bona fides* as a religion in the legal sphere and litigating this legal claim internationally in the courts. In this process, the Scientology case in Australia became a key milestone.<sup>9</sup>

As we begin to look toward the future for religious freedom in Australia in the post-Ruddock Review era it is important that we keep in mind our past history of religious liberty concerns. As such, what follows provides a legal and historical account of the circumstances that led to the Scientology case and a discussion of what that decision concluded. In doing so, we look in particular at why the Church of Scientology’s status as a “religion” was so disputed in Australia and explain some of the reasons why Scientology has appeared so ready to utilise the courts as a means of defending what it perceives as threats to its religious liberty—whether real or imagined.

### **A “lightning rod” for controversy**

Whatever else one might say about the Church of Scientology, it has to be noted at the outset that it is hands-down the single-most controversial and unpopular of a series of New Religious Movements (NRMs) to emerge in the past century. While controversies surrounding other groups have usually come and gone, Scientology has remained a topic of intense media and government scrutiny across the globe since the 1950s.<sup>10</sup> Indeed, in her overview of the Church of Scientology in the edited volume *America’s Alternative Religions*, Mary Bednarowski, one of the few theologians (as opposed to sociologists or religious studies scholars) to seriously examine the teachings of NRMs, characterised Scientology—not unfairly—as a “lightning rod for cultural boundary conflicts.”<sup>11</sup>

While space does not permit a detailed treatment of this, one could cite numerous reasons why the Church of Scientology has become so controversial. Perhaps the four most salient aspects of this have been its ongoing conflicts with mental health professionals and anti-psychiatric beliefs; its sometimes aggressive and litigious approach to critics; its disputed status as a *bona fide* "religion"; and concerns about its internal discipline of its members. All of these aspects have been the subject of extensive media coverage and together with (and in some cases, arguably as a result of) this media scrutiny has come wider government scrutiny on several occasions and in different state jurisdictions.

As any cursory look at Australian media coverage of non-mainstream religions since at least the 1980s indicates, Scientology has been unable to shake its controversial reputation across various traditional and emerging media platforms and in wider popular culture.<sup>12</sup> Documentaries, television reports, adult cartoons, and anti-Scientology websites all depict it as a dangerous mind-control group, an avaricious cult with a stable of high-profile celebrity members, and promotional material with production values that rival a Hollywood studio.<sup>13</sup>

Whether one thinks such coverage is fair or not—and even with reference to coverage in Australia opinions here are divided—one cannot deny that in media terms, Scientology makes good copy and that in terms of a public relations war, it finds itself today in an unenviable position in the court of public opinion.<sup>14</sup> It also cannot be denied that such a high profile has led in many cases to a degree of government scrutiny at both a federal and state level that is completely disproportionate to the group's modest numbers, which many critics suggest (perhaps prematurely) are a sign of its imminent demise.<sup>15</sup>

Bearing this in mind and realising that very real opposition exists toward the Church's activities from several quarters, it is hardly surprising that Scientology began early on to adopt a strategy of seeking amelioration of its concerns through the courts.<sup>16</sup> This approach has led to a reputation as a ruthless litigant. Though in fairness, this needs to be qualified to note that many of the legal cases involving the Church have been civil suits instigated by its critics, and that in some trials in which Scientology has been a key point of legal dispute, the Church itself has not even been one of the parties involved. See, for instance, the failed arguments used by the defence in the

recent murder conviction of Kenneth Wayne Thompson and the mail fraud case, *United States v Fishman*.<sup>17</sup>

Regardless, Scientology's reputation as a formidable foe in the courtroom is well deserved and in a very real way written into the Church's theology. The period when Scientology was developing what one scholar has recently labelled its "systematic theology" in the late 1960s—set out in both the extensive writings and policy documents of founder L. Ron Hubbard (1911–1986)—was also the time that the group was undergoing an intense period of controversy in a number of countries. The group's beleaguered position has arguably left an indelible mark on their attitude toward opponents.<sup>18</sup> While space does not permit wider treatment here (readers are referred to Donald Westbrook's carefully nuanced discussion) during this time Hubbard developed a systematised "theology of sin" and "theology of evil" that provided the blueprint for what might be called Scientology's understanding of "theodicy". Part of this developing theological system was its increasingly systematised understanding of outside opposition which it saw as arising from a small group of "Suppressive Persons" (SPs). SPs exhibited what Scientology's system of ethics calls the "antisocial personality," part of which involved the support of groups who attack "any constructive or betterment group" or who support or approve of "destructive actions and fights against constructive or helpful actions and activities."<sup>19</sup> As such, opponents of Scientology—whether they be psychiatrists, journalists, or oppressive governments—came to be seen as fundamentally, and almost irredeemably, evil in their actions and inclinations, destructive to others, and as a result had forgone the right to the usual ethical consideration proscribed by Scientology's complex system of ethics. In dealing with SPs, then, the Church has little compunction in pursuing them at law.<sup>20</sup>

