Submission to Religious Freedom Review

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An Important Human Right

Freedom of religion is a fundamental human right. As Mason CJ and Brennan J commented in Church of the New Faith v Commissioner for Pay-roll Tax (Vic)\(^1\) '[f]reedom of religion, the paradigm freedom of conscience, is the essence of a free society.'\(^2\) It is protected by numerous international and national human right’s instruments. For example Article 18 of the Universal Declaration of Human Rights states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.\(^3\)

Other international and supra-national examples include Article 18 of the International Convention on Civil and Political Rights\(^4\) and Article 9 of the European Convention on Human Rights.\(^5\) Common law countries with comparable legal systems to Australia similarly incorporate freedom of religion into their domestic law via constitutional protections and bills or charters of rights. Examples include the United States First Amendment,\(^6\) the Canadian Charter of Rights and Freedoms,\(^7\) the South African Constitution,\(^8\) the New Zealand Bills of Rights 1990,\(^9\) and the United Kingdom Human Rights Act 1998.\(^10\)

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\(^1\) (1983) 154 CLR 120.
\(^2\) Church of the New Faith v Commissioner of Pay Roll Tax (Vic) (1983) 154 CLR 120, 130.
\(^3\) Universal Declaration of Human Rights, GA Res 217A (II) UN GAOR, 3\(^{rd}\) sess, 183\(^{rd}\) plen mtg, UN Doc A/810 (10 December 1948) art 18.
\(^4\) International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).
\(^6\) United States Constitution amend I.
\(^7\) Canada Act 1982 (UK) c 11, sch B (‘Constitution Act 1982’) s 2(a).
\(^8\) Constitution of the Republic of South Africa Act 1996 (South Africa) s 15.
\(^9\) New Zealand Bill of Rights Act 1990 (NZ) s 6.
\(^10\) Human Rights Act 1998 (UK) s 3.
Weakly Protected in Australia

While freedom of religion is generally recognised in Australia as an important human right, like many human rights it is relatively weakly protected by the law. The Australian Constitution contains section 116 which states:

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.

However it has consistently been interpreted narrowly by the Australian High Court. Far from being a broad repository of a general principle for the separation of church and state or freedom of religion the High Court has taken a technical approach to the clause. In order for a breach of section 116 to be made out a party must establish a breach of one of the four so-called limbs of section 116.11 The High Court has read the word ‘for’ as requiring that the law in question must have the purpose of establishing a state church, imposing a religious observance or prohibiting the free exercise of religion before it will be found to be invalid.12

Further freedom of religion while recognised by the common law is only weakly protected by it. In *Grace Bible Church v Redman*13 White J concludes that ‘the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression.’14 Freedom of religion exists at common law but can easily be abrogated.

Rather than being protected via a constitutional guarantee or a provision in a bill or charter of rights freedom of religion in Australia is primarily protected via anti-discrimination legislation, the political process and a free press.

All states and territories, except New South Wales, provide some form of prohibition on discrimination on the basis of religion in their anti-discrimination legislation.15

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15 Discrimination Act 1991 (ACT) s 7; Anti-Discrimination Act 1992 (NT) s 19(1); Anti-Discrimination Act 1991 (Qld) s 7; Equal Opportunity Act 1984 (SA) s 85T; Anti-Discrimination Act 1998 (Tas) ss 14, 15, 16(o); Equal Opportunity Act 2010 (Vic) s 6(n); Equal Opportunity Act 1984 (WA) s 53.
Australia however only prohibits discrimination on the basis of ‘religious appearance or dress.’ Discrimination on the basis of religion is also prohibited in relation to employment by the Commonwealth’s Australian Human Rights Commission Act 1986. Anti-discrimination legislation also contains exemptions from some of the provisions of the relevant laws for religious organisations in relation to discrimination on the grounds of characteristics such as gender, marital status and sexual orientation. Which grounds are covered varies between jurisdictions. Exemptions are also provided to religious schools. Finally Victoria, Queensland and Tasmania prohibit religious vilification.

