Religious Freedom Challenges for Theological Colleges in Australia

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I am very grateful for the important work of theological colleges in Australia. I am a graduate of one, and one of my qualifications was issued by the Australian College of Theology. I have also been blessed on occasions too often to mention by the teaching from God's word provided by graduates and staff of such colleges.

Of course, while there is a "genre" of "theological college", each such place operates in accordance with its own specific goals- some to provide training for ministry in particular organisational structures such as denominations, others with a broader scope but based on a particular view of the Bible, of theology, and how those disciplines interact between themselves and with other important professional areas of study. Much more so than in the case of "secular" Universities such as the one I have the honour to serve in, there may be important differences between theological colleges which will very much shape the education of students and academic research that takes place. Hence the crucial importance to the work of such colleges of being able, while complying with general obligations laid down by government bodies such as TEQSA to provide education at appropriate standards, to be able to be true to their underlying faith commitments.

Today I hope to assist in equipping leaders of such colleges to continue this crucial ministry in Australia, by outlining some legal challenges that such institutions will face to their freedom to operate and teach in accordance with those faith commitments. My aim is not to depress but to warn, and to suggest ways in which the law should operate. I hope this may be helpful in considering how to fight these battles as they arise.

1. Religious freedom protections in Australia- generally

Let me start by setting the scene for protection of religious freedom in Australia in general. The right to have and to live out religious beliefs is one of the key human rights recognised in international law. Article 18 of the *International Covenant on Civil and Political Rights* (the "ICCPR") reads as follows:

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

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These are very important principles, but they are not directly enforceable under Australia law. They need to be implemented by domestic law, and so far, this has only been done in fairly patchy way.

One thing we don't have in Australia, which most other Western countries have, is a general protection of religious freedom which will over-ride other laws. In the USA of course there is protection provided by the First Amendment to their Constitution for "free exercise" of religion. In Canada their constitution contains general human rights protections, which include religious freedom, and similar laws are in place in the UK and in Europe.

Here we have one general provision in our Federal Constitution, s 116, but it is quite limited.

> **Commonwealth not to legislate in respect of religion**
> 116 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.

This provision doesn't apply to State Parliaments, only to the Commonwealth Parliament (and probably, though there is some debate on this, to the Territory Parliaments), and it has been interpreted fairly narrowly by the courts on the few occasions when it has been relied on.

Perhaps surprisingly, however, a key aspect of protection of religious freedom in Australia comes from laws governing discrimination. Laws around Australia are in place to prohibit detrimental decisions in various areas of life being made on irrelevant grounds against people who share particular characteristics. The first set of laws of this sort dealt with race discrimination. But there are laws forbidding discrimination on other grounds, including sex, and sexual orientation, and gender identity.

There are two ways discrimination laws have an impact on religious freedom. *One* is that many such laws around the country **prohibit discrimination against someone on the grounds of their religious belief**. Those can be helpful in allowing Christians to express their faith without being subjected to being fired or refused service or otherwise being subjected to some form of detriment. Some of you will operate theological colleges in jurisdictions where such laws are in place. But there are no such general laws of this sort in NSW, or South Australia, or at the federal level.

The *second* way that discrimination laws can impact religious freedom, however, is where such laws forbid behaviour that religious beliefs might support. To take one obvious example, many Christians believe that the import of the Bible's teaching is that women ought not to be priests or pastors. Yet we have a general law forbidding sex discrimination. The way this is dealt with is that both in federal and state laws there are what I like to call **"balancing clauses",** which provide that a religious group such as the Roman Catholic Church does not commit unlawful discrimination when it refuses to ordain a woman as a priest.[2]

Another possible avenue for protection of religious freedom may lie in local laws at a State or Territory level which provide for a general human rights "charter". These are currently to be found the Australian Capital Territory, Victoria and Queensland- the *Human Rights Act* 2004 (ACT)[3] s 14, the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 14, and the *Human Rights Act* 2019 (Qld), s 20. Yet while each of these Acts assures us that there is a right to religious freedom, in terms very similar to those used in the ICCPR quoted above, they also have clauses which allow over-ride of this right in terms which are much broader than the

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[2] See *Sex Discrimination Act* 1984 (Cth) s 37; *Anti-Discrimination Act* 1977 (NSW) s 56.

