



A REPORT INTO RELIGIOUS LIBERTY IN AUSTRALIA

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PROVIDED TO THE RELIGIOUS FREEDOM REVIEW EXPERT PANEL

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1. Introduction

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other’s beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society.”

Lord Nicholls¹

Beliefs and convictions – whether religious or otherwise – are a fundamental part of what makes each individual unique. These convictions inform what a person believes is right and wrong, which form moral obligations to do what is right. The ability to respond to that obligation and to speak and act in accordance with a person’s moral determination is a fundamental right – freedom of conscience. The alternative – being compelled to do what a person believes is morally wrong – is morally unjust.

But while religious liberty is a fundamental freedom in its own right, it is not a standalone concept. In order to conscientiously live in accordance with a religious worldview, several other basic freedoms are essential. Religious freedom is therefore best considered a bundle of rights, the most basic of which is freedom of speech. It is not possible to have freedom of religion without the freedom to propagate religious ideals without the threat of legal censure or restriction.

The inescapable conclusion then is that to protect religious liberty, you must protect freedom of speech and association. This means that laws such as section 18C of the *Racial Discrimination Act 1975* need to be repealed.

The IPA has long defended the fundamental right to freedom of speech. The organisation’s objection to laws like section 18C predates the introduction of section 18C itself, when the *IPA Review* published the article ‘The case against racial defamation laws.’² In 2016 the IPA published *The Case for the Repeal of Section 18C*, which collects the various philosophical and practical reasons the Commonwealth government should repeal section 18C. The principles that are relied on in that report are also used in this research report.

Of course, the IPA’s defence of free speech extends beyond section 18C: to name just a few, IPA research has informed public debate on the Gillard Labor government’s proposed 2012 changes to federal anti-discrimination laws, the 2012 Finkelstein Independent Inquiry into Media and Media Regulation, the powers of the Australian Communications and Media Authority, internet filter proposals, bans on gambling, fast food and billboard advertising, obscenity laws, blasphemy laws, restrictions on union political donations and participation, cyberbullying controls on social media and internet trolls, internet data retention regimes, and even laws against offensive plant names.³

Ensuring religious liberty would not, as some Coalition government ministers have claimed in the context of the same sex marriage debate, open the door to Sharia law.⁴ Under Sharia law,

1 *R (Williamson) v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246, [15].

2 Terry Moran, ‘The Case against Racial Defamation Laws,’ (1992) 45(2) *IPA Review* 13-15.

3 See appendix 1 of Chris Berg et al, *The Case for the Repeal of Section 18C* (Institute of Public Affairs, 2016) and www.ipa.org.au.

4 David Crowe, ‘Warning over Sharia Law in push for Religious Freedom,’ *The Australian*, 21 November 2017 <<https://www.theaustralian.com.au/national-affairs/warning-over-sharia-law-in-push-for-religious-freedom/news-story/7e5d52ec5aa6ff24148715d7eb397af2>>.

clerics make the law and impose a religious orthodoxy across society. In a liberal democracy like Australia, church and state are separate, and parliament makes the law. Under such a system, a multiplicity of faiths – or no faith at all – are permitted to exist.

However, the litany of laws that restrict speech, association, and liberty of contract – predominantly in anti-discrimination legislation – impose a burden on religious freedoms and diminishes our liberal democracy.

This paper aims to explain the fundamental principles underlying the concept of religious liberty, and to explain how the current methods and other proposals to protect this liberty are deficient or fail to achieve their goals.

2. Principles of Religious Liberty

Australian courts have described religious liberty as “the paradigm freedom of conscience” and the “essence of a free society,”⁵ and is a fundamental right because Australian “society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.”⁶

Many of the earlier ideas about freedom of religion in Europe concerned the ability of people to observe different religions (at the time, many European kingdoms had established state churches). They were also fundamentally utilitarian. Voltaire believed that permitting diversity of religion was essential to maintaining peace in English society.⁷ English philosopher John Locke’s *A Letter Concerning Toleration*, penned in 1689, outlined how to “distinguish exactly the business of civil government from that of religion.” Locke discussed the inefficacy of government efforts to restrict religious practices to produce desirable results: on the one hand, Locke believed the civil government could not command a person’s conscience, and thus could not command the spiritual good of the nation. Additionally, Locke argued that state persecution of religion led not to social unity, but unrest.⁸

James Madison, before he was a principal drafter of the United States Constitution, objected to mere religious toleration when in 1776 it was proposed to be included in a new constitution for the Commonwealth of Virginia. Madison considered toleration to imply religious freedom a gift dispensed by the government, as opposed to a natural and inalienable right.⁹ Madison was later a key drafter of the First Amendment to the US Constitution, that provided that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” which later inspired the drafters of the Australian Constitution to include a similar provision under section 116 (albeit in a form that has been applied more narrowly by the High Court, as discussed in part 3.1 of this paper).

Despite its rich history, there is often confusion regarding what exactly religious liberty is. This chapter aims to explain the fundamental principles of religious liberty and to explain why it should be protected.