Perhaps more significantly freedom of religion in Australian is protected via the political process and free press. Despite the relatively weak legal protections for freedom of religion outlined above, Australians enjoy a comparatively high level of freedom of religion. Australians does not need to fear arrest, assault or persecution as a result of their religious beliefs and practices. This is largely due to a democratic system, and free press, in which potential restrictions on freedom of religion can be debated in the public sphere. Australian’s generally subscribe to a mentality of a ‘fair go’ and, as Marion Maddox (2011, 301) has observed, ‘Australians [have] tended to be suspicious of too-overt religiosity, shying away, for example, from American-style civil religion and avoiding anything resembling ”God bless America” political rhetoric’. As a result overt restriction on freedom of religion by the State

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16 Equal Opportunity Act 1984 (SA) s 85T; see also Anne Hewitt, ‘It’s not because you wear Hijab, it’s because you’re Muslim – Inconsistencies in South Australia’s Discrimination Laws’ (2012) 7(1) QUT Law Review 57.
17 Australian Human Rights Commission Act 1986 (Cth) ss 30-35.
18 Anti-Discrimination Act 1977 (NSW) s 56(d); Anti-Discrimination Act 1992 (NT) s 51(d); Equal opportunity Act 1984 (SA) s 50(1)(c); Anti-Discrimination Act 1998 (Tas) s 52(d); Equal Opportunity Act 2010 (Vic) s 82(2); Equal Opportunity Act 1984 (WA) s 72(d); The exact formulation of these grounds and the religious exemption provisions varies between the different jurisdictions, see, eg, Liam Elphick, ‘Sexual Orientation and ‘Gay Wedding Cake’ Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions’ (2017) 38(1) Adelaide Law Review 149, 156-161.
20 Racial and Religious Tolerance Act 2001 (Vic); Anti-Discrimination Act 1991 (Qld) s 124A(1); Anti-Discrimination Act 1998 (Tas) s 19(d).
tend not to be tolerated. The swift revocation of the ban on the wearing of face coverings in federal parliament in 2014 is evidence of this process at work.\textsuperscript{22}

Further where court cases ostensibly raise freedom of religion issues these are often debated in the press and in broader public debate even though the freedom of religion issues may not be directly canvassed in court or have little chance of success. The debate over federal funding of school chaplains and the High Court cases Williams \textit{v} The Commonwealth No 1\textsuperscript{23} & 2\textsuperscript{24} are an example of this process. In Williams \textit{v} The Commonwealth No 1 the Court devoted just a handful of pages to dismissing the plaintiff’s section 116 arguments which related to the qualifications for public office rather than freedom of religion while in Williams \textit{v} The Commonwealth No 2 the Court made no mention of section 116 and barely mentioned religion at all. In both cases the High Court determined the issue on other grounds. However the plaintiff’s reasons for bring the case, the press coverage and public debate focused on freedom of and freedom from religion issues such as the separation of church and state.\textsuperscript{25}

The relative success of the political process and a free press in protecting freedom of religion in Australia does not mean, however, that some religious individuals and organisations have not faced significant restrictions on their freedom of religion. Historical examples include the banning of the Jehovah’s Witnesses during World War II\textsuperscript{26} and the banning of the Church of Scientology in Victoria, South Australia and Western Australia.\textsuperscript{27} While less overt in nature many religious individuals and groups continue to face restrictions on their freedom of religion today. Contemporary examples include the temporary ban on the wearing of face veils in federal parliament which impacts on some Muslim women,\textsuperscript{28} the no jab-no pay and no-jab no play vaccination policies which impact on those who object to all or some vaccinations on religious grounds\textsuperscript{29} and the ability of doctors to administer blood transfusions without or against parental consent to minors which impacts on the freedom of religion of...

\textsuperscript{23} (2012) 248 CLR 156.
\textsuperscript{24} (2014) 209 CLR 41.
\textsuperscript{27} Ibid, 175 – 185.
\textsuperscript{28} See Barker, Rebutting the Ban the Burqa Rhetoric, above n 22, 214 – 216.
\textsuperscript{29} See Renae Barker, \textit{No Jab-No Pay, No Jab-No Play, No Exceptions: The Removal of Conscientious and Religious Exemptions from Australia’s Childhood Vaccination Policies} (2017) 25 (2) Quaderni di diritto e politica ecclesiastica 513.
Jehovah’s Witnesses. While these restrictions may be based on good public policy grounds that, in and of itself does not change the fact that they are restrictions on freedom of religion and that those subject to them have few legal avenues to challenge these restrictions.

A State Based Issue

One of the biggest challenges in relation to the protection of freedom of religion in Australia is Australia’s federal system of government. Under the Australian Constitution the federal Government is only empowered to make laws with respect to those things set out in sections 51 and 52. This leaves significant areas of responsibility for state Governments, including many of the areas in which religious individuals and organisations interact with the law. For example, criminal law, education, health and charity laws are all areas of state responsibility. While the federal Government has increasingly involved themselves in these areas they remain ultimately areas of state responsibility. As a result, even if section 116 had been given a more expansive reading by the High Court, many laws which impact upon freedom of religion would be beyond its scope. During the Constitutional Convention debates Edmund Barton suggested that it would be impossible for the federal Government to breach section 116 as the Commonwealth has no specific power to make laws relating to religion.