[3] At the risk of confusion in this "Australian College of Theology" conference, I will use "ACT" in this paper to refer to the capital territory!

ICCPR. In any event, the reach of these laws is somewhat limited, as they do not provide the ability to over-ride Parliamentary laws (and this, I think, is generally a good thing.)

2. Religious freedom protections and theological colleges, today

We turn, then, to the current protections provided for theological colleges. Before we do, let me set out some circumstances where protections might be needed. It is just a mark of where our culture is now that some of these examples will involve differences between classical Biblical sexual morality and current accepted behaviour. But others will involve religious difference. Not all theological colleges will make decisions in this area in the same way. But I want to highlight issues that will arise for many.

(i) There may be a challenge involving staffing.
   a. A member of the academic staff with responsibility for teaching the truths of the faith, may conclude that they can no longer affirm one of the elements of the college's doctrinal statement.
   b. Or such a member may have entered into a de facto relationship with someone of the opposite sex, contrary to the teaching of the Bible that sexual activity should be reserved for marriage.
   c. Or a member of academic staff may have entered into a same-sex relationship or marriage, or announced that they are in fact a new gender which does not match their biological sex.
   d. One of the above may be true of someone in an administrative position, either public-facing (such as a receptionist) or behind the scenes (say a maintenance officer or cleaner.)

(ii) There may be a challenge involving students.
   a. The college, in the interests of assessing a student's capacity for ongoing ministry, might expect that students agree to a behaviour code affirming that sexual activity and identity issues are to conform to Biblical standards.
   b. Or a student may decide in the midst of their studies that they disagree with a fundamental part of the college's doctrinal basis.

(iii) There may be a challenge involving government funding. Government may decide that they will not provide financial support for students to study at an institution which cannot affirm the acceptability of homosexual activity or gender transition. Or there may be a decision to withdraw accreditation as a recognised tertiary education provider on similar grounds.

A number of these examples would give rise to possible actions by the persons affected under discrimination laws. Let me review some of protections provided at the moment.

Some of these issues will involve a possible breach of laws relating to sex discrimination. There are general prohibitions on this kind of discrimination at both State and Federal levels. I will confine my detailed remarks, in the interests of time, mostly to NSW at this point, though I do want later to discuss the law in Victoria and the ACT.

In NSW we have the *Anti-Discrimination Act* 1977. But, somewhat oddly, many prohibitions under this Act do not apply at all to "private educational authorities", which will probably include all theological colleges.[4] The definition in s 4(1) is:

[4] See the exemptions applying to "private educational authorities" in relation to discrimination in provision of Education to students on the grounds of sex (s 31A(3)(a)), transgender grounds (s 38K(3)), marital or domestic status (s 46A(3)), disability (s 49L(3)(a)), homosexuality (s 49ZO(3)), and age (s 49ZYL(3)(b)). In addition, such authorities are also exempt from the prohibition against employment discrimination on the grounds of homosexuality (s 49ZH(3)(c)), transgender grounds (s 38C(3)(c)), sex (s 25(3)(c)), disability (s 49D(3)(c)), and marital or domestic status (s 40(3)(c)).

> **"private educational authority"** means a person or body administering a school, college, university or other institution at which education or training is provided, not being--
> (a) a school, college, university or other institution established under the *Education Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or
> (b) an agricultural college administered by the Minister for Agriculture.

However, it seems fairly clear that similar prohibitions under federal law, the *Sex Discrimination Act* 1984 (Cth) ("the SDA"), **would** be applicable to NSW theological colleges.[5] Obligations not to discriminate on various grounds are imposed under s 20 of the SDA on "educational authorities", defined as follows in s 4(1) of that Act:

> ***"educational authority"*** means a body or person administering an educational institution.
> ***"educational institution"*** means a school, college, university or other institution at which education or training is provided.

Under s 21 discrimination in relation to education provided to students is forbidden, where decisions are made on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding. There is also a general prohibition on making decisions on the same grounds in the area of employment or engagement of contractors, under ss 14 and 16.