How these teachings have played out in practice was well summarised by a Church spokesperson who told one *Time* magazine journalist that Scientology is "not a turn-the-other-cheek religion."<sup>21</sup> Without labouring the point, this combative attitude toward critics and threats to Scientology has influenced the Church to become a "repeat player" in the legal arena and, together with the historical background outlined below, helps to better account for why in 1983, it pursued what was seemingly a dispute about taxation all the way to the High Court of Australia.<sup>22</sup>

### **“Scientology is evil”**

In its earliest years in Australia, Scientology—or the Hubbard Association of Scientologists International (HASI) as it was then known—the do-it-yourself psychotherapy Dianetics, proved extremely popular. During the late 1950s and early 1960s in Melbourne and further afield, Scientology attracted interest from quite a diverse group of people, although not everyone was enamoured by it.<sup>23</sup> By the late 1950s (when Hubbard visited Australia in 1959 to deliver a series of lectures known as the “Melbourne Congress” and opined that Australia would be the first “clear”<sup>24</sup> continent), Scientology’s sales techniques, advertising practices, and alleged negative impacts on mental health were drawing the ire of powerful interests. These included the Australian branch of the British Medical Association, the Vice-Chancellor of the University of Melbourne, and influential figures in the Roman Catholic Church and the Australian Labor Party, including soon-to-be federal leader Arthur Calwell.<sup>25</sup>

More importantly, for subsequent events, the group attracted the ire of the then head of the Victorian Mental Health Authority, Professor Eric Cunningham Dax—a man seen by many colleagues as a mental health reformer, but who for Scientology soon came to embody the quintessence of psychiatric evil that still plays a major part in Scientology’s belief system and its own conspiracy-laden view of its history.<sup>26</sup> Beginning in 1957, Dax began to use his influence to call for sanctions against Scientology advertisements in newspapers in response to some of the claims made about Scientology’s efficacy in healing physical ailments. Complaints about the group from individuals also began to mount and beginning around 1960, the Melbourne tabloid *Truth* began to run an unremitting negative campaign against Scientology, dubbing the group “bunkumology” and combining muckraking journalism with biting satire surrounding the group’s healing claims.

Through a complex series of events, largely relating to the complaints and legal action of an entrepreneurial former ALP publicity man Phillip Wearne, Scientology’s activities became a topic of debate in the Victorian parliament. To stave off criticism from the Labor Opposition, the Bolte Government established a board of inquiry into Scientology in late 1963, to be headed by Melbourne QC Kevin Victor Anderson.<sup>27</sup> This inquiry—which has left extensive documentation—heard from an array of witnesses, both for and against Scientology, though the report itself consciously sided with



the latter and came to an extremely negative and memorable conclusion in its opening prefatory statement:

There are some features of Scientology which are so ludicrous that there may be a tendency to regard Scientology as silly and its practitioners as harmless cranks. To do so would be gravely to misunderstand the tenor of the Board's conclusions. This report should be read, it is submitted, with these prefatory observations constantly in mind. Scientology is evil; its techniques evil; its practice a serious threat to the community, medically, morally, and socially; and its adherents sadly deluded and often mentally ill.<sup>28</sup>

Late in the inquiry, Scientology, which had apparently perceived that the inquiry was not going its way and saw the writing on the wall, ceased to cooperate. Around the same time, the group in Australia, which had hitherto explicitly downplayed many of the more metaphysical aspects of Hubbard's teachings (for example, the belief in past lives and the fundamentally spiritual nature of human beings) or any conflict these might have with the established religious practices of those undertaking Scientology courses, began to place greater emphasis on the group's status as a "religion". It began to characterise the entire inquiry as persecution against a religious minority. This discernible change of tack and the organisational motivation for this were to prove a bone of contention about Scientology into the present.

### **"In fact, scientology is not a religion"**

While outside the terms of reference of the inquiry, the *Report of the Board of Inquiry into Scientology* (the Anderson Report) presented to the government in 1965 featured an entire chapter on the topic of whether Scientology was a "religion," though noting that "even if scientology (sic.) could reasonably claim to be a religion, such are its practices that government action may be required to curtail or prohibit certain of its activities."<sup>29</sup> Unsurprisingly Anderson—a devout Roman Catholic—concluded in the negative, stating:

In fact, scientology (sic.) is not a religion. Apart from an occasional reference to scientology as a religious brotherhood and a claim to have some affinity with Buddhism and other religions, no claim was made at the Inquiry except

forlornly in the final stages . . . when it had become apparent to the HASI that the practice of scientology in Victoria had been revealed in a very unfavourable light, and that it had no evidence with which to controvert the impressive body of expert evidence to the effect that it was dangerous to the mental health of the community, an attempt was belatedly made to present it as a religion . . . scientology has not been, and is not, a religion.<sup>30</sup>