I think it is quite clear that the Commonwealth will have no power to make any law regarding religion, even if no amendment such as that which has been suggested is agreed to. The Commonwealth will have no powers except such as are given to it either expressly or by, necessary intention.

However, given the expansion in federal law making since federation this assertion may now be doubted. In any event section 116 does not apply to the states and as a result even this weak protection for freedom of religion is not available in relation to state based laws.

Inconsistency

As outlined above freedom of religion at the State level is primarily protected via anti-discrimination legisaltion and exemptions to those laws. Unfortunately there is significant inconsistency between these laws across jurisdictions. As a result this limited protection for freedom of religion varies across Australia. A religious individual living in one state may

31 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 8 February 1898, 661 (Edmund Barton).
32 Ibid.
33 Elphick, above n 18, 154 – 161.
have different rights and liabilities under the law to an individual living in another state. Given the fundamental importance of freedom of religion outlined above this is unacceptable. If freedom of religion is a fundamental freedom it should be equally protected for all Australians and not subject to the vagaries of where an individual lives.

How such inconsistencies can best be remedied is of course a going to be a matter of some contention. Each state and territory, along with the Commonwealth, have their own wording for the religious exemption provision provided in their anti-discrimination legislation. If there was one recommendation I would like to see come out of the Religious Freedom Review it is that there be national consistency in anti-discrimination legislation. If this cannot be achieved via co-operation between the states the Commonwealth may need to use the foreign affairs power in the Constitution to enact national anti-discrimination and/or freedom of religion laws consistent with Australia’s international obligations under the various human rights treaties and conventions.

In trying to come up with a nationally consistent provision the following principles should be followed:

1. The provision should not require a judge, other judicial or administrative officer to conduct a theological enquiry into the correctness of the religious beliefs of a specific religious organisation.

   Judges are not theologians. Requiring a judge or other decision maker to enquire into the correctness of the religious beliefs of a religious organisation is asking them to undertake a task for which they are not qualified. Religious belief is endlessly diverse. As identified by Latham CJ in The Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth34 … almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other oods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual — all of these may become part of religion.35

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34 (1943) 67 CLR 116.
Courts around the world have cautioned against judicial and other decision makers embarking on theological enquires.\(^{36}\)

Just because one religious organisation within a wider faith family holds a particular religious belief does not necessarily mean that another within the same faith family will hold exactly the same religious beliefs. This issue becomes even more acute at the level of the individual where one individual who claims to be an adherent of a particular religion may have a different interpretation to another adherent of the same faith. Both may sincerely hold these beliefs. This is in the very nature of religious belief. Neither have their religion wrong it is simply that they have come to different conclusions about what their faith requires.

Unfortunately Australian anti-discrimination cases such as *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*\(^{37}\) show evidence of judicial officers embarking on theological enquires. That case concerned the Christian Brethren Church which is a small sect of Christianity many of whose beliefs and practices vary from other more mainstream Christian churches. Yet in that case some members of the court attributed the beliefs of the broader Christian community to the Christian Brethren Church without drawing any distinction between them and in effect telling the Christian Brethren Church that they had got their religion wrong. This is not the role of the Court.

As a result a subjective test, rather than an objective one, should be used when determining the nature of the religious beliefs to which an exemption attaches.

2. Wording which unnecessarily restricts which religious organisations can make use of the exemption should be avoided.

Religious organisations may structure themselves in a variety of ways. In some cases the religious worship, proselytising and social welfare aspects of a religious organisations may be fused in the one organisational and legal structure. In others they may be contained in separate legal entities. The reasons a religious organisation may choose to structure itself in this ways is also likely to vary, from historical or

\(^{36}\) Barker, Rebutting the Ban the Burqa Rhetoric, above n 22, 199 – 201.

\(^{37}\) (2014) 308 ALR 615.
theological reasons, to reasons of convenience or to take advantage of other legal rights and opportunities.

A religious organisation should not be penalised in the exercise of its right to freedom of religion, on behalf of its members, as a result of the organisational structure they have chosen to adopt. For example the requirement in the New South Wales Anti-Discrimination Act 1977 that a religious organisation be ‘a body established to propagate’ the religion arguably limits the exception to proselyting arms of a religious organisation and may excludes social welfare arms who are established to help those in need rather than spread the particular faith, although they may, of course, do so indirectly.