2.1. What is religious liberty?

Broadly speaking, religious liberty refers to the right of individuals, either alone or as a community, to actively seek and maintain a relationship with the divine. A helpful definition was provided by Justice Dickson, in a decision handed down by the Supreme Court of Canada in 1985:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination. But the concept means more than that.

⁵ *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785, 787.

⁶ *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75, [560].

⁷ François Marie Arouet de Voltaire, ‘Letter VI – On the Presbyterians’ in *Letters on the English* (1734) viewed at <<http://www.bartleby.com/34/2/6.html>>.

⁸ John Locke, *A Letter Concerning Toleration* “... I know that seditions are very frequently raised upon pretence of religion, but it is as true that for religion subjects are frequently ill treated, and live miserably. Believe me, the stirs that are made proceed not from any peculiar temper of this or that church or religious society, but from the common disposition of all mankind, who when they groan under any heavy burthen endeavour naturally to shake off the yoke that galls their neck...”

⁹ Joseph Loconte, ‘James Madison and Religious Liberty,’ Heritage Foundation, 16 March 2001.

Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his volition and he cannot be said to be truly free.¹⁰

In other words, there are two fundamental elements to the concept of religious liberty. The first is that it requires the absence of government coercion or control that impacts the ability of members of a religious community to express a religious worldview through speech and action. The second is that religious liberty, in practice, does not refer to a standalone concept. Rather, as Ryan T. Anderson & Sherif Girgis note, “freedom of religion and conscience are part of a delicate ecosystem of liberties that include freedom of speech and association”¹¹ being unique but complementary freedoms that enable a person to live and associate with others in a way that accords with their conscience. Professor Patrick Parkinson refers to the following five basic freedom essential to religious freedom:¹²

- The freedom to manifest a religion through religious observance and practice
- The freedom to appoint people of faith to organisations run by faith communities
- Freedom to teach and uphold moral standards within faith communities
- Freedom of conscience to discriminate between right and wrong
- Freedom to teach and persuade others.

Understood as a bundle of complementary freedoms, there are a vast number of laws that, *prima facie*, don't appear to be directed at inhibiting the free exercise of a religious life, but do so in a more general or incidental way. However, this is no less serious. For instance, section 17 of the *Anti-Discrimination Act 1998* in Tasmania creates a general prohibition on certain kinds of offensive and insulting speech based on a number of characteristics outlined in section 16, such as race, age, sexual orientation and 19 others. There is no obvious directive in the law to silence religious speech, but few would doubt that the religious freedom of Catholic clergy was impacted in Tasmania in 2015 when the state Anti-Discrimination Commissioner decided the Catholic Archbishop of Hobart had a case to answer following a discrimination complaint made under section 17 for the publication and distribution of a booklet to parents of Catholic schoolchildren outlining the Church's view on the definition of marriage.¹³

We can understand from this then that a society that upholds religious liberty should uphold what Anderson and Girgis call the entirety of 'delicate ecosystem' of freedoms, the paramount of which is freedom of speech.

2.2 You can't have religious liberty without freedom of speech

Freedom of speech and religious liberty are inextricably linked. The freedom to hold a religious worldview is practically useless if a person is not permitted to express and promote that worldview.¹⁴ One only needs to consider the case of Julian Porteous (explained above at 2.1) that

10 *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 336.

11 Ryan Anderson & Sherif Girgis, 'Against the New Puritanism' in John Corvino, Ryan Anderson and Sherif Girgis, *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017) 109-10.

12 Patrick Parkinson, 'A national Agenda for Religious Freedom' (2000) available at <<http://www.ea.org.au/site/DefaultSite/filesystem/documents/public%20policy/A%20NATIONAL%20AGENDA%20FOR%20RELIGIOUS%20FREEDOM.pdf>>.

13 See for instance, Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case,' *The Australian*, 13 November 2015 <<https://www.theaustralian.com.au/national-affairs/state-politics/catholic-bishops-called-to-answer-in-antidiscrimination-test-case/news-story/b98439693f2f4aa17aca9b46c7bda776>>.

14 Subject to long-standing common law rules against defamation and the counselling or incitement of criminal offences.

freedom of speech is fundamental to religious liberty. John Roskam touched on this in the IPA's comprehensive 2016 paper *The Case for the Repeal of Section 18C*:

Without freedom of speech there can be no freedom of religion, or freedom of association, or freedom of intellectual inquiry. Freedom of speech is not merely the human right to say something – it is the right to listen and hear what's said. Freedom of speech is also the right to disagree and argue back.¹⁵

Any law that affects an individual's ability to fully participate in society diminishes human dignity and social cohesion.¹⁶ As the IPA explained in 2016, 'free speech also contributes to solidarity by limiting the frustration that people may feel if they are unable to express themselves,' and this is no less true for people who are expressing a view based on a religious belief.¹⁷ Even where that belief is deemed an "unpopular" view – for instance the belief that marriage is limited to a man and a woman – it is better for society if that society fosters an environment where people are able to voice those thoughts, rather than be silenced and left to stew in resentment.