For Anderson, Scientology was nothing more than “a soporific which insulated their [members’] minds against reality” and furthermore that “except for the purposes of deceit, scientology has not been practised in Victoria on the basis that it even remotely resembles a religion.” In support of this conclusion, Anderson quoted extensively from Hubbard’s writings as well as pointing to a series of occasions going back to the mid-1950s where Australian and visiting Scientologists had adopted clerical garb and ecclesiastical titles in what he considered a cynical exercise to cloak their activities under a socially acceptable guise.<sup>31</sup>

Anderson certainly had a point that Hubbard’s attitude toward other religions in his writings, from which Anderson quoted at some length, was non-committal at its best and downright hostile at worst—a point to which we will return.<sup>32</sup> Regardless, reading Anderson’s breathless denunciation, one is left with the distinct impression that Anderson’s real objection was that Scientology’s religious ideas had departed so widely from his own and those of conservative, early 1960s Australia.<sup>33</sup> As Anderson notes in passing, “many of the theories he [Hubbard] propounds are almost a negation of Christian thought and morality”, going on to conclude that “in a community which is nominally Christian, Hubbard’s disparagement of religion is blasphemous and a further evil feature of Scientology.” Indeed, it was by drawing a direct contrast between the explicit doctrines of his own Roman Catholicism and Scientology that Anderson most strongly impugned the group’s beliefs.<sup>34</sup>

Here, as elsewhere in the report, Anderson was extremely dismissive of the testimony given by practicing Scientologists themselves, commenting that “a partiality for dalliance in numerous religions was a characteristic of a number of witnesses who were scientologists” and that these same witnesses, who he elsewhere called fanatics, were “anxious people seeking something to believe in” and who would “treat as their creed anything which pleased

or satisfied or quieted them.”<sup>35</sup> In short, Anderson concluded that Hubbard was a fraud and his followers were at best hapless dupes.

### **Loopholes, lobbying, and litigation**

The aftermath of the Anderson Report has been treated at length by one of the authors elsewhere and can only be briefly elaborated here.<sup>36</sup> The Victorian Parliament passed the *Psychological Practices Act 1965* which placed a *de facto* ban on the practice of Scientology as well as tightening the regulation of psychology in Victoria. Following an exodus of Scientologists to other states, South Australia and Western Australia soon followed suit with legislation restricting Scientology passed in 1968 and 1969 respectively. These laws, however, were largely dead-letter and while a series of dramatic raids were initially conducted under the anti-Scientology legislation, no conviction was ever upheld. Even in Victoria the anti-Scientology clauses of the *Psychological Practices Act 1965* had fallen into complete desuetude when it was finally repealed in 1982.

What is more important here was the way that the question of achieving official recognition as a “religion” shifted to front-row status in Scientology’s quest to pursue its spiritual practices without hindrance. Following the passing of the 1965 Victorian law, Scientology shifted its public image to present itself primarily as a religious organisation. From November 1965, the group in Perth was operating under the name Church of Scientology Perth—though this was given little weight in the debates leading up to the enactment of the *Scientology (Prohibition) Act 1968* in November 1968. Similarly, throughout the debates leading up to the South Australian legislation (*Scientology Prohibition Act 1968*) Scientologists pointed to South Australia’s long history of religious dissent and papered all parliamentarians with a pamphlet asking whether actions against them were “part of a widespread conspiracy to wipe out a religion which has Total Freedom for every individual as its purpose.” Furthermore, in media reports at the time, Scientologists presented themselves as the victims of a so-called “religious inquisition” and when the *Scientology Prohibition Act 1968* was finally passed in early 1969 and a raid was launched against the Church’s Adelaide headquarters, one spokesperson decried the raid as “a violation of the SA tradition of religious freedom and personal rights.” Scientology, from this time onward, backed up its words with action and throughout the legislative process in Victoria, Western Australia, and South Australia, Scientology

issued a series of legal writs against almost every politician and critic who dared to comment negatively about the Church outside of parliament.

Critics have considered Scientology's claims during this period to be hyperbole and a sign of the movement's innate paranoia, but as the extensive legislative debates that took place in South Australia and Western Australia clearly demonstrate, there were serious legal questions to be asked. For example, there was the notable lack of evidence and the weight given to a number of expert opinions from psychiatrists who had not—on their own admission—ever actually treated a patient for mental illnesses linked to Scientology or its practices. Moreover, there remain very real questions about the fairness of the Anderson inquiry itself, which relied heavily on “expert testimony” from a clique of academics with no direct involvement with Scientology or its practices. Most of the academics had no clinical experience of treating the handful of patients who had been admitted to mental health establishments claiming to be suffering psychological harm as a result of Scientology practices. Regardless, during this time the group were not, by any means, without supporters (or at the very least MPs who saw the legislation as excessively heavy-handed).