Terms such as ‘church’ should also be avoided. Australia is a multi-faith society and any terms which is typically only associated with one, or a small number of faiths, should be avoided so that the exemptions are able to apply to religious organisations of all faiths.

3. The wording should not imply that religious belief and practice is in some way unusual. Freedom of religion is a fundamental human right not an exception to the law.

The use of the term ‘exemptions’ can be problematic in this space as it implies that religious organisations are breaking the law and are being allowed to do so either because they are in some way special or because they are in some way unusual and the law is therefore providing some special accommodation.

As outlined above freedom of religion is a fundamental human right, it is therefore no different to other fundamental human rights. ‘Exemptions’ are an appropriate mechanism to ensure that those with religious beliefs can continue to practice their faith to the fullest extent possible with in a democratic secular country like Australia while at the same time respecting other fundamental human rights more broadly.

In drafting and talking about these kinds of provisions we are limited by the English language. Neil; Foster has, for example, suggest that these clauses could be referred to as ‘balancing clauses’ rather than as exemptions which may more accurately capture
their role in safeguarding freedom of religion.\textsuperscript{38} However whatever terminology is chosen to refer to the clause themselves, in drafting these legal exemptions to anti-discrimination laws care should be taken not to exacerbate this problem via the words and phrases chosen. Words such as ‘religious susceptibilities’ are examples of the current language used which tend to suggest special treatment rather than the protection of a fundamental human right.

In addition to the three exceptions which are generally included in all anti-discrimination laws relating to the selection, training and employment of religious leaders\textsuperscript{39} a provision of the following form would provide consistency across all jurisdictions:

\begin{quote}
Nothing in this Act affects –

Any other act or practice of a body established for a religious purpose, being an act or practice which is consistent with the doctrines, tenants or beliefs of the religion.
\end{quote}

The phrase ‘body established for a religious purpose’ should be defined broadly. The term has recently been used in the amendments to the \textit{Marriage Act 1961} (Cth) and is defined in that Act as having the same meaning as that used in section 37 of the \textit{Sex Discrimination Act 1984} (Cth). Consistent use of terminology across legislation dealing with freedom of religion issues has much to recommend it. However, the \textit{Sex Discrimination Act 1984} (Cth) does not explicitly define ‘body established for religious purposes.’ Instead it relies on the common law definition of the phrase. Unfortunately, there continues to be some inconsistency and doubt as to the breadth of the phrase.\textsuperscript{40} A suitable definition which could be inserted into either the \textit{Sex Discrimination Act}, State based anti-discrimination legislation or a hypothetical national anti-discrimination act may be:

\begin{quote}
\textbf{Body established for a religious purpose} includes a body established to propagate, carry on or otherwise conduct the religious and related activities including but not limited to social outreach and welfare, the holding and management of property, the raising of funds including through commercial operations and the conduct and
\end{quote}


\textsuperscript{39} See for example \textit{Equal Opportunity Act 1984} (WA) s 72(1) – (3).

\textsuperscript{40} Elphick, above n 18, 166 – 167.
management of religious worship of any religion, including any sect, denomination or sub-group within a religion.

The phrase ‘act or practice which is consistent with the doctrines, tenants or beliefs of the religion’ should be defined as a subjective test so as not to require judges to embark on a theological enquiry. A suitable definition may be:

**Act or practice which is consistent with the doctrines, tenants or beliefs of the religion** are those doctrines, tenants or beliefs which the particular body established for a religious purpose concerned holds.

**Use of Exemptions**

As outlined above one of the ways in which the freedom of religion of religious organisations is protected is via exemptions in state and commonwealth anti-discrimination laws. These permit the religious organisation to discriminate on the basis of otherwise protected attributes such as religion, gender, marital status or sexuality. This is often particularly relevant in the training and employment of staff and/or volunteers. These exemptions permit religious organisations, including religious schools, to discriminate in the employment of staff filling ostensibly secular roles.

While those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them this only highlights an important difference between those of faith and those who are not. Taking the example of a gardener a person who has no religion is likely to see the role as being the care and maintenance of the religious organisations grounds and gardens. However the care of the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring God’s creation. Similarly the role of receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious organisation and individuals the role could be seen as the first contact between those seeking spiritual guidance and the religion involved. The difficulty faced by those of faith in understanding the religious nature of ostensibly secular roles is summed up in the quote from Thomas Aquinas:
To one who has faith, no explanation is necessary. To one without faith, no explanation is possible.