However, the SDA ss 37 and 38 provide clauses which balance out the right of students and staff not to be discriminated against, with the right of theological colleges to operate in accordance with their religious commitments.[6]

> **Religious bodies**
> 37 (1) Nothing in Division 1 or 2 affects:
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
> (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
> (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion…[7]
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> **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.
> (2) Nothing in paragraph 16(b) 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

[5] Even if NSW law could be read as providing an implied right to NSW colleges not to comply with discrimination law, under s 109 of the Constitution Commonwealth law would prevail.
[6] For my comment as to why I prefer to call these "balancing clauses" rather than "exceptions" or "exemptions", see N Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430.
[7] Section 37(2) says that the rights under s 37(1) do not apply in relation to the provision of Commonwealth-funded aged care; but as this is not directly relevant to theological colleges, I have omitted this.

> relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in 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.
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> (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.

In broad terms, the areas which will provide freedom of religion for theological colleges here are:

- Under s 37(1)(b), decisions made in the "training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order" cannot be challenged under the Act. This will be particularly applicable to either a denominational college training ministers for the denomination, or where a generalist college regularly supplies training as such for churches.
- Under s 37(1)(c), selecting persons for "any religious observance or practice" would probably include decisions such as who leads (or preaches) at a regular "chapel" service or the like.
- Under s 37(1)(d) there is a broadly framed freedom in relation to "any other act or practice of a body established for religious purposes", so long as this is "an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion".
- There are then specific protections provided under s 38 for "an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed", in relation to engagement of employees and contractors, and the provision of education to students.

There is an unresolved question (at least to my mind) as to why we have what at first glance seem to be duplicate protections provided under sections 37(1)(d) and 38. After all, isn't an "educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed", also a "body established for religious purposes"? When we drill down to the details, however, there are some differences.

One explanation may be that a "faith-based school" may be "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed" (s 38) but not actually be currently operated by "a body established for religious purposes" (s 37). So, s 38 may protect a school where its governing documents require it to confirm to Christian or Muslim principles, for example, even though the current board do not share those principles.

Are the protections provided by s 38 less than those provided by s 37? Table 1 suggests that they are, slightly.

Area of operation	**Section 37 SDA**	**Section 38 SDA**
Applies to…	"any other act or practice" of the religious group	Decisions in relation to employees, contractors and students
Which type of discrimination is excluded?	"Nothing in Division 1 or 2" will apply; ie discrimination	Decisions protected are those based on

	based on all the prohibited grounds 1. Sex 2. sexual orientation, 3. gender identity, 4. **intersex status**, 5. marital or relationship status, 6. pregnancy or potential pregnancy, 7. **breastfeeding** or 8. **family responsibilities**.[8]	1. sex, 2. sexual orientation, 3. gender identity. 4. marital or relationship status or 5. pregnancy
To what religious grounds does the exemption apply?	To "an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion"	To "discriminat[ion] in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed"

Table 1- difference between protections provided by sections 37 and 38, SDA.

The result of this comparison is that it does seem that the s 38 protections are not quite as extensive as those under s 37. This seems to have suggested to some that s 37(1)(d) may be seen to be not available to educational institutions. But this view is not persuasive. Section 37 contains no explicit indication that it is intended to operate completely separately from s 38, and such would have been easy to add.

In particular, a theological college that was actually conducted by a religious body could legitimately argue that it should be entitled to the full range of protections under s 37, since the s 38 lesser protections are only intended to be used by institutions which are only "historically" religious, in the situation noted above where the current management of the school does not share the religious beliefs on which the school is intended to operate. (This would give s 38 genuine work to do, as otherwise it could be argued that it would be otiose.)

It is worth noting that the view that both sections are applicable to educational institutions conducted on religious grounds by religious bodies, seems to lie behind amendments which were introduced into Federal Parliament by Ms Sharkie (Independent) during the debate on the *Religious Discrimination Bill* and cognate legislation.[9]

So these provisions will provide some protection for theological colleges applying their faith commitments. Interestingly there seem to be no reported cases where these precise provisions have been considered. But there are two important decisions on similar laws which illustrate both how they might operate, and the possible limits that might be placed on their protection.