Through a concerted lobbying effort, Scientology convinced senator and soon-to-be Federal Attorney-General Lionel Murphy to declare the Church of the New Faith—the name under which Scientology had registered in Victorian in 1969—a recognised denomination “in exactly the same way as any other religion” under section 26 of the *Marriage Act 1961*, if the Whitlam-led Labor Party won office. This action would make Scientology exempt from the *Psychological Practices Act 1965* under a provision for registered ministers of a “recognized religion.”<sup>37</sup> Although Murphy encountered some opposition in his own party, he was true to his word. Following the dramatic victory of the Whitlam Government in 1972, Murphy declared Scientology, along with a series of other less-controversial religious groups, a recognised denomination for the purpose of marriage in February 1973. With a stroke of his pen, Murphy had exempted Scientology from the very act passed largely to restrict its activities in Victoria. In both Western Australia and South Australia—where the Labor oppositions had both strongly opposed the legislation—the laws only needed to await a change of state government to be quickly repealed, first in Western Australia in 1973 and then in South Australia in 1974. Victoria stubbornly retained the Scientology clauses of the *Psychological Practices Act 1965* until 1982, though

it conceded the inevitable in 1977 when it registered Scientologist Elaine Allen as a recognised marriage celebrant. Chief Secretary Vance Dickie did note at the time that “we certainly would not tolerate the practices which were part of their cult before 1964.”<sup>38</sup>

Repealing the legislation against it, however, was not the sole legal strategy that Scientology undertook to legitimate its status as a “religion” for the purposes of law. In several court cases beginning in the early 1970s, the Church argued piecemeal for its religious status by targeting exemptions for religious ministers and places of worship within existing legislation. This strategy proved quite successful. For instance, in 1970, Scientologist Jonathan Gellie was exempted from national service when a judge found he was a minister of religion for the purposes of the *National Services Act 1964* (Cth); other exemptions followed, including in Victoria where the group was still “officially” banned in 1973.<sup>39</sup>

Critics have usually seen Scientology’s attempts to bypass anti-Scientology laws as the exploitation of legal loopholes, but these can equally be seen as smart litigation in order to circumvent what were fundamentally unjust, but perhaps not unpopular, laws. While Scientology was not above some more dramatic protests—and what have been euphemistically described as “dirty tricks” against perceived opponents—it showed a keen awareness that even if it was unlikely to ever win a battle in the majoritarian court of public opinion, it could still secure the free exercise of its spiritual beliefs through the less fickle avenue of the law courts. This was to prove a successful strategy. By the end of the 1970s, the Church of Scientology was, outside of Victoria, on a solid legal footing and various states had registered Scientology as a religion for a variety of statutory purposes. Besides the occasional negative news report about events overseas, Scientology was largely able to devote itself to its practices in peace. This situation provides, however, the immediate background to the 1983 case.

### **The “Scientology Case”**

The 1983 “Scientology Case” (as it has become known among lawyers) began when the Victorian Commissioner of Pay-Roll Tax refused to grant an exemption to the Federal *Pay-Roll Tax Act 1971* that allowed exemptions for religious or benevolent institutions, or charities.<sup>40</sup> The Church had been granted an exemption in South Australia and Western Australia in 1975 and in New South Wales in 1977, so the decision came as something of a surprise to

many. Subsequently the Church filed suit and an initial ruling was rendered by Justice Crockett of the Victorian Supreme Court on December 18, 1980, stating that the Church was not entitled to the exemption because it was not a religion. Crockett J used strong language in his critical opinion of the Church, referring to it as a “sham” and its rites as a “mockery.”<sup>41</sup>

Justice Crockett’s ruling was then appealed to the Full Bench of the Victorian Supreme Court, but the case was dismissed on May 5, 1982. Chief Justice Young’s majority judgement included a substantial discussion of several criteria (indicia) that might apply in determining if an organisation was in fact a religion. He initially mentioned religious ideas addressing fundamental questions or ultimate concerns that are combined into a comprehensive belief system, and accompanied by formal external or surface signs such as services or ceremonies. He then added three other considerations: public acceptance, method of joining, and commercialism, and concluded that Scientology did not meet those six criteria and therefore was not a religion under the law.<sup>42</sup> Other members of the court also offered opinions on how to define religion and what the status of Scientology should be under the law. Kaye J wrote in a concurring opinion that a religion must involve “recognition of a superior or supernatural being or power with whom an individual had a personal relation and upon whom his or her own existence depended.”<sup>43</sup> Brooking J concurred as well, stating that Scientology should not be granted a waiver because its practices were in contravention of the *Psychological Practices Act 1965* that explicitly listed the use and teaching of Scientology as violations of that Act (an issue which would cease to be relevant on appeal).

