SMBC "Hot Topics"
"Religious Freedom in Australia"

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Freedom of believers to live out our commitment and faith is being threatened in Australian society. The rise of 'identity politics' and a lack of 'viewpoint diversity' bring challenges to Christians speaking about faith. This paper will survey both biblical and legal frameworks for religious freedom: what Australian law says, the Ruddock Review, and how Christians might usefully understand this.

> Freedom of religion, the paradigm 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. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law. (*Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J)
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> Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity. (*Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [560] per Redlich JA)[2]

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[2] Of course, as the paper will note, his Honour was in dissent from the majority decision in this case. But since the purpose of these introductory quotes is to set out principles that will unfold in the paper, rather than to provide an authoritative statement of the law, I maintain that I am at liberty to use this quote at this point!

> It is only just and a privilege inherent in human nature that every person should be able to worship according to his own convictions; the religious practice of one person neither harms nor helps another. It is not part of religion to coerce religious practice, for it is by choice not coercion that we should be led to religion. (Tertullian *Ad Scapulam*, 3; quoted in R L Wilken, *Liberty in the Things of God: The Christian Origins of Religious Freedom* (New Haven; Yale UP, 2019), ch 1, n 21.)

> Choose this day whom you will serve, whether the gods your fathers served in the region beyond the River, or the gods of the Amorites in whose land you dwell. But as for me and my house, we will serve the Lord. (*Joshua* 24:15)

The question of religious freedom has always been an important one, but perhaps it has never had such attention as it has had in the couple of years. Australia has been through the postal survey on same-sex marriage, and the subsequent change of our law to allow same-sex marriage. While that debate was happening, many Christians expressed concerns about protection of their freedom to live out and speak about their convictions that the Bible tells us that marriage is reserved for a man and a woman.

These concerns were not misplaced. Even before the same sex marriage debate, it had become apparent that our society had adopted a new “sexual orthodoxy”- in effect, that so long as there is consent, anything goes. While this may have been the way that some members of society lived in past generations, we have now moved to the stage where expressing disagreement with this view is seen as a secular “heresy”. In particular, we are told that expressing the age-old Biblical view that homosexual activity is contrary to God’s will, and like other sinful activity warrants God’s judgment- is now seen as inherently “harmful”, to those in our community who now define their very identity about their sexual activity. You will all no doubt be familiar with the case of footballer Israel Folau, who on his personal Instagram feed bluntly shared the Biblical view that certain actions will lead to hell if not repented of, including homosexual activity. He has now been threatened with loss of his job, and is to go before a hearing later this week to defend himself.[3]

What I would like to do tonight is to review briefly some principles we can see in the Bible about religious freedom, and then to spend some time providing you with an overview of how the law of Australia currently protects that freedom. (Spoiler alert: we will see that the answer is: “not very well”!) I will then summarise some of the recommendations of the recent Ruddock Report, and offer some thoughts on where we will be going in the future.

I hope that this material will help you to understand how the law of Australia currently protects religious freedom, and why this is an important issue. But first, I want to briefly discuss the question- is this is a principle found in the Bible?

1. Religious Freedom in the Bible

Is there a principle of “religious freedom” in the Bible? At first it might seem unlikely. Throughout the Old Testament we see the revelation of the one true God and Lord of all the Universe, who establishes a covenant relationship with the people of

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[3] For more detailed comment on the case, see my blog post at https://lawandreligionaustralia.blog/2019/04/14/reflections-on-the-israel-folau-affair/ .

Israel. Those in Israel who turn away from their covenant Lord are expelled from the community or killed.

But even in the Old Testament, there is never any sense that a person's worship of God can be commanded or forced by violence. There is violence in the conquest of Canaan, but it is not violence aimed at "converting" the Canaanites; rather, it is aimed at removing idols and the sacrifice of children from the promised land. The prophets stress that it is an internal response, a "circumcision of the heart", that God is seeking. And the unique situation of a religious entity that is also a political entity, the nation of Israel, means that rejection of the faith of Israel amounts to rejection of the political rulers.

In the New Testament we see a different context. Jesus now identifies a role for political leaders that is different from, and separate to, the role of religious leaders, in a key passage where he concludes: "Therefore render to Caesar the things that are Caesar's, and to God the things that are God's." (*Matt* 22:21) He rejects the use of violence to defend his mission, when he tells one of his disciples who has drawn a weapon to defend him: "Put your sword back into its place. For all who take the sword will perish by the sword." (*Matt* 26:52) Indeed, earlier in his ministry Jesus rebuked his disciples when at one point they wanted to "rain fire" down on a village that rejected their message (*Luke* 9:54-56.)

After Jesus' death and resurrection, and as the gospel of the resurrected Messiah starts to spread around the Mediterranean, we see the same pattern. There is never any sense in which force is used to bring someone into the church. Paul in his missionary visits "argues" and "persuades", seeking to convince others of the truth of the gospel.[4]

What we do not see in the New Testament is the new Christian community in political control of any region. But from the early days Christian leaders argued that men and women should be free to make their own choices about which god they follow, contrary to the pattern of the Roman Empire, where the "official" gods were meant to be worshipped. The quote at the top of this paper from Tertullian (who lived from 155-240 AD) is one of the earliest of a long series of arguments for religious freedom made by the early Christians.

Of course, there were times in later history when Christians came into political power and did not allow others freedom to worship their own gods. But through history it gradually became clear that the best principle to allow the gospel to flourish, and to maintain peaceful communities, was to support the right of *everyone* in the community to believe and practice their own religion in peace, subject of course to certain over-riding values such as freedom from violence and oppression.

After the devastation of World War II, and the horrors of the Nazi Holocaust, which was aimed at a race and a religion, the international community came together and developed strong principles of international law protecting religious freedom. We see these reflected in the UN *Universal Declaration of Human Rights,* and the later *International Covenant on Civil and Political Rights* (ICCPR), art 18.

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[4] See eg Acts 17:2-3: 'he **reasoned** with them from the Scriptures, [3] **explaining and proving** that it was necessary for the Christ to suffer and to rise from the dead, and saying, "This Jesus, whom I proclaim to you, is the Christ"'; 17:16 "**reasoned** in the synagogue with the Jews and the devout persons, and in the market-place every day".

2. Religious Freedom Protection under Australian law

Let's come to the situation in Australia, then. How is religious freedom currently protected in our country?

One thing to note is that there is no overarching "Bill of Rights" in operation across our country, in contrast to most other Western countries. But protection of this "fundamental right" does takes place, even in a fragmented way, under a number of laws. We will look at the protection provided by the Federal Constitution, the impact of international treaties, the effect of the common law, domestic charters in specific States, and then turn to a controversial area, the "balancing" provisions of discrimination legislation.

(i) Religious Freedom Protection under the Constitution

One of the key features of the Australian legal system is that we are a Federation, governed by a written Constitution. The Commonwealth Parliament is given certain specific areas in which it can legislate; the States hold the "residual" powers of legislation, although if the Commonwealth has passed a valid law it can over-ride State law on that topic. This Federal division of powers is an important background to considering how religious freedom is protected.

The Commonwealth Constitution contains a clear restriction on Federal law-making powers, designed to protect religious freedom. This is s 116 of the Constitution:

> **Commonwealth not to legislate in respect of religion**
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> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or **for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

(Of course, s 116 also deals with "establishment" issues, whether the Commonwealth can create or support a religious body, and religious tests. But for present purposes we will focus on the "free exercise" clause.)

The provision is similar to, and was enacted in clear knowledge of, similar phrasing in the First Amendment to the Constitution of the United States of America. But it has become clear in later interpretation that the High Court of Australia, in the few cases where the provision has been considered, will not automatically follow the US Supreme Court.

In particular, it is important to note at the outset that s 116 only applies to **Commonwealth** laws, not to State laws. So that will restrict its ability to protect religious freedom.

There are only a handful of High Court decisions dealing with the free exercise clause of s 116. I will comment on these briefly, and then on some State decisions, including an important recent comment from the NSW Court of Appeal in 2016.

(a) *Krygger v Williams* (1912) 15 CLR 366

The first of the High Court decisions on s 116 is tantalisingly brief. Mr Krygger was a Jehovah's Witness, apparently. As such he objected to involvement in, and support for, military operations. The Commonwealth had passed a law requiring all men to report for military training under Part XII of the *Defence Act* 1903.

Mr Krygger was convicted of failing to report for military training and sentenced to be "committed to the custody of a sergeant-major for 64 hours" (being the amount of time per year he was supposed to report for training). He appealed to the High Court that the law was an interference with his free exercise of his religion.

A feature of the case which is important to understand is that the legislation did contain provisions relating to "conscientious objection" to bearing arms- but those provisions said that while the person who was an objector was only to be given non-combatant roles (such as working behind the lines or in an ambulance), they still had to report for training.

The two judges of the High Court who heard the matter were dismissive and could hardly see the problem. They clearly regarded the matter as resolved by the provision for non-combatant status. But of course, for Mr Krygger it seems likely that the more important issue was that his personal involvement as a non-combatant would still be providing support for a war effort to which he fundamentally objected.

Still, there are some very broad statements, which treat freedom of religion very lightly. Griffith CJ said at 369:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.

Barton J was no more sympathetic:

> ..the *Defence Act* is not a law prohibiting the free exercise of the appellant's religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill. I think this objection is as thin as anything of the kind that has come before us (at 372-373).

(b) Judd v McKeon (1926) 38 CLR 380

This next decision does not primarily involve s 116, but has some interesting comments by Higgins J on the provision. The case was a prosecution for failing to vote at a Senate election. The legislation said that in order to escape liability the elector had to have a "valid and sufficient reason". The reason he offered was that he was a socialist, and that all the candidates were capitalists, and hence he preferred none of them!

Not the first time in Australia, then, that someone faced this dilemma. But the majority of the High Court said that he just had to vote anyway, "valid and sufficient" reasons being things unconnected with the over-arching obligation to vote, such as family illnesses or natural disasters or the like.

Higgins J, however, disagreed. His Honour thought that a political reason could have been valid. And in particular his Honour thought that if the elector had a *religious* objection to voting, then s 116 would operate to excuse him from doing so (at 387). He then went on to offer some comments about *Krygger*, which one might have thought should have precluded a s 116 argument here if the words used by the judges in that case were meant seriously (since after all one could argue, in the words of Griffiths CJ, that voting "had nothing to do with religion".)

But Higgins J seems to suggest that he would not agree with all that was said in *Krygger*:

> The case of *Krygger v. Williams* under the *Defence Act* may be accepted in its entirety without this case being affected. There a youth was charged under sec. 135 with failing to render the personal service required of him, military service as a senior cadet, "without lawful excuse." The Act did not allow conscientious objection to such military service as a "lawful excuse." Such an excuse was excluded by the law; but the law had made provision for allotment of conscientious objectors to non-combatant duties (sec. 143 (3)). This was the limit of the "lawful excuse," the only excuse allowed by law. There is no such limit here in the words "valid and sufficient reason." The distinction is obvious, whatever view one may take of the fact that the two Judges in that case treated the defendant's conscientious objection to perform military duties—to attend drill, to serve as a cadet—as if it were a mere objection to fight. A man may of course assist the operations of a combatant force as much by doing its fatigue duty as by standing in the firing line. (at 389-390)

The last 2 sentences, of course, suggest that his Honour was not entirely persuaded by the reasoning in *Krygger*.

Provisions on compulsory voting still require a "valid and sufficient" reason for not doing so, but those like Jehovah's Witnesses who have a religious objection to voting are now regarded as having a such a reason. On its website the Australian Electoral Commission comments:

> 41. Under s 245(14) of the Electoral Act or s 45(13A) of the Referendum Act the fact that an elector believes it to be a part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for not voting.[5]

(c) *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116

The next case is really the major Australian authority on freedom of religion under s 116; and while it seems not to support a broad meaning of the phrase, on closer analysis I think it lays the ground for a sensible view.

The case involved the Jehovah's Witnesses again, but this time on a much broader scale than in *Krygger,* which was just one member declining military training. Here the denomination as a whole was under threat. The court noted that the theology of the Jehovah's Witnesses involved the views that all organised political entities (up to and including the British Empire) were "organs of Satan", and that it was the duty of all members of the church to not participate in human wars. In addition, they would refuse to take an oath of allegiance to the King.[6]

While these views were unpopular in peacetime, at the height of World War II, when many Australians were fighting and dying overseas for the British Empire, they were pretty explosive. So much so that under a general regulation-making power given by the *National Security Act* 1939 (Cth), regulations called the *National Security (Subversive Associations) Regulations* 1940 had been made, and under those regulations the Governor-General had declared the Jehovah's Witnesses to be a subversive association, and the Commonwealth had taken over its main meeting centre.