[8] Items in bold are not duplicated in s 38.

[9] See Ms Sharkie's amendment to the SDA, moved in the course of debate on the *Human Rights Legislation Amendment Bill* 2021 in the House of Representatives on 10 Feb 2022 (though recorded in the Hansard for 9 Feb 2022 as the debate took place after midnight): *House of Representatives Hansard Wed 9 February 2022*, at 280. The amendment repealed s 38(3) of the SDA and at the same time amended s 37 to make it clear that a religious school could not rely on s 37 once the relevant provision of s 38 had been removed. The amendment was notable in that it passed the House without the official support of the government, 5 members of the government crossing the floor. But as noted previously, the amended package of legislation of which this was a part did not pass the Senate prior to the prorogation of Parliament for the 2022 election.

I mention these briefly.[10] In *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010) a same-sex couple had approached the Wesley Mission Council to be accepted as possible foster parents for children in need. The Mission had a policy based on its religious commitments that it would only place children with a heterosexual couple. They were sued for "sexual orientation" discrimination, but in the end were able to successfully show that their policy fell within the balancing clause in s 56 of the NSW ADA. The Tribunal which ultimately determined the matter[11] found that the refusal to entertain the claimant's application 'conform[ed] to the doctrines of [the] religion' and that to not allow homosexual foster carers was 'necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.

While this was a sensible outcome, the course of the litigation illustrates one problematic aspect of these sort of provisions. At first instance the lower level of the Tribunal had ruled that the Mission could not demonstrate that its views on the Bible's teaching on marriage and sex were part of its "doctrines", and hence could not be used to excuse its decision. This was connected with a decision that any relevant doctrines had to be those shared by the whole of the denomination the Mission was attached to (the Uniting Church of Australia). Thankfully the NSW Court of Appeal overturned those initial views and held that the relevant doctrines were those actually held by the Mission itself (which was independent to a large extent from the denomination). This approach meant that the later Tribunal panel was able to rule that 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.

While this was a good outcome, there was a more problematic decision handed down in Victoria. In *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014) a campsite run by an organisation connected to the Christian Brethren had been asked to provide accommodation for an event which was said to be aimed at affirming same-sex attraction to a group of young people. When the CYC people declined to accept the booking, saying that it was contrary to their religious commitments to support this message, the organisation was sued for sexual orientation discrimination.

CYC were held liable by a Tribunal and ordered to pay damages of $5000. Their appeal was rejected, though by a 2-1 decision where a strong dissent was given by one of the appeal judges, Redlich J. The CYC was held not to be a "body established for religious purposes" for the purposes of a defence under s 75 of the then-applicable legislation, the *Equal Opportunity Act* 1995 (Vic). The majority also ruled that even if it were such a body, its decision not to allow a booking here was not required by its "doctrines". Maxwell P in the majority 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.[12] This is clearly far too narrow a view. The majority decision also fails to deal with the question whether an organization can be seen to be providing support for a particular *viewpoint* which has been announced when a booking is made.

Application of balancing clauses to "religious groups", then, will partly depend on which organizations are allowed to count as "religious", and also on which of their religious beliefs are allowed to count as "doctrines". Even if, as the court here says, refusal to support a message about the "normality" of homosexuality is itself directly discriminatory, the proper

[10] For more detailed analysis of these and other cases from overseas, see Foster (2016) above n 6.
[11] *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).
[12] *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [276]-[277].

application of the balancing clause here should in my view have allowed CYC to use their objection to that **message** as a reason not to provide the relevant service.

While there seems to be a clash between the approaches of the appellate courts in the two different States, unfortunately the High Court of Australia declined special leave to appeal.[13] Under the current law, then, it would seem to be wise for religious bodies to be as clear as possible that their "doctrines" include the teaching of the Bible on issues of sexual morality and sexual identity.