This detailed and damning ruling by the Victorian Supreme Court was appealed to the High Court of Australia where the judgement was unanimously overturned by a five-person bench on October 27, 1983. The judgement has been cited since in other nations grappling with the same issue of how to define religion in an increasingly pluralist contemporary world, so it is worth exploring in more detail.<sup>44</sup>

High Court Justices Mason and Brennan held that there are two major criteria for a religion, including “belief in a supernatural being, thing or principle, as well as an acceptance of canons of conduct that give effect to those beliefs.” They qualified the latter point by stating that canons of behaviour “which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.” They then

went on to state that “[v]ariations in emphasis (of the canons of conduct) may distinguish one religion from other religions, but they are irrelevant to the determination of an individual’s or a group’s freedom to profess and exercise the religion of his, or their, choice.”<sup>45</sup>

What is perhaps most interesting about the conclusions of Mason and Brennan JJ, however, is the evidential basis they used to arrive at their decision. While the earlier decisions, both by Crockett J and on appeal, had been based primarily on the analysis of Hubbard’s often impenetrable writings, Mason and Brennan JJ noted instead that “the court cannot be assured that the meaning of writings said to be of religious significance is the meaning which the ordinary reader would attribute them.”<sup>46</sup> As such, they instead considered oral testimony and affidavits from individual Scientologists that focused on what Westbrook has elsewhere called the “lived religion” aspect of Scientology as opposed to its institutional or organisational forms.<sup>47</sup> This approach was important and also contained in it an acknowledgement that while Scientology’s organisational leadership may have been pursuing the status of religion with cynical aims—as had been suggested by Anderson nearly two decades earlier—this did not invalidate the beliefs and practices of everyday Scientologists, and it was the latter who were under legal consideration. As Mark Darian-Smith notes:

Their Honours found that the fundamental problem with the trial judge’s approach was that he had approached the question of whether Scientology was a religion by considering the beliefs, practices and observances of people in command rather than those of the general body of adherents to Scientology.<sup>48</sup>

In what remains the quotation most often cited by critics of this decision, their honours noted that “charlatanism is a necessary price of religious freedom” and that “lack of sincerity or integrity on [a leader’s] part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.”<sup>49</sup> As Darian-Smith further notes:\

In ultimately finding that the body of adherents to Scientology had a religion their Honours were prepared to leave aside the motivations of L. Ron Hubbard and the hierarchy of the Church of the New Faith.<sup>50</sup>

Justices Wilson and Deane added other considerations for determining what is and is not a religion under the law. They comment that a belief in the supernatural involves “belief that reality extends beyond that which is capable of perception by the senses”, and state that if such a belief is absent then “it is unlikely that one has ‘a religion.’” The ideas in the canon must relate to man’s nature and relationship to things supernatural. And the ideas must be accepted by followers “as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance.” Adherents must constitute an identifiable group and “the adherents themselves must see the collection of ideas and/or practices as constituting a religion.”<sup>51</sup>

Justice Murphy, citing more inclusive precedents from the United States, argued in another section of the opinion that any definition of religion must be inclusive and quite dependent on the claims being made by adherents. After reviewing a number of different religions with their many variations of belief and ritual, he states, “[t]he list is not exhaustive; the categories of religion are not closed.”<sup>52</sup>

None of the High Court justices was without clear suspicions about the motives of Scientology—all had clearly read Anderson’s earlier report and were aware of controversies surrounding the group and carefully considered Crockett J’s initially negative judgement. However, as noted above, they were also more careful to draw a distinction that in religious freedom terms “protection is required for the adherents of religions, not for the religions themselves.”<sup>53</sup> Murphy in particular took a strong line in noting that most religious institutions were guilty of the very commercialism and tax avoidance that Scientology was accused of by Crockett J, but took a stronger line on religious liberty similar to that he took a decade earlier as Attorney-General (so strong that it has remained a minority position):

Religious discrimination by officials or by courts is unacceptable in a free society. The truth or falsity of religions is not the business of officials or the courts. If a purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution



is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is “one in, all in.”<sup>54</sup>

The erudite High Court opinions discussed *inter alia* the ideas and theories of a number of important scholars including Max Weber, Clifford Geertz, Emile Durkheim, James Frazier, Bryan Wilson, Carl Jung, Albert Einstein, Bertrand Russell, Julian Huxley, Thomas Jefferson, and others in considering what constitutes a religion and what criteria should be used in such determinations.<sup>55</sup> Clearly, the opinion was heavily dependent on those scholarly offerings in the determinations about how to define religion, more so than on judicial precedents from the United States or United Kingdom. As a result, the court stated unequivocally that Scientology met the criteria for establishing itself as a religion, and that it therefore should be granted an exemption from the pay-roll tax.