The regulations were struck down as invalid. But importantly for our purposes, the reason for their invalidity was not that they breached s 116, but that they went beyond either the regulation-making power, or else beyond the Constitutional power involved, as being too far-reaching. In particular one of the features that struck the judges concerned

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[5] See http://www.aec.gov.au/about_aec/Publications/Backgrounders/compulsory-voting.htm (accessed 7 May 2015). For a recent case where a person's claim to be exempt from voting on "secular" grounds was rejected, see *Commonwealth Director of Public Prosecutions v Easton* [2018] NSWSC 1516 (11 October 2018).

[6] See the summary at pp 117-118, esp point 9.

was that under the Regulations organisations were prohibited from advocating "unlawful doctrines", which was defined to include "any doctrine or principle advocated by a declared body". Since the JW's were within a tradition that honoured the Bible, their doctrine included such subversive tenets as the Ten Commandments! Even Latham CJ, who would have supported most of the regulations, thought this part of the regulations went too far- see 144. But overall 3 out of the 5 judges ruled that the regulations were too broad and were, in effect, a disproportionate response to the danger posed by the JW's.

Hence, as noted above, s 116 was not the reason for invalidity. But in the course of their judgments their Honours made some very interesting comments on the section. Latham CJ, for instance, noted that:

- section 116 is a clear and general prohibition on all laws, and so is an important limit on law-making power (at 123);
- it must be read to operate on a broad definition of "religion", and to include a protection even for those of "no religion" (at 123); this will even include "non-theistic" religions such as some forms of Buddhism (at 124);
- it is an important feature of s 116 that it protects, not just the "majority" or "popular" religion, but provides protection of "minorities, and, in particular, of unpopular minorities" (at 124);
- the provision covers not only opinions but also actions in reliance on religious opinions:

> The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. (at 124)

- however, not all religions are good or helpful, and free exercise of religion must be balanced with other interests- his Honour cites some US decisions and concludes that the test to be applied must be something like, does a law amount to an "undue" infringement of freedom of religion, taking into account other important interests (at 128);
- still, Latham CJ is careful to point out that he does not agree with some of the US cases. In particular he notes that the sort of approach adopted in *Reynolds v United States* 98 US 145 (1879) (allowing a law against polygamy to over-ride then-current Mormon beliefs simply because it had a plausible public interest) seems too narrow a view of an important freedom:

> When the suggestion that religious beliefs should be superior to the law of the land is rejected as a matter of course, it may well be asked whether the very object of the constitutional protection of religious freedom is not to prevent the law of the land from interfering with either the holding of religious beliefs, or bona fide conduct in pursuance of such beliefs. (at 129)

- In this case, however, his Honour thought that the freedom of religion of the JW's had to give way to national security considerations- as otherwise this freedom would destroy all other freedoms:

> It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. (at 131)

In a post-Sept 11, 2001 world, of course, the balancing of religious freedom and national security continues to be an ongoing debate. The issues may come back again as the government considers preventing people from going to explosive areas of the Middle East to join in the "Islamic State" so-called "caliphate". Could it be argued that restriction of movement in this way impacts the freedom of religion of those who think they are obliged to join IS? Even if it were so argued, it seems likely that interests of national security would be held to over-ride freedom of religion in this situation.

Other members of the High Court in the *JW's case* (who were more inclined to strike down the regulations as too broad in any event) gave less time to the s 116 issues, but effectively ruled in a similar way.

Overall, then, while the case is one where s 116 did not operate on its own to protect the religious freedom of the JW's, the court affirms the importance of the section, and that very serious grounds must be provided before religious freedom can be over-ridden. Here of course, in the middle of a desperate and global war, it was judged that the teaching that governments were "tools of Satan" was just too subversive of the war effort. But the very fact that the offensive regulations were struck down on other grounds may indicate that the court was not entirely happy with the overall policy.

(d) *Kruger v Commonwealth (the "Stolen Generations case")* [1997] HCA 27; (1997) 190 CLR 1

The next decision is *Kruger,* in 1997. It has to be said that this relatively recent decision of the High Court is one of the most unsatisfactory on s 116. I think this is partly because even the parties concerned saw s 116 as a "subsidiary" argument to others they were making. The action was an attempt to challenge the policies that led to Aboriginal children being removed from their parents, and it involved a number of very complex issues, including an attempt to create "implied rights" under the Constitution of freedom of movement and association, and issues to do with the impact of international law which had not been implemented domestically and how it could be taken into account.

Part of the argument, however, was that removing children from their families had an impact on the practice of their traditional religion, and hence it involved an interference with religious freedom under s 116.

The s 116 claim failed, though the approaches taken by different members of the Court were varied.

Brennan CJ gave the argument very short consideration. He took the view that a law would only fall foul of s 116 if that were the law's **main** intention:

> To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids.[7] None of the impugned laws has such a purpose. (at 40)

Perhaps the least that can be said about that quote is this: while there may be an argument that this is the appropriate view to take for "establishment" issues (which of course was what the cited *DOGS* case was about), it seems arguable that this is by no means an appropriate approach in free exercise claims. After all, even in Latham CJ's

[7] *Attorney-General (Vict); Ex rel Black v The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559 at 579, 615-616, 653. The case was sponsored by an organization called "Defence of Government Schools", and hence often goes by the acronym "DOGS".

comments in the *JW's* case, it was recognised that this is an important right of citizens that should not be lightly discarded.

Dawson J took the view (based on the previous decision in *R v Bernasconi* [1915] HCA 13; (1915) 19 CLR 629 on s 80 of the Constitution) that s 116 is not applicable to laws governing Territories made pursuant to s 122; and hence since all the complaints were about the actions of Territorial laws, s 116 was not relevant (at 60). However, he also said that he would have agreed with Gummow J that if s 116 did apply, it did not impact on the relevant laws (at 60-61).

Toohey J at 85-86 thought that s 116 did apply to Territorial laws; but he also thought that the purposes of the law in question needed to be considered.

> The question should therefore be asked: was a purpose of the Ordinance to prohibit the free exercise of the religion of the Aboriginals to whom the Ordinance was directed? It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose. (at 86)

In contrast to Brennan CJ, there is recognition that a law may have a number of "purposes". But again, there is a sharp line drawn between "purpose" and "effect", so that an effect (however serious and however disparately felt by people of a particular religion) would not be enough to breach s 116.

Gaudron J said that s 122 was clearly subject to s 116 (at 123). Her Honour noted, however, that while s 116 was an important limit on Commonwealth legislative power, it could not be said to create a constitutional "right" which could be sued upon in damages for a citizen, partly because the provision did not govern the States (who are of course free to establish religions or impair religious freedom as they see fit)- see the comments at p 125.

On the question as to whether a law needs to have the "purpose" of impairing freedom of religion, or not, her Honour took a slightly wider view of the matter than some other members of the Court:

> s 116 was intended to extend to laws which **operate to prevent the free exercise** of religion, not merely those which, in terms, ban it. (at 131, emphasis added)

Her Honour also stressed the need to interpret constitutional guarantees broadly, so as not to allow Parliament to circumvent them by laws that appear to have innocent aims.

McHugh J agreed with Dawson J that s 116 was not applicable to laws made under s 122- at 142. **Gummow J** took a fairly narrow "purpose" approach and concluded that the purpose of the legislation was not to interfere with free exercise- at 160. Interestingly his Honour cited the controversial *Smith* decision from the US as apparently an indication of the approach he preferred- see n 629 at 160.[8]

His Honour did, however, concede that legislation which seemed to be directed to other matters might be a "concealed" attack on religion and in those possible

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[8] As those interested in religious freedom issues in the US will know, the general approach of the US Courts to religious freedom issues in recent years is to read the right very narrowly, so that if there is a "neutral" (i.e. not clearly anti-religious) reason for a law, it will not breach the First Amendment, following the decision in *Employment Division v Smith* 494 US 872 (1990).

circumstances might be subject to attack under s 116- see 161. His Honour also took the view that s 116 was applicable to laws passed under s 122- see 167.

The upshot of *Kruger*, then seems to be that the majority of the Court took a reasonably narrow, "purposive" view of s 116, requiring a close examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion. Arguably this is something of a retreat from comments made by Latham CJ in the *JW's case*, where his Honour there said that the purpose of legislation was only one factor in determining whether it breached s 116 (see *JW's* at 132, though this passage itself was doubted by Gaudron J in *Kruger* at 132.)[9]

However, some members of the Court at least allowed that legislation could have more than one purpose, and Gaudron J demonstrates how even in this case it could have been concluded that one purpose at least of the relevant legislation was the impairment of free exercise of religion.

On the vexed question of whether s 116 governs the laws of the Territories made pursuant to s 122, Toohey, Gaudron and Gummow JJ are all clear that it does; Dawson and McHugh JJ that it doesn't; and Brennan CJ unfortunately doesn't offer a view (although the fact that his Honour explicitly found that the laws did not breach s 116 suggests that he may have been sympathetic to the view that it applied.) So there is no clear majority on the point, which is presumably why one textbook states: "The court has not yet resolved the question whether s 116 applies to laws made under the territories power".[10]

On balance, however, I think that when presented with the issue the court will hold that s 116 applies to the Territories. I am reinforced in this view because in recent years, in *Wurridjal v Commonwealth* (2009) 237 CLR 309, a majority of the court over-ruled past decisions holding that the right to "just terms compensation" under s 51(xxxi) did not apply to the Territories. So there seems to be a definite trend to apply what few constitutional "protections" that there are, equally to the Territories as to other parts of the Commonwealth.

(e) The Hoxton Park case

Section 116 was more recently considered in some detail, though not in the High Court but in the NSW Court of Appeal, in ***Hoxton Park Residents Action Group Inc v Liverpool City Council*** [2016] NSWCA 157 (5 July 2016) when discussing the "establishment" clause. The main ground for the decision, upholding as valid Commonwealth provision of funding for an Islamic school, was that the "establishment" clause of s 116 was not breached except by a law that amounted to the setting up of a "national church" of some sort.[11]

The court also, however, made some interesting comments on "free exercise". The appellants had argued that the legislation allowing funding of an Islamic school

[9] See the comment of Gray (2011) at 316, with which I agree: "The test in Kruger for invalidity pursuant to [s 116], that the law be passed with the purpose of restricting religious freedom, is with respect too narrow",

[10] Clarke, Keyzer & Stellios *Hanks Australian Constitutional Law: Materials and Commentary* (9th ed; Australia, LexisNexis Butterworths, 2013) at 1174, [10.4.6].

[11] Following, of course, the earlier decision of the High Court in the so-called "DOGS" case, *Attorney-General (Vic); Ex rel Black v Commonwealth* [1981] HCA 2; 146 CLR 559.

"prohibited free exercise of religion", contrary to s 116, because students at the school were not free to decline to engage in the religious activities- see [142].

In effect, as with the other cases discussed above, the argument here failed because the Court held that the "purpose" of the legislation was not impairment of free exercise. However, I still think this matter needs further thought.

In ruling that the law would not fall foul of the s 116 limb on prohibition on the free exercise of religion, the Court of Appeal at [146] referred to *Krygger v Williams* (1912) 15 CLR 366, where as seen there are some blunt words rejecting a "free exercise" claim if a law which has "nothing at all to do with religion" has an incidental impact on religious freedom (there a law for conscription to military service). Similar views expressed by Brennan and Toohey JJ in *Kruger v Commonwealth* (1997) 190 CLR 1 were noted and supported at [147]. The correct view of the matter was said to be that a law would only contravene s 116 if its clear "purpose" were to impair religious freedom.

With respect, I would like to suggest that more discussion of this "free exercise" point was warranted. In particular, the Court of Appeal in *Hoxton Park* does not really discuss what we have seen is clearly the major "free exercise" decision in Australia, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116. As seen, in that decision the leading judgment of Latham CJ suggested that a law that amounted to an "undue" infringement of freedom of religion (see p 128) would contravene the free exercise clause.

The view that consideration of the free exercise limb of s 116 involves more than simply looking at the apparent "overall purpose" of legislation can also be supported to some extent from the decision of Gaudron J in *Kruger*. Her Honour's comments in my view provide some grounds for saying that the narrow view of the purpose of legislation adopted in relation to the "establishment" prohibition, may not be appropriate for the other matters s 116 deals with.

In the *Hoxton Park* case itself, however, I would agree with the Court of Appeal that there was no breach of the "free exercise" clause of s 116, even if it were viewed more widely. After all, as Beazley P notes at [154], the affected students were those "whose parents have exercised a choice to send them to a school which engages in such observances".

Basten J makes the same point in his discussion of the "imposition" argument, even assuming it were available, at [281]:

> [C]entral to the concept of "imposition" is the element of religious observance which is non-consensual. With respect to children, the source of any consent must be found in the beliefs and intentions of the parents. There is no suggestion that any parent is under any threat or improper pressure to send their children to a particular non-secular (or secular) school. No doubt such a choice is strongly influenced by the parents' religious beliefs: in that (relevant) sense the **choice is entirely consensual**. Further, whatever may have motivated a parent to send a child to a school which provides religious instruction of a particular kind, the Commonwealth is neutral as to that aspect of the child's education. It was not right to say that the Commonwealth required that the school provide religious instruction and hence imposed religious observance on the children. The fact that the school imposed such a requirement, and obtained funding from the Commonwealth, does not mean the Commonwealth imposed any such requirement. The funding criteria were silent as to this aspect of the school's curriculum.