The situation here becomes even more difficult when we consider the law as it now stands in Victoria under its *Equal Opportunity Act* 2010 (Vic) ("EOA"). There were a number of important changes made to the "balancing clauses" in Victoria by the *Equal Opportunity (Religious Exceptions) Amendment Act* 2021 (Vic), significant parts of which came into force this week, on 14 June 2022.[14]

The precise interpretation of some of these provisions may not be clear until we have seen some cases on them. But in broad terms the legislation replicates the pattern noted above set up by sections 37 and 38 of the SDA- it deals with "religious bodies" (under sections 82 and 82A), and then it provide for similar rules in relation to a "person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles" (sections 83 and 83A). So, it seems to account for entities where the governing body is committed to acting on religious principles, and also for schools or tertiary institutions where the principles of the body are designed to be religious, even if the governing entity may not themselves be so committed.

In general, it seems to me that theological colleges will be places that are clearly "religious bodies", and so I will confine my comments to sections 82 and 82A. As with s 38 of the SDA, I think sections 83 and 83A are mainly relevant to institutions that are only "historically" religious, and I suspect there are few if any theological colleges that are in that category.

The main impacts of the new sections 82 and 82A are to make it harder to run a theological college on principles drawn from a religious world view.

1. Section 82 deals with issues other than staffing decisions; so this will relate to student matters and (perhaps) what is taught in courses. Section 82(1) replicates the general permissions given in s 37(1)(a)-(c) of the SDA by exempting issues relating to training and ordination of ministers of religion from the prohibitions in Part 4 of the EOA. However, when we come to the more general operation of the college, we find in s 82(2) that
   - Staffing decisions have to be considered separately under s 82A;
   - While there is a broad exemption for "anything done…on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity", where this "(a) conforms with the doctrines, beliefs or principles of the religious body's religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religious body's religion";
   - this is subject to that thing being "reasonable and proportionate in the circumstances".
2. In relation to staffing decisions, religious bodies may not under s 82A of the amended *EOA* make these decisions based on whether or not the staff member agrees with fundamental **moral** values being taught by the body or school; the grounds on which a staff member can be hired or fired are limited to "religious belief" **alone** (and it seems from the way this is worded, to mean that this will apply even to someone hired as a

[13] See my discussion of the High Court's refusal of special leave to appeal in the *CYC v Cobaw* litigation, Neil J Foster 'High Court of Australia declines leave to appeal CYC v Cobaw' (2014), at http://works.bepress.com/neil_foster/89 .

[14] For my comments on the legislation as it was being debated, which are still valid as it went through Parliament unamended, see https://lawandreligionaustralia.blog/2021/10/28/victorian-religious-exceptions-amendment-bill-introduced/ (Oct 28, 2021).

"religious studies" teacher.) This rule will also apply (after a further 6 months) to any organisation "providing services funded by the Victorian Government"- s 82B.

3. All religious bodies can *only* make an otherwise "discriminatory" staffing decision based on religious beliefs which is justified by demonstrating that the "inherent requirements" of the position require such a criterion- s 82A(1)(a). The implication is that a secular Victorian tribunal or court will have to determine whether such requirements are applicable by examining the religious beliefs of the body or school for themselves.[15] In addition it will need to be demonstrated (again to whatever secular body has to decide) that this decision is "reasonable and proportionate in the circumstances"- s 82A(1)(c).

To give some examples about how this will work in relation to staffing: first, someone will have to make a judgement about whether a requirement to live in accordance with the ethos of the college is an "inherent requirement" of the position. Who decides if the church history lecturer, for example, or a psychology academic, or a receptionist, is part of the team conveying important religious messages or modelling a godly life to students or members of the public? Second, however, the college can only make employment decisions if the inherent requirement cannot be met because of "**religious** belief or activity".