This decision firmly established that in the form it was practised in 1983, Scientology met any reasonable criteria for a religion and, as the foregoing discussion suggests, the lengthy decision included a quite sophisticated analysis of characteristics to consider in defining religion for purposes of the law. The decision in the Scientology case represented the culmination of a long battle in Australia to establish the Church of Scientology as a religion and has since been cited frequently both in Australia and overseas. Both New Zealand and the United Kingdom have had court cases concerning minority faiths in which the Australian case was considered a persuasive precedent. The case has also been cited in 44 other cases in Australia as of 2018, including multiple mentions in some of the cases in which it is cited.<sup>56</sup>

### **Conclusion: the forgotten freedoms of forgotten faiths**

Returning to the Ruddock Review, the report noted that many submissions to the inquiry considered freedom of religion the “poor cousin” of other human rights. Even the former Human Rights Commissioner, now Liberal Party MP, Tim Wilson had suggested in an opinion piece in *The Australian* cited in the Report that religious freedom ranked among a set of “forgotten freedoms.”<sup>57</sup> Whether this is indeed the case is debatable, and the Panel did

not accept the fears expressed in some submissions that religious freedom in Australia was in “imminent peril.”<sup>58</sup> Regardless, the comment does provide a way of highlighting an absence in the Report: if religious freedom is the forgotten freedom, then minority religions are often the forgotten (or tacitly ignored) faiths, though they are also often the groups whose religious liberty is most easily flaunted and whose concerns are most readily dismissed by an unsympathetic majority. As a result, they are also the faiths most likely to have to defend their rights at the Bar.

Given the social and legislative context out of which the Ruddock Review emerged, it is unsurprising that the Panel only touched the experience of minority religions in passing, though the topic has featured—with various emphases—in a series of earlier enquiries touching on matters of religious freedom and the regulation of religious groups. What the Panel did find, however, was by its own admission “troubling” accounts of social hostility. The Panel also prefaced their recommendations by noting that “the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance.”<sup>59</sup> As a way of maintaining this vigilance, the Panel’s recommendations called for the Human Rights Commission to collect and analyse quantitative and qualitative information in a series of areas where the experience of religious freedom in Australia might be threatened at a community level. The Panel also recommended that greater support should be given to educating Australians about freedom of religion and belief as a fundamental human right—an activity, incidentally, which the Church of Scientology has been actively pursuing for decades.

Religious liberty is, as one of the author’s maintained in an article for *National Outlook* over two decades ago, “a key way that multicultural societies can foster the integration of diverse peoples and thereby dampen tendencies toward social conflict and dissension.”<sup>60</sup> Bearing this in mind, it is of vital importance in the post-Ruddock Review era that these two recommendations not simply be put aside, and that as a nation we continue to examine the experiences of members of minority faiths along with the majority, including wider social hostility they encounter. We also need to better educate ourselves about the factors and circumstances that encourage such groups to behave as they do.

While the preceding discussion has demonstrated the Church of Scientology’s road to recognition was clearly circuitous, it has not been seriously questioned since in Australia. The Church’s negative reputation

has remained and critics have at times proposed other tactics to restrict its activities. However, Scientology's experience reminds us of an important legal principle enunciated nearly half-a-century earlier when another unpopular minority religion (the Jehovah's Witnesses) appeared before the High Court. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* Justice Latham noted that while "the religion of the majority of people can look after itself", protection for religious liberty "is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities."<sup>61</sup> With increasing religious pluralism, the history leading up to 1983 Scientology case reminds us that for religious liberty to be preserved, legal cases will continue to need to be litigated, and that it may often be threatened marginal minorities who will be required to do this.<sup>62</sup>

## Endnotes

- 1 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* (1983) CLR 120 at 130.
- 2 Religious Freedom Review, *Report of the Expert Panel* (Canberra, 2018), 34.
- 3 *Ibid.*, 90.
- 4 See, for example, Ian Ellis-Jones, "What is religion?" *Local Government Law Journal* 13 (2008), 168–183.
- 5 For a discussion of what is at stake here see Alan Aldridge, *Religion in the Contemporary World* (Cambridge: Polity, 2007), 17–41.
- 6 On Scientology alone for the legal sphere see, for example, Peter Edge, *Legal responses to Religious Difference* (London: Kluwer Law International, 2002), 391–432; Paul Horwitz, "Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion," *DePaul Law Review* 47, no. 1 (1997): 851–54; and James R. Lewis, "Scientology: Sect, Science, or Scam?" *Numen* 62 (2015): 226–42. For the wider debate see Alan Black, "Is Scientology a Religion?" *Australian Religion Studies Review* 10, no. 1 (1997): 13–28; Benjamin Beit-Hallahmi, "Scientology: Religion or racket?" *Marburg Journal of Religion* 8, no. 1