In short, my view is that the discussion of "free exercise" issues may need to be slightly nuanced. The right to religious freedom is an important human right, protection

of which in Australia depends in part on s 116. To confine the prohibition in s 116 to laws the "sole or dominant" purpose of which is explicit interference with religious freedom seems to apply far too narrow a reading.[12]

Even a broader reading here, however, would have led to rejection of the challenge to funding, as no-one would be forced against their wishes to send their children to a religious school of any sort. But for the future, protection of religious freedom requires the slightly broader approach authorised by the leading decision of Latham CJ in the *Jehovah's Witness case*, a careful consideration of whether there is an "undue impairment" of religious freedom when weighed up against other compelling community interests. Only then can the true diversity of the Australian community be properly protected.

(f) Some other comments on s 116

The above are the main decisions in which the free exercise clause of s 116 has been considered. But there are some comments on the provision in a couple of other cases worth mentioning.

In ***Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association*** (1987) 17 FCR 373 at 388, Jackson J said:

> Assuming that the "purpose" of ... a law is to be gathered from its "effect" or the "result" which it achieves, and that if the law has the effect proscribed by s 116, it would be impossible to deny that the "purpose" of it was otherwise (that is, to say that it was not a law "for prohibiting the free exercise of any religion"), it is necessary to see what effect the decisions in question have...

This was an interesting case involving a decision to deport a "radical" Muslim cleric, Sheikh El-Hilaly. The claim was made that in doing so the Minister had acted contrary to s 116, presumably by interfering with the free exercise of religion either by the Sheikh or else by those who wished him to be their religious leader. In the end the court concluded that the "purpose" of the Minister's actions was not in any way to inhibit the free exercise of religion of anyone, and hence there was no contravention of s 116.

Jackson J said at 389:

> Accepting, however, that there will be some disruption of worship occasioned by the decisions in question it does not seem to me that there is in terms of s 116 any prohibition of the free exercise of religion. Section 116 states in my view not merely the broad proposition that no religion shall be established, but also that no religion shall be prohibited. The term "prohibiting" in s 116 means what it says and appears to me to mean a proscription of the right to exercise without impediment by or under Commonwealth laws any religion which is the choice of the person in question.
>
> The Migration Act 1958 itself contains no such proscription. Nor in my view is it possible to regard the refusal of the appellant to permit a particular person who is a minister of a religion to remain in Australia a prohibition of the free exercise of that religion. It may be that circumstances such as repeatedly refusing to allow any overseas ministers of a religion to enter or remain in Australia might in a different case amount to such a prohibition, but this is not the position here.

I must say I think there are some interesting issues here, which are somewhat elided by the judgment. Would it matter, for example, whether the behavior and views of the Imam concerned were solely "religious" in nature or "political"? Can one indeed

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[12] For further discussion of this issue, see L Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution" (2016) 44/3 *Federal Law Review* 505-529, available at SSRN: https://ssrn.com/abstract=2834486 .

draw a line there? It seems to me that whatever view one takes of the matter the "free exercise" of the Imam's religion was being interfered with if he was deported based on views expressed in sermons.

In many ways it might have been more honest to recognize this and to address directly the competing interests to be taken into account (such as whether it was against Australia's interests in national security to have someone in leadership in the Muslim community advocating violent jihad, which seems to have been an arguable view of what was being said.)

In ***Halliday v Commonwealth of Australia*** [2000] FCA 950 (14 July 2000) an "ambit" claim was made challenging the constitutional validity of provisions introducing the GST, and a s 116 issue was said to arise because, according to the claim, it was contrary to Islam for a Muslim person to collect tax on behalf of the government- see [16]. The claim was rejected; interestingly the court referred to a similar US decision where an Amish person claimed the right not to pass on collected taxes to the government, and where it was held that the community interest in revenue collection had to take primacy- see *United States v Lee* [1982] USSC 40; 455 US 252 (1982), noted at [20].

Sundberg J commented

> [21] The GST laws (including the withholding provisions) do not prohibit the doing of acts in the practice of religion any more than did the military service law in *Krygger v Williams*. **At most they may require a person to do an act that his religion forbids. But that is not within s 116**. If the matter be approached by asking whether the law is a law "for prohibiting the free exercise of any religion", in the sense that it is **designed** to prohibit or has the purpose of prohibiting that free exercise, the answer must be in the negative. It is plainly a law of general application with respect to taxation. There is no hint of a legislative purpose to interfere with the free exercise of a Muslim's or anyone else's religion. Nor is it a law that has the result or effect of prohibiting the free exercise of any religion. A person professing the Muslim faith can avoid committing the sin of acting as a tax collector by ensuring that he deals only with suppliers who quote an ABN. On the view espoused in *Lee*, the **importance of maintaining a sound tax system is of such a high order** that religious belief in conflict with the withholding of GST tax is not protected by s 116. When Latham CJ asked whether freedom of religion has been *unduly* infringed by a law, he was in my view asking a similar question to that posed by *Lee*. There is no **undue interference** here. Especially is this so when a person can avoid acting as a tax collector by dealing only with suppliers who quote an ABN. I have canvassed the various "tests" that can be distilled from the cases. But the essential point, in my view, is that the withholding tax provisions do not prohibit the doing of any act in the practice of religion. The claim that the GST law offends s 116 has no prospect of success. (emphasis added)

While I don't disagree with his Honour's conclusion, the paragraph contains a "smorgasbord" of propositions, not all of which are consistent in my view with previous law or each other. The "undue" infringement discussion is a reasonable use of Latham CJ's decision in the *JW's case.* But is it really true that s 116 can **never** apply to a law because it requires someone to do something their religion forbids? (After all, that would have been a quick way of disposing of the issues in the *JW's case*; but it was not the way the court approached it.)

The reference to whether a law is "designed" to prohibit a religion is a reference to the "purposive" test, which is indeed justified under *Kruger*. But then his Honour discussed the "importance" of the interest in tax collections, which is a "balancing" process. And then his Honour concludes that in any event a Muslim person could avoid the "tax collection" aspect altogether, so there is no real s 116 issue anyway!

With respect, there are some important issues, which it would have been better to have dealt with here. Simply being able to avoid the impact of a requirement by changing one's behavior may not resolve the religious freedom issue. To take a more up-to-date example, suppose Federal anti-discrimination law were interpreted to mean that a person who baked wedding cakes, who refused to supply a cake in support of same sex marriage, was guilty of sexual orientation discrimination?[13] Would it be a sufficient answer to a claim that this was an undue interference with religious free exercise, to say that the person can avoid the problem by getting out of the wedding cake business?

See also ***Daniels v Deputy Commissioner of Taxation*** [2007] SASC 431 (7 December 2007), where the plaintiff claimed that the provisions of s 116 allowed him to decline to pay the proportion of his taxes which he calculated went to fund abortion. The court not un-naturally declined to agree. Even apart from the complexities of administering a scheme where members of the public were allowed to take conscientious objection to the way their taxes were spent, it would seem be an unworkable system in principle.

Still, it seems clear that we have some way to go before the courts in Australia are really clear about how free exercise under s 116 should work. Given the limits of s 116 as a protection for religious freedom in Australia, are there other options? I want to flag three that may be possible: international obligations, common law protection, and domestic charters. We will also discuss the important "indirect" protection provided by "balancing clauses" in anti-discrimination laws.

2. Protection of religious freedom other than through s 116

(a) Protection under International Conventions?

There are a number of important international treaties that protect religious freedom. Probably the most important one, which Australia has undertaken to be bound by, is the *International Covenant on Civil and Political Rights* (the ICCPR), article 18 of which provides for a broad right of religious freedom.

It reads:

> 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.

[13] Those interested in these issues will know that such cases have arisen elsewhere. One was the decision of the Oregon Bureau of Labor and Industries to issue a penalty of $135,000 against a small cake-making business, Sweet Cakes by Melissa, for declining to make a cake celebrating a same sex wedding- see V Richardson, "Oregon panel proposes $135K hit against bakers in gay-wedding cake dispute", *Washington Times*, April 24, 2015.

> 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.

But under Australian law international treaties are not "incorporated" into our domestic law automatically; Parliaments need to take a further step and pass implementing laws. Unless the Commonwealth or a State/Territory enacts specific legislation, the most that can be said (and this argument has been run in a couple of cases) is that as a matter of judicial discretion in interpreting ambiguous legislation, the courts should presume that Parliament would intend to comply with international law (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.) But so far no statute has been found to be sufficiently unclear in the area of religious freedom for this principle to be applied.

One case, however, where international obligations provided at least one reason for the decision was *Evans v NSW* [2008] FCAFC 130. In this decision a major ground for overturning restrictive NSW regulations that had prohibited the 'annoying' of Catholic World Youth Day participants was that they interfered (without explicit Parliamentary authority) with the fundamental common law right of freedom of speech. Branson & Stone JJ commented:

> 74 Freedom of speech and of the press has long enjoyed **special recognition at common law**. Blackstone described it as 'essential to the nature of a free State': *Commentaries on the Laws of England*, Vol 4 at 151-152. …
>
> 76 In its 1988 decision in *Davis v Commonwealth* (1988) 166 CLR 79, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law. … In their joint judgment Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said (at 100):
>
> Here the framework of regulation … reaches far beyond the legitimate objects sought to be achieved and **impinges on freedom of expression** by enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power…
>
> 78 The present case is not about characterisation of a law for the purpose of assessing its validity under the Constitution of the Commonwealth. The judgments in *Davis* 166 CLR 79 however support the general proposition that **freedom of expression in Australia is a powerful consideration fav**ouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow. [**emphases** added]

The evidence in that case disclosed that Evans and other members of the public were planning to demonstrate against what they perceived to be bad policies and doctrines taught by the Roman Catholic Church. The challenged regulations would have restricted their right to do so by requiring them not to 'annoy' participants. The Federal Court held that these regulations should be struck down on the principle that the head legislation enacted by the NSW Parliament should not be interpreted, in the absence of express words, as allowing regulations to be made which interfered with this fundamental common law right. This principle, known somewhat obscurely as the "principle of legality", was also applied by some members of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) and in a related

case concerning freedom of speech, *Monis v The Queen* [2013] HCA 4 (27 February 2013).

The Federal Court in *Evans,* however, also incidentally referred to the value of religious freedom, supporting this by reference to the general terms of s 116 of the *Constitution*, and to Art 18 of the UDHR.

> 79 In the context of World Youth Day it is necessary to acknowledge that another important freedom generally accepted in Australian society is freedom of religious belief and expression. Section 116 of the Constitution bars the Commonwealth from making any law prohibiting the free exercise of any religion. This freedom is recognised in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights…in Art 18.

Of course international conventions can provide a model to encourage legislation, and as we will see in a moment there is some local legislation that to some extent specifically adopts the ICCPR.

There was an attempt made to develop an argument along these lines in one case. In *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 (12 August 2011) the applicants argued that the court ought to interpret the native title legislation in accordance with the ICCPR to allow recognition of their freedom of religion. The trial judge and the Full Court rejected this claim. The legislation had no relevant "gaps" that the international obligations could fill. The Full Court said:

> [106] … neither logic nor the judgment in *Teoh* support the use of Australia's international obligations in the interpretation of the provisions under consideration in the absence of any ambiguity in the language of the provisions.
>
> [107] If a provision has a clear meaning then that meaning either reflects Australia's international obligations or it does not. There is no scope for the application of any canon of construction to establish the meaning. But where there is more than one possible meaning of the provision, the canon of construction favouring Australia's international obligations is available to identify the intended meaning. In other words, the canon of construction only has work to do where the provision is open to more than one interpretation. This is the reason for the reference in the judgment in *Teoh* to the use of the canon of construction for the purpose of resolution of ambiguity.
>
> [108] Thus, the primary judge was correct to hold that a statutory provision will be construed so as to conform with Australia's international obligations only in order to resolve ambiguity in the language of the provision.
>
> [109] As explained earlier in these reasons, there is no relevant ambiguity in s 38 and s 39 of the Act, and hence no occasion for resort to the international obligations contained in the ICCPR or the UN Declaration arose. The primary judge was correct to so determine.

A more recent decision where more positive reference was made to international religious freedom principles was *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26.

(It should be noted that there was also some comment on the application of international religious freedom principles in the Victorian Court of Appeal decision of *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). I have previously written on this decision and suggested that

on the whole the decision was wrong, and the use of international sources not very impressive. The decision is discussed below on other issues.)[14]

(b) Common law protection for religious freedom?