Suppose a staff member decides to move in with a de facto partner. The staff member may say, I still believe, I just interpret the scriptures differently to allow me to live the way I choose. The college may see that as a "religious" difference. But a secular court or tribunal may say, no, that is not a religious matter; what you are concerned about is the person's "lawful sexual activity" or "sexual orientation". Thirdly, even if the college overcomes the first two hurdles it will need to show that asking the staff member to stand down is "reasonable and proportionate"! Again, this is a decision that will need to made by a court or tribunal which has no real sympathy for the school's religious ethos.[16]

Notice that all 3 criteria must be met. Even if the staff member is a "core" theological or Biblical studies lecturer, and so would clearly satisfy para (a), the other criteria will present problems. In fact, let's suppose a Biblical studies teacher at a Christian theological college has become a Muslim, and so meets para (b) as well. Even then, para (c) will need to be considered by a secular tribunal: is it "reasonable and proportionate" to stand down the lecturer? Maybe the person promises to keep using the same lecture notes, while taking every Friday off for prayers at the mosque. The college might be required by a tribunal to allow this Muslim convert to stay as a teacher, all the while (from the college's perspective) undermining the ethos of the college.

Just briefly, I note that a similar restricted view of freedoms given to religious educational bodies has now been adopted in the Australian Capital Territory. Under the *Discrimination Act* 1991 (ACT) s 46 decisions in relation to students and staff can only be made on grounds of religious belief, not on morality grounds. And even in those case, where staffing is concerned, it must be shown that "the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings".

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[15] See my more detailed analysis of the provisions in my blog post, "Victorian Religious Exceptions Amendment Bill introduced" (Oct 28, 2021) https://lawandreligionaustralia.blog/2021/10/28/victorian-religious-exceptions-amendment-bill-introduced/ .

[16] For an article commenting on the question as to when secular courts should be deciding theological questions, see Neil J Foster. "Respecting the Dignity of religious organisations: Courts deciding theology?" *University of Western Australia Law Review* Vol. 47 (2020) p. 175 - 219 at: http://works.bepress.com/neil_foster/135/ .

It is worth noting that more changes in this area may be ahead in the Australian Capital Territory. The ACT government have released an "Exposure Draft" of a *Discrimination Amendment Bill* 2022.[17] They have also issued a brief summary.[18] Most of the changes, however, will not relate directly to theological colleges.

In this situation I have recently been exploring whether this sort of law at a State or Territory level might not clash so much with Commonwealth law, that it could be invalid. Under the Constitution s 109 says that where there is a clash between Commonwealth and State law, the State law is rendered inoperative to the extent of the clash. Similar principles apply where there is a clash between over-arching federal law and a Territory law.

There has been no clear decision on this issue in the area of religious freedom and these sort of balancing clauses, but I think, with lower level laws becoming increasingly restrictive, this sort of argument might succeed in the future.[19]

There is one more law which may have a serious impact on religious freedom of theological colleges in Victoria, which is the *Change or Suppression (Conversion) Practices Prohibition Act* 2021 ("CSCPPA") (which commenced operation on 17 Feb 2022).[20]

The core of the legislation is the definition of "change or suppression practice" ("CSP") in s 5. Section 5(1) provides the main definition.

Under s 5(1):

> **5 Meaning of change or suppression practice**
> (1) In this Act, a **change or suppression practice** means a practice or conduct directed towards a person, whether with or without the person's consent—
> (a) on the basis of the person's sexual orientation or gender identity; and
> (b) for the purpose of—
> (i) changing or suppressing the sexual orientation or gender identity of the person; or
> (ii) inducing the person to change or suppress their sexual orientation or gender identity.

Each part of this definition is worth noting carefully. Let's consider a situation where a student at a theological college has been experiencing same-sex attraction (or even, as we will see below, a single heterosexual make student experiencing temptation to sleep with his girlfriend.) As part of pastoral care for students, a chaplain then counsels the student to help them not to engage in sexual sin. Could that be unlawful?

- Note that, despite the use of the word "practice" in the phrase being defined, the definition itself picks up "a practice or **conduct**". The word "practice" may imply an ongoing pattern of behaviour; the word "conduct" seems capable of referring to a *single* instance of, say, counselling or advice.

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[17] See https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/5916/5405/1134/J2022-244-Discrimination_Amendment_Bill_2022-D06_Final.PDF .

[18] See https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/5616/5413/0668/Fact_Sheet_-_Exposure_Draft_Discrimination_Amendment_Bill_2022.pdf .

[19] I have had an article on this topic accepted for publication in a new journal, the *Australian Journal of Law and Religion*, which should be available in the next month or so.