- (2003). Stephen Kent, "Scientology—Is this a religion?" *Marburg Journal of Religion* 4, no. 1 (1999): 123.
- 7 On this and other examples see Renae Barker, *State and Religion: The Australian Story* (London: Routledge, 2019), 183–225.
  - 8 See, for example, Stephen Mutch, "Failure to launch rather than clear sailing: the media-focused trials, triumphs and tribulations of the Church of Scientology," *Spółeczeństwo i Rodzina* 50, no.1 (2017): 11.
  - 9 See, for example, the Scientology booklet, *What is Freedom of Religion? Known Your Rights* (2017) available at: <http://www.scientologyreligion.org/religious-freedom/what-is-freedom-of-religion/>.
  - 10 The amount of scholarly literature on the Church of Scientology has grown steadily in recent years. For various perspectives, see James R. Lewis (ed.), *Scientology* (Oxford: Oxford University Press, 2009); Hugh B. Urban, *The Church of Scientology: A History of a New Religion* (Princeton: Princeton University Press, 2011); and Donald Westbrook, *Among the Scientologists: History, Theology, and Praxis* (Oxford: OUP, 2019).
  - 11 Mary Bednarowski, "The Church of Scientology: Lightning Rod for Cultural Boundary Conflicts," in *America's Alternative Religions*, ed. Timothy Millar (New York: SUNY Press, 1995), 385.
  - 12 A point well made by Malcolm Knox, "Only itself to Blame: The Church of Scientology," *The Monthly*, September 2009, 34–43.
  - 13 See, for example, Bernard Doherty, "Sensational Scientology! The Church of Scientology and Australian Tabloid Television," *Nova Religio* 17, no. 3 (2014): 38–63.
  - 14 For differing opinions, see Doherty, "Sensational Scientology!"; Mutch, "Failure to launch rather than clear sailing"; and Adam Possamai & Alphia Possamai-Inesedy, "Scientology Down Under," in *Scientology*, ed. Lewis, 354–59.
  - 15 Ben Weir, "Australian recruits have dwindled to virtually zero': Scientology struggles in NSW," *Sydney Morning Herald*, January 13, 2019, <https://www.smh.com.au/national/nsw/australian-recruits-have-dwindled-to-virtually-zero-scientology-struggles-in-nsw-20190112-p50qzy.html>.
  - 16 See William W. Horne, "The Two Faces of Scientology," *The American Lawyer*, (July/August 1992), 74–82 and Anson Shupe, "The Nature of the New Religious Movements—Anticult "Culture War" in Microcosm: The Church of Scientology versus the Cult Awareness Network," in *Scientology*, ed. Lewis, 275–79.

- 17 On this point, see J. Gordon Melton, “On doing research on Scientology: prospects and pitfalls,” *Acta Comparanda*, Subsidia IV (2016): 13. For the recent Thompson trial, see Richard Ruelas, “Scientology defense fails as jury returns first-degree murder verdicts in Prescott trial,” *Arizona Republic*, February 20, 2019, <https://www.azcentral.com/story/news/local/arizona/2019/02/20/kenneth-thompson-scientology-defense-fails-prescott-valley-murder-trial-penelope-edwards-troy-dunn/2927347002/>.
- 18 On this period, see Roy Wallis, *The Road to Total Freedom: A Sociological Analysis of Scientology* (New York: Columbia University Press, 1977), 190–224. On the development of Scientology’s theology, see Westbrook, *Among the Scientologists*, 95–124. What follows draws *inter alia* on Westbrook’s analysis.
- 19 On what constitutes the antisocial personality see *The Scientology Handbook* (Los Angeles: Bridge Publications, 2001), 407–11.
- 20 The wider policy implications of this are spelled out at length in John Foster, *Enquiry into the Practice and Effects of Scientology* (London: HMSO, 1971), 127–57.
- 21 “A Sci-Fi Faith,” *Time*, April 5, 1976, 60.
- 22 See James T. Richardson, “Scientology in Court” in *Scientology*, ed. Lewis, 283–92.
- 23 For a sympathetic portrait of the group’s earliest years in Australia and how the bans had an impact on everyday Scientologists, see the fascinating memoir of Janis Gillham Grady, *Commodore’s Messenger: A Child Adrift in the Scientology Sea*, Organization (self-published, 2017). See also Steve Cannane, *Fair Game: The Incredible Untold Story of Scientology in Australia* (Sydney: ABC Books, 2016), 4858.
- 24 In Scientology the term “clear” refers to a key step on the Church’s “bridge to total freedom.” On this visit see Russell Miller, *Bare-Faced Messiah: The True Story of L. Ron Hubbard* (New York: J. Holt, 1988), 236.
- 25 This section and the following sections rely heavily on Bernard Doherty, “Colonial Justice or a Kangaroo Court: Public Controversy and the Church of Scientology in 1960s Australia,” *Alternative Spirituality and Religion Review* 6, no. 1 (2015): 949; and “The Anderson Inquiry and its Australian Aftermath 1963–1973,” in *The Handbook of Scientology*, eds. James R. Lewis and Kjersti Hellesøy (Leiden: Brill, 2017), 249–78.
- 26 On Scientology’s own view of its history and psychiatry, see, for example, Heber C. Jentsch, “Scientology: Separating Truth from Fiction,” in *New*