If international law does not provide strong religious freedom protection, can it be found in the common law tradition? While the common law has a long tradition of protecting freedoms in general, there is not a strong common law religious freedom tradition. In fact, of course, the common law developed in a country (Great Britain) where there was an established church, the Church of England, and at various points in history there were legal disabilities imposed on those from other religions.

Ahdar and Leigh in their important discussion of the issues (see their book on the Further Reading list) are generally sceptical about such a common law right. The closest the common law comes, perhaps, is a series of cases where the courts have interpreted private testamentary gifts by testators that were clearly designed to favour a particular religion in such a way that beneficiaries who were not of that religion might be able to take the gift.[15] However, while one could argue that this approach supports the freedom of religion of the beneficiaries, it may be said that at the same time it undermines the freedom of religious choice made by the testator!

In Australia there was one attempt to invoke an implied religious freedom principle, which effectively failed. In *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376 the Grace Bible Church was running a non-Government school but had not received approval from the State educational authorities. They were convicted of an offence and fined. On appeal their argument was that the Church had a religious objection to being required to have their curriculum approved by the State, and that, as Zelling J summarised it at 377:

> there is an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament.

As might perhaps have been expected, their argument did not succeed. The judgments of the Supreme Court are interesting, but all conclude that there is no general "inalienable" right of religious freedom, for the sort of reasons we have already noted. Zelling J commented that s 116 clearly only applies to the Commonwealth, not to the States, and there was no general common law right of religious freedom which could be said to have been inherited by SA, referring to the laws concerning heresy and blasphemy. The comment from Rich J in the *JW's case* at 149, where his Honour said "It may be said that religious liberty and religious equality are now complete", was "not true in public law when Rich J wrote those words, nor is it true now" (Zelling J, at 379).

His Honour gave an interesting review of the early history of South Australia, noting that from an early time the State refused to fund religious bodies. But none of this history established a fetter on the power of the State Parliament.

The other members of the Full Court agreed, although Millhouse J said that he had been interested to read the comment of the High Court in the *Church of the New Faith* decision that I have used at the top of this paper.

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[14] See Neil J. Foster (2014) "Christian Youth Camp liable for declining booking from homosexual support group" at: http://works.bepress.com/neil_foster/78 .
[15] See Ahdar & Leigh, 2nd ed at 130.

There was a very interesting later South Australian decision, which touched on some of these issues. In *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, [1995] SASC 5532 (25 August 1995) there was an attempt to prevent a Commission of Inquiry examining the question whether certain religious beliefs which had been said to be "secret women's business" of the Ngarrindjeri were genuine and long-standing beliefs, or whether, as alleged by some, they had been invented in recent years. (The beliefs had been involved in the question whether a particular bridge should be constructed.)[16]

Since the inquiry was set up by the State government s 116 was not directly relevant. An argument was made, however, that "freedom of religion" was an important common law principle, which the court should not allow to be lightly over-turned. In the end the members of the SA Full Court agreed that simply making an inquiry into whether the beliefs were genuinely held, or not, did not of itself amount to an undue infringement of the freedom of religion of those who were said to hold the beliefs. Nevertheless, there were some interesting comments made about the importance of freedom of religion.

Doyle CJ commented:

> I accept that **freedom of religion is one of the fundamental freedoms** which entitles Australians to call our society a free society. **I accept that statutes are presumed not to intend to affect this freedom**, although in the end the question is one of Parliamentary intention. But in my opinion it cannot be said that conduct of the sort in question here (the institution and conduct of a mere inquiry), to the extent that it affects freedom of religion is, as such, unlawful at common law. Nor, in my opinion, does this freedom so limit the powers of the executive government that this inquiry, which it considers appropriate in the public interest, is beyond the power of the executive government if or to the extent that it affects freedom of religion…
>
> For the purpose of these reasons I have assumed, without deciding, that the "women's business" the possible fabrication of which is the subject of inquiry, is an aspect of Aboriginal culture which is protected by the fundamental principle of freedom of religion. I likewise assume, without deciding, that the **inquiry will in fact intrude upon the freedom** of certain Ngarrindjeri people to hold and practise their religion, because of the practical compulsion to submit to scrutiny the substance of their beliefs and to disclose matters which they regard as secret. I stress that I have not decided either of these matters. (at 64 SASR 552-553) (emphasis added)

It seems to have been arguable that the conduct of the inquiry might have infringed upon a religious belief that information had to be kept secret, but even if so the strength of any common law presumption was not sufficient to over-ride the specific power of the executive government to cause the issue to be inquired into.

Debelle J agreed with the Chief Justice, but expanded on some issues:

> For the purposes of this action only, I am prepared to assume that the **freedom of religion is a fundamental freedom in our society**. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society: *Church of the New Faith v The Commission of Payroll Tax (Victoria)* (1983) 154 CLR 120, per Mason ACJ and Brennan J at 130. But the freedom of religion like a number of other fundamental freedoms is **not absolute**. The freedom is not inalienable and may be regulated by statute: *Grace Bible Church v Reedman* (1984) 36 SASR 376. The extent to which this fundamental freedom renders other conduct unlawful at common law is open to serious question. Even if the holding of the Royal Commission constitutes an impairment of the freedom

[16] Those interested in Constitutional issues will note that this was part of the well-known "Hindmarsh Island Bridge" litigation, different aspects of which were considered in *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.

> of religion, it is not clear whether as a matter of law it has the consequence that the impairment is unlawful or otherwise gives rise to any right which avails the plaintiff… (at 554-555)
>
> The Royal Commissioner has the power to coerce witnesses: see s11 of the Royal Commissions Act 1917. It may be a grave insult or at least an affront to a person who professes a particular belief to be required under pain of some penalty to attend and answer questions in respect of that belief. Compulsion to attend before a commission of inquiry and answer questions as to one's belief leads to justifiable concerns of a potential to interfere with the freedom to adopt and practise a religion of one's choice. The line between a mere inquiry and a step which impairs freedom of religion may be very fine and at times be very difficult to draw. But that is the kind of task which the courts are not uncommonly called upon to undertake. Having regard to the nature of the inquiry, I do not think there is any impairment of the free exercise of religion.
>
> The inquiry stems from allegations that the women's business is a fabrication. Included in those who allege that the women's business is a fabrication are persons who say they are members of the Ngarrindjeri nation. The inquiry may, therefore, involve an examination of the beliefs of Ngarrindjeri women to determine the content of their belief. **That inquiry does not require an examination of the truth or falsity of the belief**. It is not concerned to establish whether the beliefs are consistent with that part of Aboriginal customary law and tradition which constitutes the religious beliefs of the Ngarrindjeri nation. It is not concerned to establish whether the belief is a rank heresy**. Instead, it is concerned with determining whether the asserted women's business has been recently manufactured by a group of Ngarrindjeri women**. One of the reasons for the inquiry is that a group of Ngarrindjeri women deny that the asserted women's business ever formed part of the religious beliefs of the Ngarrindjeri. The inquiry whether the asserted women's business forms part of the beliefs of Ngarrindjeri women will involve, among other things, an examination of the allegations as to fabrication, an examination of how long the belief as to the asserted women's business has existed and, if it is a recent held belief, when and how it came into existence. There may be difficulties in proving these matters, difficulties which are compounded because Aboriginal law and tradition is an oral tradition. But these are matters which are capable of being established by evidence of extrinsic facts. It is the limited nature of this inquiry which prevents it from being an impairment of the freedom of the Ngarrindjeri women to exercise their religious belief.
>
> **It is necessary to maintain a balance between the legitimate interests of those who seek to pursue a course of conduct and those who have a religious belief which seeks to prevent the desired course of conduct**. If it is not possible to inquire whether the tenets of the asserted religious belief require that the conduct cease or to inquire whether the person who proclaims the belief genuinely believes it or to inquire whether it has been fabricated, those who are prevented from pursuing their legitimate interests are adversely affected without a proper opportunity of examining the case against them. As already mentioned, the freedom of religion is the paradigm freedom of conscience. No civilised society would seek to impose an improper restraint upon that freedom. Equally, no civilised society would wish to permit the freedom to be unfairly or improperly used as a means of preventing others from pursuing their legitimate interests. If an inquiry is constituted on the ground that the asserted belief is a fabrication, great care must be undertaken to ensure that there are proper grounds for the inquiry and that allegations of fabrication are not used as a cloak to hide the fact that the intention is to circumscribe the free exercise of that religion. The secret aspects of Aboriginal law and tradition deserve proper respect and care must be taken to ensure that there is no unlawful impairment of the freedom of Aboriginal people to practise their religion. But the nature of this particular inquiry and the manner in which it is being conducted do not impair the freedom of the Ngarrindjeri women to exercise their religious beliefs. (at 555-557) (emphasis added)

The decision is an interesting one, because it at least raises the possibility that a common law protection of free exercise is possible within the bounds of the "principle of legality", although of course it can be over-ridden if Parliament (or, perhaps, the Executive) choose to do so.

To sum up on this question: we have seen it is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law making by Parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a "presumption" which would inform courts when interpreting legislation. The "principle of legality" means that a court, when reading an Act, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that "freedom of religion" is, or perhaps has now become, a fundamental common law right, as "the essence of a free society", then it may provide guidance for courts interpreting legislation.

(c) Protection under specific State and Territory charters of rights

As noted previously, Australia has no general Federal "Charter of Rights" (unlike the US or even, today, the UK where the European Convention on Human Rights has to some extent been incorporated into local law.) But individual jurisdictions have chosen to implement such charters, and the State of Victoria (*Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 14) and the Australian Capital Territory (*Human Rights Act* 2004 (ACT) s 14), as well as now the State of Queensland (*Human Rights Act* 2019 (Qld), s 20) have enacted general human rights instruments which contain explicit protections for religious freedom.[17]

So far there have been not many decisions considering these provisions.

While it did not directly involve the application of s 14, the decision in *Aitken v The State of Victoria, Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) mentioned the provision in passing. In this case, parents of children at a State school objected to the fact that Scripture classes (special religious instruction) were offered at the school their children attended, but their children were "singled out" because they had withdrawn them from the class. The Tribunal found that there had been no adverse impact on the children, and hence that there was no breach of the Charter or the legislation on discrimination.

However, the Tribunal commented briefly on the accepted approach to applying the Charter in interpreting Victorian legislation:

> [97] The parties and the Commission submitted, that on current authority, the proper application of the Charter required first, ascertaining the ordinary meaning of the provision applying normal principles of statutory construction. Secondly, if on its ordinary construction the provision limits a right protected by the Charter, in this case those recognized by ss 14(1), 8(2) and (3), the next step is to determine whether the limitation of that right is demonstrably justified as a reasonable limit in accordance with s 7(2) of the Charter. Thirdly, if the limitation is not justifiable, an attempt had to be made to give the provision a meaning that is compatible with human rights and that is also consistent with the purpose of the provision. The respondent bore the onus of demonstrating that the limitation on the right was justifiable.

The decision of the trial judge here was upheld on appeal in *Aitken & Ors v State of Victoria* [2013] VSCA 28 (22 February 2013).

A significant reference to s 14 of the Victorian Charter was found in the decision of the Victorian Court of Appeal in *Hoskin v Greater Bendigo City Council* [2015]

[17] Queensland's legislation received Royal Assent on 7 March 2019 but has not been proclaimed to formally commence operation yet.

VSCA 350 (16 December 2015). This was an appeal from a decision of the Council to allow the construction of an Islamic mosque in Bendigo. The Court of Appeal held that the Council had appropriately considered the relevant "social impacts" in approving the mosque. In the course of the judgment, however, they noted that the Council had been obliged to take into account important human rights provisions, including s 14:

> [22] In support of this case, the permit applicant submits that the P&E Act is to be construed in a manner which gives effect to the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter').
>
> [23] Sections 14 and 19 of the Charter seek to protect the human rights to freedom of culture, religion and belief. Section 14 states:
>
> (1) *Every person has the right to freedom of thought, conscience, religion and belief, including—*
>
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
>
> (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private*.
>
> (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.[18]
>
> [24] Section 19(1) of the Charter states:
>
> *All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language*.[19]
>
> [25] Section 32(1) of the Charter provides:
>
> *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*.[20]
>
> [26] We accept that the provisions of ss 14 and 19(1) of the Charter inform the construction of the objectives of planning as they are stated in s 4 of the P&E Act and the terms of s 60(1)(f) of the Act relating to significant social effects upon which the debate in this matter ultimately focussed….
>
> [31] The Charter is relevant in this case not only to the proper construction of the objectives of planning in Victoria and to the proper understanding of the notion of significant social effects. It also imposed an obligation upon the Council and, on review, the Tribunal to have regard to the human rights of the proposed future users of the mosque when deciding whether or not to grant the permit.