[20] For a detailed analysis of the provisions, see https://lawandreligionaustralia.blog/2021/01/15/victorias-conversion-practices-bill-is-as-bad-as-they-say-it-is/ (Jan 15, 2021)- the Bill went through Parliament unchanged after these comments were made, and was then delayed in coming into operation for about a year. Some of the material in the main text is reproduced from those earlier comments with slight updating.

- The relevant practice or conduct must be "directed towards" a person. There may be scope for arguing that this does not cover a "mutual conversation", but the next part of the definition makes this harder to argue.
- The phrase "whether with or without the person's consent" is shocking. It means that a conversation or course of conduct which has actually been **invited** by a person seeking assistance in overcoming what they see as an undesired temptation, may still be unlawful.
- The relevant conduct must have been entered into "on the basis of" the person's sexual orientation or gender identity. One argument that might be put would be to say that a conversation conveying the Bible's view that sex should be reserved for the context of a male/female marriage, would be one that would be identical whether the person concerned was heterosexual or homosexual. The *activity*, not the "orientation", would be the basis for the conversation. But such an argument would probably not be successful due to the definition of "sexual orientation" relied on by the legislation. The phrase is explicitly said to mean a person's "intimate or sexual relations with" other persons. Hence any suggestion that someone should behave in a particular way in their sexual *activity* with others, could be seen to be "on the basis of" the person's "sexual *orientation*".
- The conduct must, further, be for one of two purposes. One purpose is "changing or suppressing the sexual orientation or gender identity of the person". The other is "inducing" the person to make such a change- presumably the difference is that in the second option the person themselves will be persuaded to make the change, but in the first this change is somehow made independent of their will? In any event, the goal of the relevant conduct will be a change of orientation or gender identity, or "suppression" of such. In terms of orientation, the definition noted above seems to imply that any advice to a person that God's will is that they should be "chaste" and not engage in sexual activity outside a man/woman marriage, can be seen to be at least a "suppression" (or an "inducement" of suppression) of their "intimate or sexual relations" with another person.

The effect of the above is that a "CSP" can be a one-off discussion with someone, which may have been initiated by the person themselves, where they are told of the Bible's teaching on sex and encouraged to obey its teachings. In the explanatory material issued by the Government there was an attempt to downplay this impact on the religious freedom (of both the person seeking counsel, and the counsellor) by saying that the definition would not apply to "general discussions of religious beliefs around sexual orientation or gender identity that aim to **explain** these beliefs and not change or suppress a person's sexual orientation or gender identity" (emphasis added; taken from the "statement of compatibility" filed by the Government in Parliament). But the fact is that there are very few situations where someone has sought counsel from a Christian pastor where that person would simply "explain" the faith without encouraging the other person to obey what the Bible says. Indeed, the Bible itself warns against simply grasping the content of the word without obeying it:

> [22] But be doers of the word, and not hearers only, deceiving yourselves.
> *James 1:22 (ESV)*

At the heart of the Act, then, a "conversion or suppression practice" can be seen to include Person A speaking to Person B, at Person B's *own request*, to explain the teaching of the Bible and to encourage Person B to live in accordance with it. Indeed, it has to be said that the definition is so broad ("sexual orientation", for example, including attraction to, and sexual activity with, persons of a different gender) that it would cover a chaplain telling a male student that he ought not to have sex with his girlfriend.

That these scenarios are not imaginary can be seen from guidance issues by the Victorian Equal Opportunity and Human Rights Commission now that the law is in force:

> **Examples of illegal practices**
> Practices that would be considered illegal under the Act include:
> - a religious leader meeting one-to-one and pressuring a member of their congregation to suppress and ignore their feelings of same-sex attraction by practising celibacy;
> …
> - a religious leader tells a member of their congregation that they will be excommunicated if they continue their same-sex relationship.

Of course "pressure" is not good; but the first example would clearly seem to capture someone being encouraged by a chaplain to live in accordance with the Bible's teaching, and the second a discussion where a student would be warned that they could not continue in their studies if they openly defy the Bible's teaching.