- Religious Movements and Religious Liberty in America*, eds. Derek H. Davis and Barry Hankins (Waco: Baylor University Press, 2002), 141–61 and Eric Roux, “Scientology: From controversy to global expansion and recognition,” in *“Cult Wars” in Historical Perspective: New and Minority Religions*, ed. Eugene V. Gallagher (London: Routledge, 2017), 165–76.
- 27 On the activities of Wearne, which are key to understanding what transpired in Victoria, see Bernard Doherty, “The Fertile Mind of Phillip Bennett Wearne: The Curious Career of an Early Scientology Apostate,” *Acta Comparanda*, Subsidia IV (2017): 129–46.
- 28 Kevin Victor Anderson, *Report of the Board of Inquiry into Scientology* (Melbourne: A.C. Brooks, 1965), 1.
- 29 *Ibid.*, 167.
- 30 *Ibid.*, 147–48.
- 31 *Ibid.*, 149.
- 32 *Ibid.*, 149–53.
- 33 A point even conceded by critical authors like Cannane, *Fair Game*, 108. On conservative religious values of this era, see David V. Hilliard, “Church, Family and Sexuality in Australia in the 1950s,” *Australian Historical Studies*, 27 (1997): 133–46.
- 34 Anderson, *op cit.*, 152.
- 35 *Ibid.*, 149.
- 36 See Doherty, “The Anderson Inquiry and its Aftermath,” 258–74.
- 37 See *Psychological Practices Act* 1965 s. 2 (34). Available online at: [http://www.austlii.edu.au/cgi-bin/viewdb//au/legis/vic/hist\\_act/ppa1965238/](http://www.austlii.edu.au/cgi-bin/viewdb//au/legis/vic/hist_act/ppa1965238/)
- 38 Steve Harris, “State says yes to scientology minister,” *The Age*, May 19, 1977, 1.
- 39 On these cases see New South Wales Anti-Discrimination Board, *Discrimination and Religious Conviction* (Sydney: The Board, 1984), 212; and Renae Barker, “Scientology, the Test Case Religion,” *Alternative Law Journal* 40, no. 4 (2015): 278.
- 40 This section draws *inter alia* on the analysis in NSWADB, *Discrimination and Religious Conviction*, 150–156, and the superb analysis by Bruce Kaye, “Case Note and Commentary: An Australian Definition of Religion,” *UNSW Law Journal* 14, no. 2 (1991): 332–51.
- 41 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 141.
- 42 Scientology failed the “method of joining” test because it did not require singular loyalty to one belief system and organization. It failed the

- “commercialism” test because it was too commercial, a point made strongly by Justice Crockett in his original ruling.
- 43 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 171.
- 44 The most important recent decision relating to Scientology being the U.K. Supreme Court case *Hodkin and Another, Regina (on The Application of) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77.
- 45 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 137.
- 46 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 130.
- 47 Westbrook, *Among the Scientologists*, 5.
- 48 Mark Darian-Smith, “Case Note: Church of the New Faith v. Commissioner for Pay-Roll Tax,” *Melbourne University Law Review* 14 (1984): 540.
- 49 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 141.
- 50 Darian-Smith, “Case Note: Church of the New Faith v. Commissioner for Pay-Roll Tax,” 542.
- 51 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 174.
- 52 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 151.
- 53 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 132.
- 54 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)* at 150.
- 55 The opinion even contains a list of dozens of additional scholarly references, pages 162–63, organised according to specific topic.
- 56 See, for example, the Jade report on the case at <https://jade.io/article/67076>.
- 57 Religious Freedom Review, *Report of the Expert Panel*, 39.
- 58 *Ibid.*, 8.
- 59 *Ibid.*, 89.
- 60 James T. Richardson, “Religious freedom in Australia?” *National Outlook* 17, no. 3 (May 1995): 17.
- 61 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR at 23.
- 62 As Renae Barker shrewdly notes in “Scientology,” 279, “perhaps rather than being critical of Scientology’s litigious nature we should embrace their enthusiastic pursuit of this important legal question”.