The court also noted similar comments about the need to support religious freedom which had been made by McHugh J in *Canterbury Municipal Council v Moslem Alawy Society Ltd*[21], although those comments were made in the context of general

[18] Emphasis added.
[19] Emphasis added.
[20] Emphasis added.
[21] (1985) 1 NSWLR 525.

principles rather than a specific statement of human rights. An earlier Tribunal decision involving a mosque application, *Rutherford & Ors v Hume CC* [2014] VCAT 786 (14 July 2014) had also referred to s 14 in stressing that religious freedom rights supported the right to build a place for religious worship.

There is an important recent book by N Villaroman, *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia*. (Leiden: Brill, 2015) dealing with these issues.[22]

A very interesting and challenging set of facts involving a claim based (in part) on s 14 is to be found in *Fraser v Walker* [2015] VCC 1911 (19 November 2015). A person who was standing outside an abortion clinic in Melbourne was displaying a poster that featured pictures of aborted fetuses. She was charged with, and convicted of, "displaying an obscene figure in a public place" contrary to s 17(1)(b) of the *Summary Offences Act* 1966 (Vic). There were a number of interpretive and human rights issues raised in her defence; the County Court, for example, decided that something could be "obscene" even if it had no sexual connotations, but was simply "offensive or disgusting" – para [21].

But one of the grounds of defence was that display of the poster was part of her "right to freedom of conscience and religion"- [38]. This, along with other human rights defences, was rejected. The Judge commented:

> 49 I accept Miss Ruddle's submission that the appellant's right to religious freedom does not provide a legal immunity permitting her to breach the provision of the Act in question. Assuming the appellant's stance on abortion comes from her religious belief, the display of obscene figures is not part of religion nor can it be said the display is done in furtherance of religion.

I think there might be more to be said on this point, especially as opposition to "abortion on demand" is a well-known religious stance of the Roman Catholic church. Clearly it is a difficult question, and the court ought to have weighed up the religious freedom rights of the activist here in light of the emotional and other harm that might be caused to those seeking to use the services of the clinic. But I am not so sure that it should have been summarily dismissed as in no way connected with her religion.

The decision of the County Court in this case was upheld on appeal to a single Judge of the Supreme Court of Victoria, in *Fraser v County Court of Victoria & Anor* [2017] VSC 83 (21 March 2017). The application of the right to religious freedom was not considered as one of the grounds of appeal.[23]

Many of you will be aware of the recent decision of the High Court in *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (10 April 2019), which upheld the validity of laws in Victoria and Tasmania prohibiting communication about abortion within 150m of an abortion clinic. The claim that the laws were invalid was based on "freedom of speech" arguments- it could not be made on the basis of any religious freedom provided by the Constitution (as the laws are State laws), nor was it made on the basis of a right given by the Victorian Charter (presumably as, bizarrely, the Victorian Charter contains

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[22] For a review of the book, see N Foster, "Review of *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia* by Noel Villaroman (2015)", (2016) 58 (2) *J of Church and State* 387-389; DOI: https://doi.org/10.1093/jcs/csw013.

[23] For a detailed analysis of the appeal, see my blog post, "Abortion, Obscenity and Free Speech" (March 26, 2017) https://lawandreligionaustralia.blog/2017/03/26/abortion-obscenity-and-free-speech/ .

an explicit provision, s 48, preventing it from operating on any laws concerning abortion!)[24]

Another interesting s 14 case was *Haigh v Ryan* [2018] VSC 474 (24 August 2018). In that case a prisoner in custody claimed to be a follower of the "Pagan" religion, and that his religious rites included the use of tarot cards. The prison authorities had allowed him to use a couple of packs of such cards, but one pack contained 4 cards which had suggestive images on them included bare-breasted women, which was contrary to the general rules about suggestive and pornographic material. He claimed that his religious freedom rights had been impaired.

Ginnane J accepted (as did the prison authorities) that "Paganism" could be classified as a religion, and accepted also that the prisoner did not need to prove that using the cards was a "necessary" part of his religion, so long as it was "motivated" by his religion.

His Honour held that the decision to remove the cards was unlawful because the authorities had not turned their minds to the impact of s 14 on the decision, and Victorian law required that this be done. However, the final order was simply that the authorities reconsider the decision taking s 14 into account, and in doing so they would be entitled to take into account the limits allowed to be imposed by the 2006 Act.

There is a summary of the reasoning here:

> 58 I accept that the use of Tarot cards, including the four Tarot cards in issue, can be a ritual associated with the practice and observance of the plaintiff's religion. I consider that, on the assumed footing that Paganism is a religion, the withholding of the four Tarot cards which the plaintiff wishes to use does engage his right of religious freedom and belief. I consider that the withholding of the cards is a limitation on the exercise of his religious right, though a relatively minor one.
>
> 59 The next question is whether that limit is **reasonable and demonstrably justified** having regard to the matters set out in s 7(2) of the Charter. That subsection requires that the reasonable limitation be **demonstrably justified in a free and democratic society based on human dignity, equality and freedom** taking into account all relevant factors including five that are listed, the first of which is 'the nature of the right'. The other four are the **importance and the purpose of the limitation, the nature and extent of the limitation, the connection between the limitation and the right, and whether there are any less restrictive means** reasonably available to achieve the purpose that the limitation seeks to achieve.[25] (emphasis added)

In *The Queen v Chaarani (Ruling 1)* [2018] VSC 387 (16 July 2018), in a trial of three Muslim defendants for terrorism-related offences, the wife of one of the defendants wanted to wear a face-covering *niqab* while seated in the spectator's area of the court, and relied on s 14 as a reason for doing so.

The trial judge, Beale J, refused permission; in short, he held that the security risks in a highly charged trial, including risks of misbehaviour by spectators, were seen to outweigh the religious freedom interests.

His Honour summed up:

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[24] See my note on the Clubb and Preston cases at https://lawandreligionaustralia.blog/2019/04/10/high-court-upholds-abortion-buffer-zone-laws/ .

[25] See *Charter* ss 7(2)(a)-(e); *Sabet v Medical Practitioners Board* [2008] VSC 346; (2008) 20 VR 414[186]-[191] (Hollingworth J).

> 27 In summary, for the reasons given above, I consider it a reasonable limitation "demonstrably justified in a free and democratic society based on human dignity, equality and freedom" to require spectators in the public gallery to have their faces uncovered

(There is a general discussion of the Victorian Charter's protection of religious freedom in the Aroney, Harrison and Babie article in the Further Reading list.)

Section 14 of the ACT law was mentioned, although in the end it was not necessary to apply it, in *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council* (Administrative Review) [2012] ACAT 81 (21 December 2012). There the Roman Catholic Diocese was applying to revoke a heritage declaration over a parish church so that it could undertake a redevelopment. However, 3 members of the parish wanted to apply to be heard on the heritage proceedings because they wanted to support the declaration. The Tribunal noted that arguably their rights under s 14 might be relevant (especially the rights involving "worship… as a community"), but concluded that even without taking s 14 into account the parishioners all had a sufficient "interest" in the matter to be able to be heard.

There seems little doubt that, as time goes on, these Charter provisions will provide further examples of claims for religious freedom. In general they do not provide "direct" remedies, but they do provide an avenue whereby a court may declare that a breach of a right has occurred, and they certainly provide an "interpretative" framework, which may influence the way legislation is to be read.[26]

There are complex limitations, however, as to how courts can "interpret" legislation in accordance with these type of provisions, in light of the High Court's decision in *R v Momcilovic* (2011) 245 CLR 1. There was no clear ratio in that case, but a number of members of the court suggested that the "interpretation" provision in the Victorian Act could not be used to "read in" words that were not present

There has been some critique that the "limitations" clauses in the local Charters tend to be too broad, and would justify limitations on the relevant human rights that would not be justified at international law- I think this is a fair comment. For example, Aroney et al in their review of the Victorian Charter note, in relation to its implementation of art 18 ICCPR, that it:

- Omits art 18(3), with its careful delineation of when exceptions are allowed, in favour of the much broader s7 exception;
- Omits art 18(4), which explicitly provides that parents have the liberty to determine their children's religious education.

It should be noted also that there is a very little-known provision in the Tasmanian Constitution, s 46 of the *Constitution Act* 1934 (Tas), which "guarantees to every citizen" "free profession and practice of religion… subject to public order and morality". The provision had apparently never been considered by the courts until the decision of the Federal Court in *Corneloup v Launceston City Council* [2016] FCA 974 (19 August 2016) at [38].

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[26] For further comment on these provisions see ch 5 of the Evans text, and the discussion in Evans & Evans (2008).

In that case Mr Corneloup (who was one of the plaintiffs in the *Adelaide Preachers case*, *AG (SA) v Adelaide City Corpn* (2013) 249 CLR 1 dealing with religious free speech) wanted to preach public in Launceston in Tasmania. He was prevented from doing so by an officer of the Council refusing him a permit, applying what she thought were relevant Guidelines, which regarded "religious spruikers/hawkers" as not able to speak. In fact, when the relevant by-laws were examined the Federal Court (Tracey J) held that the officer had not been authorised to make the decision, and in any event had been unlawfully applying a "blanket prohibition" when the by-laws required a reasoned decision to be made on each occasion. As a result the order refusing a permit was quashed, and the Council directed to apply the law properly.

Mr Corneloup had also challenged the decision on Federal Constitutional grounds (impairment of right to freely communicate on political matters), and on the basis of s 46 of the Tasmanian *Constitution Act*. Since the refusal was being quashed on administrative law grounds Tracey J did not give the constitutional grounds detailed consideration. But he said this about the s 46 arguments:

> [36] Mr Corneloup's other constitutional ground was pressed in reliance on s 46 of the *Constitution Act 1934* (Tas). This section, which was introduced into the State Constitution in 1934, provides that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."
>
> [37] Again, Mr Corneloup's argument focussed on the Guidelines rather than the Malls By-Law. He claimed that, as a citizen, he was entitled to the "benefit" of s 46. Preaching was one aspect of the practise of his religion. The Guidelines prevented him from preaching in the malls and, as a result, contravened s 46(1) of the Constitution Act.
>
> [38] Given the inapplicability of the Guidelines it is not necessary to pursue this ground in any detail. Had it been necessary to do so Mr Corneloup's argument would have confronted a number of difficulties. The first is that s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified "guarantee" has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice: see *McGee v Attorney-General* [1973] IESC 2; [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the "guarantee". In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.

It is submitted that, even if s 46 does not have an "over-riding" role, it might have a part to play as an "interpretive" principle under the doctrine of "legality" mentioned before, so that a court should strive to read any Tasmanian legislation as not interfering with religious freedom to the maximum extent possible. It will be interesting to see if s 46 plays a role in the future.

(d) Discrimination laws and "Balancing provisions"

Finally, freedom of religion is also protected in two different ways under legislation that prohibits discrimination around Australia.

(1) Prohibition of discrimination on religious grounds

The **first** is that in most jurisdictions (all except NSW and the Commonwealth), one of the grounds of unlawful discrimination is religious belief, so that it would be

unlawful to sack someone, or deny them services, on the grounds of their religious belief, where this was irrelevant to their employment or receiving the relevant services.

The jurisdictions where it is currently unlawful to discriminate against someone on the grounds of their religious commitment are:

- Qld- *ADA* 1991, s 7(i) "religious belief or religious activity";
- Tas- *ADA* 1998, s 16 (o) and (p): (o) "religious belief or affiliation;" (p) "religious activity";
- Vic- *Equal Opportunity Act* 2010, s 6(n) "religious belief or activity";
- WA- *EOA* 1984- Part IV of the Act deals with discrimination on the ground of "religious or political conviction" (see s 53);
- ACT- *Discrimination Act* 1991, s 7(i) "religious or political conviction";
- NT- *ADA* 1992, s 19(1)(m) "religious belief or activity".
- SA- no broad protection, but a specific provision in s85T(1)(f) of the *Equal Opportunity Act* 1984 (SA) which prohibits discrimination in certain defined areas on the basis of "religious appearance or dress."

There are not many decisions on these provisions.[27] There are two that go into the issues in a bit more detail, however.

In *McIntosh, Ahmad v TAFE Tasmania* [2003] TASADT 14 (10 November 2003) a claim for religious discrimination was made against the TAFE for refusing to provide a separate "prayer room" which the Muslim employee could use for prayer. The Tribunal concluded that there was no discrimination, on the basis that any other member of staff who wanted a room set aside for their own purposes would also have been declined! The case notes that some accommodation had been made in rostering to allow the employee to attend a Mosque on Fridays.