Exemptions which permit a religious organisation to discriminate in relation to staff in ostensibly secular roles impinge upon the rights and freedoms of others. Most obviously they infringe upon a potential employee’s right not to be discriminated against. They may also impinge upon other second generation rights such as the right to seek and gain employment. Given this an argument could be mounted that the religious organisation’s freedom of religion should be abrogated in the interests of protecting the rights and freedoms of other. However there is another option which would assist in balancing the rights and freedoms of others with the right to freedom of religion: transparency. A requirement of this nature could also be required for the advertisement of goods and services by religious organisations and in relation to the admission of students at religious schools.

Where a religious organisation intends to make use of an exemption contained in the relevant anti-discrimination act they could be required, in the advertisement of any position of employment, to state that they may make use of the exemption in their hiring decisions. The advantage of such a requirement is that potential employee are alerted to the fact that they may be lawfully discriminated against before they submit an application to the religious organisation. In effect they can choose not to waste their time applying for a position they are unlikely to be selected for.

The requirement to be transparent in the use of exemptions would also open their use up to greater public scrutiny. At the moment no such requirement for transparency exists. As a result while religious organisations may be making use of an exemption they also may not be. It is only when a dispute arises, where an individual believes that the exemption applied by the religious organisation was done so unlawfully, that public debate and therefor scrutiny can occur. Equally where a religious organisation chooses not to make use of an exemption this too would be a matter of public record. Those who interact with these religious organisations would then have the necessary knowledge to make informed decisions about their continued interactions.

A requirement for transparency in the use of exemptions should be drafted simply and not require the religious organisation to state specifically the religious belief or practice on which they rely in order to take advantage of the exemption. For example a suitable provision for inclusion in the relevant anti-discrimination acts may be:
Where a religious organisation intends to rely on [insert relevant section and subsection number] of the Act in relation to employment a statement in the following form must be included in the advertisement of the position of employment.

[name of religious organisation] may make use of the exemptions provided in [insert relevant section and subsection number] of the [insert name of Act].

For example an advertisement for employment by a hypothetical Christian Church which wishes to make use of the exemptions in the Western Australian Equal Opportunity Act 1984 (WA), as currently written, would read:

Christian Church XYZ may make use of the exemptions provided in section 72 of the Equal Opportunity Act 1984 (WA)

As outlined above a similar provision could be drafted in relation to the advertisement of goods and services, the employment of staff by religious schools and the admission of students to religious schools.

Freedom of Religion Not Freedom to Discriminate

Holding and practicing religious beliefs which are out of step with mainstream society is often difficult. Those from minority faiths often find aspects of their faith and the practice of the religion in conflict with the general law. Often this conflict is inadvertent and the law in question does not intend to restrict religious practice but does so because the particular religious belief was not considered in the drafting of the law. In other cases, even where the religious belief was considered, there are good public policy reasons for imposing that restriction on a minority religious practice.

Christians, who have historically been the majority faith in Australia,\(^4\) are now beginning to experience some of the difficulties faced by minority faiths in the past. Although Christianity is still the dominant faith in Australia, Christians can no longer assume that law and policy setting will necessarily conform to their beliefs and practices. Nor can they assume that all Christians will hold the same beliefs in relation to important public issues. Both of these factors have been highlighted in the recent same-sex marriage, euthanasia and abortion debates.

However in seeking to protect their freedom of religion those of faith must be careful not to convert a legitimate demand for freedom of religion into a demand for freedom to discriminate. Freedom of religion is just one of many human rights and where these are in conflict balance must be found. Freedom of religion has never been absolute. For example Article 18(3) of the *International Covenant on Civil and Political Rights* states that:

> 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.  

It is for this reason that I have not recommended and do not advocate extending the exemptions to cover individuals and businesses.

While freedom of religion may be subject to limitations and the freedom must not be converted to a freedom to discriminate care must also be taken not to push it aside in a bid to protect the rights and freedoms of others. As I have said elsewhere:

> As those who self-identify as having no religion rightly claim protection in the form of freedom from religion and a voice in public debates on matters of belief, we must be conscious not to trample on freedom of religion at the same time. While Christianity, as the majority faith of Australia, has been able to "look after itself" until now, with its waning majority we must be careful not to trample the religious freedom of Christians in the rush include new and different voices in public debate.

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Manning Clarke famously characterized religion in Australia as, and perhaps is increasingly, a "whisper in the mind and a shy hope in the heart." As the balance between the "nones" and those of faith shifts, we must be careful not to drown out this shy voice. In finding our way forward as a nation, the solutions at which we arrive will be a uniquely Australian balancing act - and all the richer for being so.  

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