These are draconian laws which would penalise ordinary Christian counselling and prayer conducted on Biblical principles with the permission of a person seeking help. Over in the UK, the Victorian laws are being portrayed as "best practice" as activists seek to introduce similar provisions there. The Christian Institute has published advice prepared by a QC which notes that, if implemented in the UK, many features of the Victorian law would be regarded as in breach of human rights law in force there.[21] Here in Australia there may be some parts of the law which conflict with Commonwealth law, but that is less clear where the law is not explicitly dealing with "discrimination" as the other Victorian laws noted above do. So the law will need to be endured and, if contrary to the Bible's teaching, we may reach the point where we have to resist it.

There are a number of other features of the legislation which I don't have time to cover here. But let me add one final comment. The legislation purports to extend its reach, not only to Victoria, but to other jurisdictions around Australia. Section 8 of the CSCPPA provides:

> 8 Extra-territorial application
> (1) This section applies if—
> (a) a person engages in conduct outside, or partly outside, Victoria; and
> (b) there is a real and substantial link between the conduct and Victoria.
> (2) This Act has effect in relation to the conduct as if it had been engaged in wholly within Victoria.

So, in theory, if a theological college in another part of Australia operates online by, for example, providing one to one counselling for remote students in Victoria, then it may engage in unlawful activity under Victorian law by running a Zoom session with a counsellor in another jurisdiction. As with other provisions under the Act, it will usually not be a criminal offence (such requires evidence of "injury" or "serious injury" and will usually only arise after an extended course of action, I think), but this may give rise to a decision by the VEOHRC to conduct an investigation of some sort, especially if the college has a local branch in Victoria.

3. The Religious Discrimination Bill and proposed amendments

All of you are no doubt aware that there was a Bill presented to Federal Parliament in the last months of the former Coalition government which would have addressed religious

[21] See https://www.christian.org.uk/human-rights-implications-of-proposals-to-ban-conversion-therapy/ .

discrimination as a topic of federal law.[22] Without going into all the details, I think the Bill, while not perfect, was a generally sensible one that would have been a step forward for religious freedom in Australia. Unfortunately, it was "torpedoed" at the last minute in the House of Representatives. An amendment was moved, not to the main *Religious Discrimination Bill*, but to an associated Bill, which would have removed the rights noted above for religious educational bodies to apply their faith commitments around appropriate sexual activity and identity, in providing education (specifically, the protections provided by s 38(3) of the SDA). The government took the view, correctly in my opinion, that the package with this last-minute amendment (passed due the defection of 5 Government back-benchers), was worse than no Bill at all, and declined to move the legislation forward in the Senate.

With the federal election the Bill has now, of course, lapsed, and we await to see what form such legislation will have when introduced by the new ALP government. It seems likely, however, that any revised package will include some amendments to sections 37 and 38. The repeal of s 38(3) is seen as dealing with a supposed problem that Christian schools can expel gay or transgender children. There is actually no evidence that such is happening. But to repeal s 38(3) will be to force Christian educational institutions, including theological colleges, to no longer apply Biblical sexual morality principles in relating to their students.

In addition, there will be pressure to go "the whole hog" and to repeal the rest of s 38 SDA, dealing with staffing and employment issues. This will also create potential major problems for theological colleges.

4. What the future may bring

Those who follow the Lord Jesus know that the ultimate future will bring his return and taking his people to be with him in glory! In the short term we are called to be faithful and to proclaim his gospel, for our God desires all to be saved. Theological colleges play a vital role in teaching and equipping pastors and other ministry workers to build up the church and further the proclamation of the gospel. In doing their work, colleges can use the legal structures that are given in our society to defend their right to operate in accordance with truth. There are challenges ahead, but we know the end of the story and in whom we trust.

[22] For background and comments on the Bill as presented to Parliament, see https://lawandreligionaustralia.blog/2021/11/24/the-religious-discrimination-bill-arrives/ (24 Nov 2021), and for later developments see https://lawandreligionaustralia.blog/2022/02/10/religious-discrimination-bill-passes-lower-house-along-with-sda-amendment/ (10 Feb 2022).