The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 also raised an issue of discrimination on the basis of religion. Here a lady who was in charge of a local St Vincent de Paul branch was told that she had to step down as she was not a Roman Catholic. There was an attempt to apply the provision of the Qld legislation which allowed a "religious body" to be exempt from the Act in terms of appointment of priests and ministers, training of such, and appointment of people to carry out "religious observances".[28]

In the end the Tribunal found that the provision did not apply because the St Vincent de Paul Society was not a "religious body"! This somewhat surprising conclusion was expressed as follows:

> [76] On my reading of the constitution documents, the Society is not a religious body. It is a Society of lay faithful, **closely associated with the Catholic Church**, and one of its objectives (perhaps its **primary objective) is a spiritual one**, involving **members bearing witness to Christ** by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. **That is not enough**, in my opinion, to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).

[27] For comment on some, see C Evans, *Legal Protection of Religious Freedom in Australia* (Sydney: Federation Press, 2012) at 144-147.

[28] The relevant provision was s 109 of the Qld ADA, which was virtually identical to s 37 of the Commonwealth SDA (although since the Commonwealth does not have a prohibition on religious discrimination, s 37 itself is not directly relevant- it relates to sex discrimination.)

> [77] Likewise, and despite the particulars which have been provided of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves "religious observance or practice". (emphasis added)

While most people would see "Vinnies" as providing services to the poor rather than religious services, it does seem a bit odd that an organisation which can be described as it is in para [76] is not "religious".[29]

A recent case where a claim of "religious discrimination" failed was *Jason Camp on behalf of Charlotte Camp v Director General, Department of Education* [2017] WASAT 79 (29 May 2017), where the Tribunal held that it was not discriminatory against an atheist pupil for a school to offer a "school creed" to be recited at fortnightly assemblies, which contained a line mentioning God. The students had been told they need not recite this line.[30]

It should be noted that the recent Ruddock Report (discussed more below) made an important recommendation that the Commonwealth Parliament enact a *Religious Discrimination Act*, to outlaw religious discrimination around Australia. I think that this is a sensible way of recognising the importance of this fundamental human right to religious freedom. It is not the only thing that could be done, but it does represent a good step forward. We do not want people being fired from their jobs, or denied public services, because they hold minority religiously based views or practices which do no harm to others.

However, it is very important, as the Ruddock Report itself notes, that the Svt provide "appropriate "exceptions and exemptions, including for religious bodies, religious schools and charities", but with a caveat that it would be better to refer to these as "balancing provisions". I prefer this terminology (see the article on the reading list), because when something is an "exemption" there can be the idea that it is only meant to be temporary and narrow. But these clauses recognising religious freedom, as we will see soon, are an important feature of the architecture of human rights protection in Australia.

In the context three types of such provisions are needed:

a) To balance the right not to be discriminated against on religious grounds, with **other fundamental rights** such as bodily integrity and free movement. It should not be unlawful, for example, to decline to employ someone who has advocated use of violence against unbelievers, even if their advocacy is religiously based.
b) To balance out the **rights of different religions not to be required to support other religious worldviews**. A church should be entitled to not employ someone as a youth worker who comes from a different religious background.

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[29] This decision seems similar to, and perhaps something of a precursor to, the later decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014), where CYC were held not to be "a body established for religious purposes" under s 75 of the *Equal Opportunity Act* 1995 (Vic). See my note, above n 14, for comment on this issue.

[30] For more detailed comment, see "No religious discrimination where school has optional clause in creed" (21 June, 2017) https://lawandreligionaustralia.blog/2017/06/21/no-religious-discrimination-where-school-has-optional-clause-in-creed/#more-5848 .

c) **To allow religious groups to control their own internal affairs**. Under international law, for example, it is well established that a member of a religious group cannot claim to be discriminated against by another member of the *same* group, because they differ on doctrine or practice. The remedy for someone who does not like the way their own group is being run, is to leave that group. This view has been taken in Australia, in *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26, in the European decision in *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10, and the recent Canadian Supreme Court decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26.

The **Government Response** to this recommendation has been very positive:

> The Australian Government will introduce a Religious Discrimination Bill into the Parliament which will provide for comprehensive protection against discrimination based on religious belief or activity, as recommended by the Panel.

They rightly point out that crafting the law will require some care, and they propose to provide a draft law and to seek consensus from other parties to provide an agreed approach. There was no draft law provided before the election was called, however. So we will have to wait and see what happens there.

(2) Religion as an "exemption" from other discrimination laws

Second, and related to this, all jurisdictions whose laws prohibit discrimination on various grounds, have included provisions that are designed to "balance" religious freedom with the right not to be discriminated against.[31] So that, for example, while there is a general prohibition on employment decisions being made on the basis of gender, all jurisdictions allow ***churches or other religious organisations*** to decide only to appoint male clergy, because that is seen by some religious groups as a key part of their teachings.[32] The law takes the view that it reasonably preserves the religious freedom of believers in these groups, and the groups as a whole, to allow their religious freedom to be exercised in this way.

However, in most jurisdictions there is a major "gap" in discrimination legislation "balancing provisions", which is that very few recognize that ***individual members of the public***, as well as religious organisations and what we might call "religious professionals", have religious freedom rights that may be impaired by uniform application of discrimination laws.[33]

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[31] For a general academic paper on these sort of provisions, see N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430. For a more detailed review of all "religious balancing clauses" in Australian discrimination legislation, see N Foster, "Protecting Religious Freedom in Australia Through Legislative Balancing Clauses" *Occasional papers on Law and Religion* (2017) at: http://works.bepress.com/neil_foster/111/ , presented at the *Freedom 17: Religious Freedom in a Secular Age?* Conference, Freedom for Faith, 14 June, 2017; Canberra, ACT.

[32] See, eg, s 37 of the *Sex Discrimination Act* 1984 (Cth).

[33] There is a narrow group of organisations outside those formally classified as "religious organisations" which are able to rely on balancing provisions in the religious area, namely "educational institutions" conducting religiously based schools. See eg *Discrimination Act* 1991 (ACT) ss 33, 44 and 46; ADA 1992

So, for example, if you run a business and want to apply Christian principles in your business, it may not always be possible to do so, depending on the type of issue that comes up. In NSW, an early decision under the *Anti-Discrimination Act* 1977 in *Burke v Tralaggan* [1986] EOC 92-161 held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of "marital status" under s 48 of the Act. (The interesting article by Moens comments on this case.)

Suppose, instead of renting out a flat, you offer accommodation in your own house to casual visitors, in a "bed and breakfast" situation. Do you as an individual have the right under the law, on the basis of religious convictions about sexual behaviour, to decline to accept a booking for a double bed from a gay couple, or from an unmarried couple?

An issue of this sort came up in the UK, in *Bull v Hall* [2013] UKSC 73 (27 November 2013). The Bulls ran a boarding house, and had refused, on grounds of their religious views, to give double bed accommodation to a same sex couple. The Supreme Court upheld the decisions of lower courts fining them for breaching a regulation prohibiting discrimination on sexual orientation grounds. There was a slight difference of opinion within the Court- 3 members found that this was "direct" discrimination, whereas 2 members of the court hold that it was "indirect" discrimination (in my view a better opinion, since the ground of their refusal was expressed to be that the couple were not married, not that they were homosexual.) But even those who held it was indirect discrimination took the view that it could not be justified.

However, it is interesting to note that it may *not* be unlawful to do this in NSW. Under s 48 and s 49ZQ of the ADA 1977 (NSW), which deal with provision of accommodation, there is an exemption that applies where the accommodation in question is one in which the provider also resides, and where less than 6 beds are provided. So, it seems that the NSW Parliament has explicitly decided not to require someone who offers accommodation in what is in effect their own house, to comply with the discrimination law in this area. Section 23(3)(a) of the Cth *SDA* 1984 contains a similar exemption, although interestingly it only applies where there are no more than **3** beds provided. (Since the Commonwealth provision will over-ride the State one where there is a clash, the "3 bed" rule is the one that will have to be applied, in my view.)

There is something of an irony in the fact that, so far as I can discover, the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or "professionals") is contained in the law of Victoria.[34] The irony lies in the way that the

(NT), s 30(2); EOA 1984 (SA) s 34(3). In NSW there are a number of broad exceptions under the legislation applying to "private educational authorities", which would seem to generally exempt all non-Government schools, including most religious schools. But since most religious schools would be run by groups that most members of the public would call "religious" these provisions may not add very much to the protection for religious organisations.

[34] There is a provision in s 52(d) of the *Anti-Discrimination Act* 1998 (Tas) which allows a "person" to discriminate "on the ground of religious belief or affiliation or religious activity" insofar as it is in relation to an "act that –
(i) is carried out in accordance with the doctrine of a particular religion; and
(ii) is necessary to avoid offending the religious sensitivities of any person of that religion." This provision, then, only applies as an exemption to discrimination on the basis of religion, and so is substantially

scope of a similar prior provision has been so narrowly interpreted in a decision of the Victorian Court of Appeal.

The current provision is s 84 of the *Equal Opportunity Act* 2010 (Vic):

> **Religious beliefs or principles**
>
> 84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The former Victorian Act contained a similar provision, s 77 of the *Equal Opportunity Act* 1995 (Vic):

> 77. Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

(a) *CYC v Cobaw*

It was this provision was subject to a very narrow reading in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). There a Christian camping organization, and its representative Mr Rowe, were sued for sexual orientation discrimination when Mr Rowe indicated that the organization would not accept a booking for a program which would be run for same-sex attracted young people and present homosexuality as a normal and ordinary part of life.

I have discussed the *CYC* decision in some detail in a previous note.[35] But let me briefly summarise the ways in which the Court of Appeal here provided a very narrow reading of the apparently generous provisions of former s 77 of the 1995 Act, which will also impact on future readings of s 84 of the 2010 Act. I will also note the dissenting view of Redlich JA, which may provide guidance in the future should the majority view not remain authoritative. (His Honour's views may also provide guidance in other jurisdictions, where appellate courts at least will need to decide whether or not the *CYC v Cobaw* decision is "clearly wrong" or not, if it is applicable to similar provisions elsewhere.)

On the question of the **necessity** of the relevant action for compliance with beliefs, Maxwell P ruled that Mr Rowe could not rely on s 77, as it was not "necessary" for him to apply sexual standards of morality from his religious beliefs, to other persons. The rule that sex should only be between a heterosexual married couple was a rule of "private morality" and even on its own terms did not have to be applied to others- see [330]. This of course ignored the fact that Mr Rowe was being asked to support a message of the "normality" of homosexual activity with which he fundamentally disagreed.

As Redlich JA in dissent noted:

> [567] … What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes

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narrower than the Victorian provision discussed in the text. So far as I am aware there are no reported decisions dealing with the Tasmanian provision.

[35] See above, n 14.

> antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community.

Neave JA discussed the meaning of the phrase "necessary… to comply" and concluded that, while there was a subjective, honesty, element in the criterion, it also required some objective consideration. She summed up the requirement as "what a reasonable person would consider necessary … to comply with his genuine religious belief", at [425]. This seems to be correct, so long as "reasonable" means "a reasonable person who belongs to the particular religion".

Redlich JA seems to have adopted a similar criterion:

> [520]…the word 'necessary', in its application under s 77 to religiously motivated action, must mean action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles.

Does the new wording of s 84, "reasonably necessary… to comply", imply that the previous wording of s 77 was a purely subjective criterion? No, Neave JA concluded at [427]. The implication is that the change in s 84 was simply clarifying something that was already present in s 77. On this question Redlich JA seems to have taken a slightly different view. At [531]-[532] his Honour suggested that the contrast with the later provision supported a more "subjective" interpretation of the earlier one. On the other hand, he went on to comment that even if the provision required a showing of "reasonable necessity":

> [533] This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal.

In other words, the narrow approach of the Tribunal would still be inappropriate under the reformulated s 84.[36]

Another aspect of the question of "necessary to comply" was an issue concerning the content of the religious beliefs. How was this to be determined? And was it sufficient if an action was "motivated" by belief, or did it have to be "required".

Maxwell P again took a narrow view of these questions. He accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships- see [276]-[277].

His Honour then further went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact "doctrines". He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise- see [284]. Hence in his Honour's view a refusal of accommodation

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[36] There was some discussion of the differences between the 1995 and the 2010 legislation in the application for special leave to appeal to the High Court: see *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). Counsel for CYC noted that the provisions were very similar, but in the end the High Court refused leave, and one ground seemed to be the fact that it was a question of the interpretation of the old Act. For a review of the Special Leave application see Neil J Foster, (2014) "High Court of Australia declines leave to appeal CYC v Cobaw", at: http://works.bepress.com/neil_foster/89 .

cannot have been "required" by Christian doctrine. On this point he held that "conforms to" doctrine must mean that there is "no alternative" but to act in this way- [287]. In relation to Mr Rowe his Honour commented at [331]: "The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey."

Neave J at [435] also distinguished between some behaviour being "motivated by … religious beliefs" and being "necessary".

Redlich JA, in contrast to the majority, ruled that it was not necessary or appropriate for the court to make a decision about the "centrality" or "fundamental" nature of religious beliefs.[37] Nor was it necessary to show that the beliefs "compelled" the believer to do the act in question.[38]

In what **spheres of life** is religion allowed to matter?

In the analysis offered by Neave JA at [429] what was at stake was said to be "protecting the right of individuals to hold religious beliefs and express them in worship *and other related activities* and protecting the rights of other members of a pluralist society to be free from discrimination". I have added the emphasis there to highlight words of some concern. There is an unfortunate tendency in some commentary on religious freedom to see it as merely dealing with what goes on in church meetings. This description of religious freedom as relating to "worship and other related activities", where "worship" is no doubt intended to mean "church meetings", gives a very narrow scope to religious freedom.

That this is indeed what her Honour intended can be seen in the next paragraph, where she purports to rely on European jurisprudence to say:

> [430]….Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs *in the context of worship or other religious ceremony*. That is because a person engaged in commercial activities can continue to manifest their beliefs in the *religious sphere*. (emphasis added)

As I point out in my previous paper, there were some European and UK decisions which came very close to holding the very harsh view that the right to freedom of religion in the employment context, for example, could be perfectly well protected by the fact that an employee whose religious freedom was impaired could leave and find another job. But those views have now substantially been rejected by the decision of the European Court of Human Rights in *Eweida v The United Kingdom* [2013] ECHR 37 (15 January 2013) at [83] where the court accepted that a person who was sacked for their religious beliefs had indeed experienced a restriction on their religious freedom.

The narrow view, then, that somehow religious freedom protection does not apply in the commercial sphere, or only in a very attenuated way, does not receive support from current European jurisprudence. More importantly, it received no support from the wording of s 77. There were no words excepting "commercial activity" from the requirement to protect an action seen as necessary to comply with religious beliefs.

In effect, as Redlich JA noted in his dissenting judgement on this point in *CYC v Cobaw*, Neave JA was endeavouring to conduct the "balancing" process involved herself.

[37] See [525]: "Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety."

[38] See [520]. It would be sufficient that it be an action that the person "undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles".

But in fact, that balancing process had **already** been conducted by Parliament, which had placed s 77 in its then-applicable form, into the legislation. As Honour noted:

> [474] The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the 'right to religious freedom.' Where the legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has struck a balance between two competing human rights, the task for the Court is not then one of determining how the balance should be struck. The Court must faithfully construe and apply the provisions without preconception or predisposition as to their scope so as to give effect to the legislative intent.

And later:

> [515] When, as is so obviously the case with s 77, Parliament adopts a compromise in which it balances the principle objectives of the Act with competing objectives, a court will be left with the text as the only safe guide to the more specific purpose.[39] Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.[40]

Redlich JA, contrary to the other members of the Court of Appeal, concluded that Mr Rowe *could* make out a defence under s 77. He said that the Tribunal had given an unjustifiably narrow reading of religious freedom, wrongly subordinating the provisions in ss 75 and 77 to "non-discrimination" rights. Instead, Parliament's language had to be read as it stood. There was to be no presumption that religious freedom only applied in a "non-commercial" sphere. Indeed, the other provisions of the 1995 Act showed clearly that the non-discrimination obligations were intended to apply in the workplace and the marketplace. Hence the limits on those obligations drawn by ss 75 and 77 were clearly also operational in those areas.

His Honour concludes a very illuminating discussion on these issues as follows:

> [572] Section 77 excuses an act of discrimination in the marketplace when it is known that to perform the act will facilitate a purpose that is fundamentally inconsistent with the person's belief or principles. The application of the exemption does not depend upon CYC having advertised that it was a religious organisation or provided some means of forewarning that particular uses of their facility would be refused. The absence of such steps could not give rise to the inference that their religious principle or belief did not necessitate the refusal of the request. As adherents to the faith of the Christian Brethren the applicants' beliefs dictated their response upon being informed of the intended use of their facility. Once the applicants were invested with knowledge of the purposes of the WayOut forum and the matters which, as Ms Hackney acknowledged, would inevitably be discussed, the applicants were bound by their principles and beliefs to refuse the use of their facility for that purpose.

It is greatly to be regretted that the majority did not approve these comments. An application for special leave to appeal the decision to the High Court of Australia was refused.[41]

(b) OV & OW v Wesley Mission

It is perhaps worth noticing at this point the odd fact that the whole *CYC* decision very rarely refers to the fairly similar NSW litigation in *OV & OW v Members of the*

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39 *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).

40 *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

41 See above, n 36.

Board of the Wesley Mission Council [2010] NSWCA 155 (6 July 2010.)[42] While that case, like *CYC*, involved a "religious organisation", comments also had to be made on the issues concerning the content of doctrine and its relevance to behaviour.

In particular, one of the issues in that case was whether a belief that marriage between a man and a woman was the ideal way for a child to be raised, could be justified as being a "doctrine" of the Wesley Mission. After an initial Tribunal finding to the contrary, the Court of Appeal directed a new hearing, noting that there was a need to consider "all relevant doctrines" of the body concerned.[43] On referral to the Tribunal, it held that the word 'doctrine' was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included moral as well as religious principles.[44] It may be that the Victorian Court of Appeal considered that this final decision, being one of an administrative tribunal not a superior court, was not binding; but it seems unusual that it was not even noted. Certainly some comments of the NSW Court of Appeal were relevant, and in accordance with the High Court's directions to intermediate appellate courts in Australia,[45] should have been taken into account unless regarded as "plainly" wrong. This seems to imply that a future appellate court in Australia which is not in either Victoria or NSW will have choose between these two competing readings of similar legislation, and courts in those States will be required to take differing approaches. All that can be said with confidence is that these issues are still matters of some uncertainty.

(c) Religious Schools and Same-Sex Attracted Students and Teachers

There are a number of issues we could comment on relating to "balancing clauses" in discrimination law, but one that has generated a lot of concern lately is the situation with faith-based schools and same sex attracted students and teachers.

The issues arise because it has been argued that laws forbidding discrimination on the ground of sexual orientation may impact on the right of schools to apply Biblical sexual values in dealing with students and staff.

Commonwealth law has for some time prohibited discrimination on certain specific grounds, limited because the Commonwealth needs specific "treaty" justification for such laws, which are enacted under the "external affairs" power in s 51 of the Constitution. Currently Commonwealth law forbids discrimination on the grounds of race, disability, age and sex. The *Sex Discrimination Act* 1984 (Cth) ("SDA") initially only dealt with discrimination on the basis of sex (gender), marital status and pregnancy; in 2013 the Act was expanded to outlaw discrimination on the basis of sexual orientation and gender identity.

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[42] And see the final stage of the litigation in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010). The one and only reference to the litigation in the *Cobaw* appeal is to be found in a very brief footnote, n 141, to the judgment of Maxwell P, on the fairly technical issue of what "established" means.

[43] See the CA decision, per Allsop P at [9].

[44] *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].

[45] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135]- while the comment relates directly to "uniform national legislation", it would seem to apply here where legislation in most States, while not completely uniform, usually includes some defence relating to "doctrine".

Even at a stage when only the more traditional "sex" grounds were covered, it was realised that a total ban on differential treatment in all areas on the basis of the matters concerned would have a drastic effect on some religious groups. The Roman Catholic church, for example, has long ordained only men to be priests. This would arguably be discriminatory under the SDA. So, from its introduction the Act has contained provisions allowing what would otherwise be discriminatory behaviour on behalf of religious organisation, when it was required by their religious views, to not be so regarded. Section 37 of the Act allows religious groups to continue with their traditional practices in the area of ordination of clergy, and in some other areas.

Similarly, it was appreciated that religious schools would need similar protections. A conservative Christian school, for example, which taught that marriage was only between a man and a woman, and that all sexual activity should be reserved for marriage, could hardly employ a religious studies teacher who was living in a de facto relationship. One of the reasons for parents sending children to a religious school is that they expect the school to not only teach, but to model, behaviour that supports the religious mission of the school.

So, s 38 of the SDA provides protections for religious schools in areas of employment:

> **Educational institutions established for religious purposes**
>
> 38 (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(Sub-section 38(2) is almost identical but applies this protection in the case of contractors rather than employees.) What these provisions make clear is that it is not "unlawful discrimination" for a religious school to require staff and contractors to teach and model the religious values of the school.

In addition to the provisions of s 38(1) and (2) relating to **staff**, s 38(3) contains an explicit provision allowing a religious school to require **students** at the school to also comply with school values in this area of sexual behaviour:

> 38 (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

This sub-section was present from the very start of the 1984 Act, although at that stage it only allowed discrimination on the basis of marital status or pregnancy. (The specific terms of s 21 allowed the running of single sex schools.) When the Act was expanded under the Labor Government in 2013 to prohibit discrimination on the other grounds, this exclusion clause was also expanded to cover those grounds.

In the Explanatory Memorandum tabled in Parliament when s 38(3) was given its current form in 2013, the Labor Attorney-General, the Hon Mark Dreyfus QC MP, said:

> The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity.

There was no particular "campaign" from religious schools prior to introduction of this law to allow them to exclude, or expel, same sex attracted students. Indeed, so far as I am aware, no religious school has a blanket policy that excludes or penalises gay students on the basis of "orientation" alone. But the provision may be of assistance in circumstances where a student who is gay wants to make that a public matter for discussion and activism in the school. This provision allows a school which wants to maintain the general Biblical standard of sexual morality among the student body, for example, to calmly discuss with the student and his or her parents whether that school is the right place for them, or whether they would be more comfortable at a place which affirms their choice to agitate about this issue.

Recommendation 7 of the Ruddock Report reads as follows:

> **Recommendation 7**
>
> The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
>
> - The discrimination is founded in the precepts of the religion.
> - The school has a publicly available policy outlining its position in relation to the matter.
> - The school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated.
> - The school has regard to the best interests of the child as the primary consideration in its conduct.

Given the background mentioned above, the first thing to be said is that this recommendation is unfortunately worded. At first glance, and looked at in isolation, it seems to contain a positive recommendation to "provide that religious schools may discriminate". This sounds like a massive change to the law. But in fact, in the context, it is clearly intended to be a recommendation that *narrows* the scope of the current law, rather than expands it. I think the sense of the recommendation would have been better captured if it had said "may **only** discriminate" under the listed conditions.

(One issue worth briefly noting: each of the States and Territories also have laws dealing with discrimination, and some of them do not currently seem to allow religious schools to apply their beliefs in dealing with same sex attracted students. Some commentators have suggested, then, that this recommendation will actually bring about a major change in those jurisdictions. I do not think this is so. In my view, the effect of s 109 of the Constitution is that where a religious school has been given the privilege of applying its faith commitments to decisions in this area, then State law cannot take away that privilege. I have discussed this briefly in a previous blog post here, and in a conference paper available here, at pp 23-26. In other words, religious schools in those jurisdictions *already* enjoy the benefit of s 38, although I concede this has not been directly tested in the courts.)

The additional conditions which the Panel has recommended apply to the existing law which allows discrimination, s 38(3), are that the policy be "founded on the precepts of the religion", be made publicly available to existing and prospective students and parents, and that action only be taken with the "best interests of the child" as the guiding principle.

While the publicity recommendations are very sound (to reduce the chance of parents and students not being aware of this issue),[46] the other two recommendations are not so clearly right, in my view.

The first, that discrimination here is only justified where "founded in the precepts of the religion", sounds fine, but on further thought presents some problems. This condition is different to the current one, which is that the decision "discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". This change is not a good idea, as its effect may be to hand over to the secular court or tribunal the task of determining what the precepts of a religion "actually" require. That is not an authority that courts and tribunals actually want, and on many occasions, it has been recognised that a secular court should not be making binding decisions on religious doctrine.

On the other hand, the proposal would be fine if it simply meant that the decision must be a good faith attempt to apply the religion as interpreted by the school, and not a "sham" to allow dismissal or discipline for ulterior motives.

The final suggested criterion also sounds fine, until the same question is asked: *who determines* what is in a child's "best interests"? It is not adequate to say that this is a "neutral" issue that can be determined by child counsellors or psychologists. The Christian school may say: in our view it would not be in the interests of the child to support their preference for homosexual activity, as that is contrary to the Bible's teaching. Often a secular counsellor would strongly disagree. On balance I would oppose including this final criterion- not in *substance* (of course I favour a decision in the child's best interests) but because the *process* for determining the answer to the question is so unclear.

Following the early leaking of recommendation 7, however, and the press "beat-up" around it, the Government announced that it would as soon as possible remove any ability of religious schools to expel gay students on the basis of their orientation alone. While I think this is reasonable, the fact is that schools do still need the ability (to fulfil their mission) to ask students to comply with Biblical standards of *conduct*, whatever internal "orientation" they may have. So any amendment in this area needs to be carefully drafted.

However, the debate then moved (at the suggestion of the ALP and the Greens) to the question of **teachers** at religious schools.

While "orientation alone" should not be a ground to expel or discipline students, removing the provisions that allow schools to make these decisions in relation to staff is a bad idea. Religious schools exist because parents want the option to see their children educated in an institution which supports their religious and moral worldview. Students

[46] See recent paper from Renae Barker supporting this view: (2019) *Alternative Law Journal* "Religions should be required to be transparent in their use of exemptions in anti-discrimination laws" https://doi.org/10.1177/1037969X19840815 .

do not just learn academic truths from their teachers; in many cases they admire them as people, and model themselves on the values their teachers live out. Hence someone who is committed, by their identification and activity, to opposing the moral framework of the school, is not suitable to be working as part of that school community. A fully committed member of the Greens would not be suitable to work in the office of the Conservatives. The same issues arise in relation to religious schools and same-sex-oriented teachers.

These developments were then followed by a Bill introduced by the Greens, which would have virtually removed all religious freedom protections from faith-based schools. While that legislation did not go through, there was a Bill introduced by Senator Penny Wong and supported by the ALP which would have been almost as bad. It removed s 38(3) and tried to say that the same result would be achieved if the issue was dealt with under "indirect discrimination" provisions; and it added a clause which seemed to be wide enough to cover all "educational activities" conducted by churches, not just schools but Bible study groups, Sunday School and even sermons.[47]

By the end of 2018 the two major parties had still not reached agreement on amendments to the law. This year, then, the Government (just prior to calling the election, on 10 April 2019) announced that it had referred the following issues to the **Australian Law Reform Commission**:

> consideration of what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order to:
>
> limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos…48

Given that, as we have seen, "exemptions" and balancing clauses under discrimination law are a key way of providing religious freedom protection in Australia at the moment, this has the potential to be a very important review (and note that, while it will cover the situation of schools, it extends to "religious institutions" more broadly)

The ALRC is due to report on 10 April 2020; they have set out a timeline on their website which says that they will issue a Discussion Paper on 2 Sept 2019 and invite responses from the public by 15 October 2019.[49] It is not entirely clear whether, even if the Morrison Government is returned at the forthcoming election, it will proceed with its promise to introduce a *Religious Discrimination Bill*, or whether it will then wait to see what the ALRC says about the "exemptions" issues; nor of course do we know what will happen if there is an ALP Government after May 18, though I suspect that they will allow the ALRC to at least continue with the inquiry. It would be good if interested Christians downloaded the Discussion Paper and made some submissions to the inquiry.

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[47] See my detailed analysis at "ALP Bill on religious schools and students" (Nov 29, 2018), at https://lawandreligionaustralia.blog/2018/11/29/alp-bill-on-religious-schools-and-students/ .

[48] See the Terms of Reference at https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx .

[49] See https://www.alrc.gov.au/inquiries/review-framework-religious-exemptions-anti-discrimination-legislation .

3. The Ruddock Report

It would be remiss of me not to say a little bit more about the report of the Ruddock Panel, especially as the title of the report was the *Religious Freedom Review.*

The committee was set up after the debates on the amendment of the marriage law to allow same-sex marriage. During that debate there were comments that religious freedom issues had not been properly considered, and so the then-Prime Minister, Malcolm Turnbull, set up a panel of experts chaired by the Hon Phillip Ruddock (a former Liberal AG) to consider whether religious freedom needed more protection.

The Report was provided to the Government in May 2018, but for whatever reason it was not released (and there was no official Government response) for some time. In the lead-up to a key by-election in the electorate of Wentworth (caused by the resignation of Malcolm Turnbull after he had lost the leadership), the 20 recommendations of the Report were "leaked", seemingly in an attempt to embarrass the Government in an electorate which was regarded as more "progressive" and in favour of LBGTQ+ rights.[50]

I have already mentioned the recommended *Religious Discrimination Act*, and the recommendations about religious schools. The full set of recommendations is in the appendix to this paper. I have provided a series of posts on my blog which summarise the recommendations and the Government Response.[51]

4. The future of religious freedom in Australia

Of course, there is a great deal more that could be said about all these areas, but hopefully this will provide a useful overview of religious freedom protection in Australia. On the whole, our history has been fairly free from serious religious conflicts, and it is to be hoped that we can continue to enjoy the freedom to live in accordance with our fundamental beliefs, while respecting the rights of others.

Nevertheless, it seems clear that religious freedom issues will emerge, especially (if examples from other parts of the Western world are taken into account), in connection with anti-discrimination laws relating to sexual orientation, following the recognition of same sex marriage.

It would seem to be wise to increase the domestic protection for religious freedom generally by legislation that recognizes the strength of this important human right. One option would be to improve and clarify the balancing clauses now contained in Federal and State-based discrimination legislation, to better recognize the legitimate religious freedom interests of believers. Another possibility would be more general religious freedom legislation applying across the Commonwealth by enactment of broad protection based on the external affairs power and specific religious freedom treaties.

I would like to suggest that, given the "patchwork" protection for freedom of religion noted above and in the attached papers, it is past time for consideration to be

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[50] See the first of a number of my blog posts responding to the leaking at https://lawandreligionaustralia.blog/2018/10/12/ruddock-report-religious-schools-and-same-sex-attracted-students/ (Oct 12, 2018).

[51] See https://lawandreligionaustralia.blog/2018/12/13/the-ruddock-report-has-landed-part-1/ (Dec 13, 2018), https://lawandreligionaustralia.blog/2018/12/14/ruddock-report-summary-and-responses-part-2/ (Dec 14, 2018), https://lawandreligionaustralia.blog/2018/12/19/ruddock-report-response-part-3/ (Dec 19, 2018).

given at the Commonwealth level for protection of religious freedom to be the subject of specific legislation. The Commonwealth has undertaken to provide serious religious freedom protection by acceding to the ICCPR and under art 18 in particular. It would be appropriate that this commitment be translated into law. Apart from other sources of Commonwealth power, it would seem fairly clear that the external affairs power would support implementation of the international human right to free exercise of religion, limited in the specific ways provided under art 18 but not in other ways that currently narrow its scope.

In the past, ironically, religious groups have been some of the strongest voices resisting formal protection of religious freedom through statute.[52] But it seems likely that many of those concerns can be met by adoption of clear guidelines for judicial decision-making (rather than leaving open-ended discretions to judges), by legislating clear and workable "balancing clauses" to ensure that the religious freedoms of different groups are reasonably accommodated, and by fully (not partially) implementing the narrow "limitations" provisions of art 18(3) ICCPR. The challenge of formulating principles for such legislation should be put to a law reform body in the near future.

Of course, in the current atmosphere positions supporting increased religious freedom laws are not popular.[53] It will no doubt require continued public support from various actors to demonstrate the case for such changes. Hopefully those believers who themselves are convinced of the importance of religious freedom can have the courage to speak out and lead proposals for reform.

Further Reading

- Ahdar, R & Leigh, I *Religious Freedom and the Liberal State* (2nd ed; Oxford: OUP, 2013)
- Aroney, Nicholas; Harrison, Joel; Babie, Paul "Religious Freedom under the Victorian Charter of Rights" [2017] ELECD 129; in Groves, Matthew; Campbell, Colin (eds), *Australian Charters of Rights A Decade On* (The Federation Press, 2017) 120; at: https://ssrn.com/abstract=2816687 or http://dx.doi.org/10.2139/ssrn.2816687 .
- Australian Human Rights Commission, *Freedom of religion and belief in 21st century Australia* (Research Report, Canberra, 2011)
- Blackshield, Tony "Religion and Australian constitutional law" in Radan, Peter, Denise Meyerson and Rosalind F. Croucher *Law and religion: God, the state and the common law* (London; New York: Routledge, 2005) 75-106
- Blake, G "God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century" (2009) 31 *Aust Bar Review* 279
- Dingemans, Sir J et al *The Protections for Religious Rights: Law and Practice* (Oxford: OUP, 2013), esp ch 4, "Comparative Perspectives", Part A "Australia" by P Babie (pp140-159)
- Evans, C & Evans S *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, 2008)

[52] See, eg, Patrick Parkinson, "Christian Concerns with the Charter of Rights" (August 31, 2009), Sydney Law School Research Paper No. 09/72; available at SSRN: https://ssrn.com/abstract=1465125.

[53] Compare the popular outcry in the United States when the State of Indiana attempted to introduce a fairly standard version of religious freedom legislation previously adopted by many other States.

- Gray, Anthony "Section 116 of the Australian Constitution and Dress Restrictions" [2011] *DeakinLawRw* 15; (2011) 16(2) *Deakin Law Review* 293
- Kenny, Justice Susan "The right to freedom of religion" (FCA) [1999] *FedJSchol* 2 available at http://www.austlii.edu.au/au/journals/FedJSchol/1999/2.html
- Moens, G "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195-217
- Pannam, C L "Travelling s 116 with a US Road Map" (1963) 4 *Melb Uni L Rev* 41 {a classic early discussion of the issues}

Neil Foster
1 May 2019

Appendix- Ruddock Panel Recommendations[54]

Chapter 3 – Domestic legal framework

Recommendation 1

Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

Recommendation 2

Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

Recommendation 3

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

Chapter 4 – Manifestation and religious belief

Charities and faith-based organisations

Recommendation 4

The Commonwealth should amend section 11 of the Charities Act 2013 to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'.

Employment in religious schools

Recommendation 5

The Commonwealth should amend the Sex Discrimination Act 1984 to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

(a) the discrimination is founded in the precepts of the religion

(b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and

(c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

Recommendation 6

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any

[54] From the *Religious Freedom Review: Report of the Expert Panel* (May 2018), available in full at https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf .

exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

Enrolment of students in religious schools
Recommendation 7
The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
(a) the discrimination is founded in the precepts of the religion
(b) the school has a publicly available policy outlining its position in relation to the matter
(c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
(d) the school has regard to the best interests of the child as the primary consideration in its conduct.

Recommendation 8
Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.

Religious and moral education
Recommendation 9
State and Territory education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters and ensure that these policies are applied consistently. These policies should:
(a) include a requirement to provide sufficient, relevant information about such classes to enable parents or guardians to consider whether their content may be inconsistent with the parents' or guardians' religious beliefs, and
(b) give due consideration to the rights of the child, including to receive information about sexual health, and their progressive capacity to make decisions for themselves.

Solemnisation of marriages and use of places of worship
Recommendation 10
The Commonwealth Attorney-General should consider the guidance material on the Attorney-General's Department's website relating to authorised celebrants to ensure that it uses plain English to explain clearly and precisely the operation of the Marriage Act 1961. The updated guidance should include:
(a) a clear description of the religious protections available to different classes of authorised celebrants, and
(b) advice that the term 'minister of religion' is used to cover authorised celebrants from religious bodies which would not ordinarily use the term 'minister', including non-Christian religions.

Recommendation 11
The Commonwealth Attorney-General should consider whether the Code of Practice set out in Schedule 2 of the Marriage Regulations 2017 is appropriately adapted to the needs of smaller and emerging religious bodies.

Recommendation 12
The Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:
(a) conforms to the doctrines, tenets or beliefs of the religion of the body, or
(b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Chapter 5 – Vilification, blasphemy and social hostility
Blasphemy
Recommendation 13
Those jurisdictions that have not abolished statutory or common law offences of blasphemy should do so.

Recommendation 14
References to blasphemy in the Shipping Registration Regulations 1981, and in State and Territory primary and secondary legislation, should be repealed or replaced with terms applicable not only to religion.

Chapter 6 – Discrimination
Recommendation 15
The Commonwealth should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Recommendation 16
New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Chapter 7 – Data, dialogue and education
The experience of religious freedom
Poor literacy concerning human rights and religion

Recommendation 17

The Commonwealth should commission the collection and analysis of quantitative and qualitative information on:
(a) the experience of freedom of religion in Australia at the community level, including:
(i) incidents of physical violence, including threats of violence, linked to a person's faith
(ii) harassment, intimidation or verbal abuse directed at those of faith
(iii) forms of discrimination based on religion and suffered by those of faith
(iv) unreasonable restrictions on the ability of people to express, manifest or change their faith
(v) restrictions on the ability of people to educate their children in a manner consistent with their faith
(b) the experience of freedom of religion impacting on other human rights, and
(c) the extent to which religious diversity (as distinct from cultural diversity) is accepted and promoted in Australian society.

Recommendation 18
The Commonwealth should support the development of a religious engagement and public education program about human rights and religion in Australia, the importance of the right to freedom of religion and belief, and the current protections for religious freedom in Australian and international law. As a first step, the Panel recommends that the Attorney-General should ask the Parliamentary Joint Committee on Human Rights to inquire into and report on how best to enhance engagement, education and awareness about these issues.

Recommendation 19
The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

Chapter 8 – Conclusion
Recommendation 20
The Prime Minister and the Commonwealth Attorney-General should take leadership of the issues identified in this report with respect to the Commonwealth, and work with the States and Territories to ensure its implementation. While the Panel hopes it would not be necessary, consideration should be given to further Commonwealth legislative solutions if required