2.3 Understanding the separation of church and state

John Locke's *A Letter Concerning Toleration* was an influential document that informed the understanding of religious liberty among the founding fathers of the United States, and in particular Thomas Jefferson.¹⁸ Locke wrote *Toleration* in the aftermath of a period of great conflict and religious persecution in England. Religious toleration was proposed on the one hand as a solution to the social unrest at the time, arguing the ability to practise different religious beliefs would make the citizenry less aggrieved. Another key theme from *Toleration* is the concept of the separation of church and state. According to Locke, the government and the church (or churches as the case may be) are "perfectly distinct and infinitely different"¹⁹ entities with differing interests. In other words, the state is concerned with the "civil rights and worldly goods" but cannot in practice command conscience, and therefore cannot command the spiritual good of society.

Thomas Jefferson adopted Locke's ideas, as demonstrated in this excerpt from his *Notes on the State of Virginia*:

Our rulers can have authority over our natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others.²⁰

Unfortunately, the concept of the separation of the church and state has been misused by secular campaigners to justify limits on religious freedoms.²¹ However, this is plainly ahistorical: the separation of church and state is a fundamental precondition to freedom of religion.

15 John Roskam, Foreword to *The Case for the Repeal of Section 18C* (Institute of Public Affairs, 2016) 4.

16 Chris Berg et al, *The Case for the Repeal of Section 18C* (Institute of Public Affairs, 2016) 23-24.

17 Ibid. Also see John Locke, *A Letter Concerning Toleration* (1689).

18 Michael Rieger, 'The Right of Conscience: From Locke to Jefferson,' *Libertarianism.org*, 30 June 2017 <<https://www.libertarianism.org/columns/right-conscience-locke-jefferson>>.

19 John Locke, *A Letter Concerning Toleration* (1689) 24, 47-48.

20 Thomas Jefferson, *_Notes on the State of Virginia_* (Digital Facsimile of the manuscript copy of 1785 edition, Massachusetts Historical Society) 95.

21 The Secular Party of Australia is a typical example, which regards the separation of church and state as "the essence of secularism" and the absence of which renders Australia a "pluralistic theocracy": <https://www.secular.org.au/the-separation-of-church-and-state/>.

2.4 The unique threat to religious liberty from discrimination law

Since religious liberty is intrinsically comprised of several other fundamental liberties, the range of laws that can conflict with religious freedom is very broad. Any law that threatens freedom of conscience, freedom of association and others have the potential to restrict freedom of religion.

Examples of areas of laws that have an impact on the freedom to express a religious viewpoint include (but are certainly not limited to) anti-vilification laws (for instance, the Porteous case under Tasmania law, discussed in an earlier section of this paper, and the Catch the Fires Ministries case²²), laws prohibiting vigils outside of facilities that perform abortion services,²³ and restrictions on street preaching.²⁴ John Roskam highlighted the unique danger of anti-discrimination laws in the context of the Porteous case, noting how that dispute went beyond the right to express a religious viewpoint but demonstrated how anti-discrimination laws are "bigger threat to freedom of speech than outright regulation or control of the media because they're so insidious and because they affect everyone... [these] laws are now also chilling this country's political process."²⁵

Anti-discrimination instruments are a significant area of law that have a unique impact on religious freedoms. These instruments establish generally applicable prohibitions on behaviour that is discriminatory against another person because of protected attributes. Where anti-discrimination instruments protect certain attributes, such as sex, sexual orientation and gender identity, this can conflict with the ability to faith based organisations and individuals who run small businesses to operate in accordance with their faith and conscience. A key example in Australian law was a case brought against Christian Youth Camp Limited, that operated a number of faith-based camp facilities in Victoria. Cobaw Community Health Service Limited successfully sued CYC in 2014 under the provisions of the *Equal Opportunity Act 1995* (Vic) when it was refused to accept a booking from Cobaw to hire the camp facility for the use of same sex attracted young people. The Victorian Civil and Administrative Tribunal and the Court of Appeal Victoria found that CYC had engaged in unlawful discrimination. Leaving aside the particular circumstances of the case, the decision sets out a number of principles that limit the ability of faith-based groups to discern who they enter into business relations with, and exposes them to other restrictions, such as employment decisions.

There is a considerable amount of precedent from other jurisdictions about how similar discrimination instruments interact with religious freedoms of individuals and others. A small bakery in the United Kingdom was penalised under Northern Irish sexual orientation regulations for refusing to decorate a cake (for a political event) iced with the words "Support Gay Marriage".²⁶ In the Canadian province of British Columbia, the Trinity Western University had its accreditation revoked (later overturned) by the provincial law society for requiring students to agree to enter into a covenant to "abstain from... sexual intimacy that violates the sacredness of marriage between a

22 See *Catch the Fires Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 where a Christian group addressing a Christian audience was sued under section 8 of the *Racial and Religious Tolerance Act 2001* for inciting contempt for the Islamic faith.

23 See *Reproductive Health (Access to Terminations) Act 2013* (Tas), which prohibits certain activities within a 150 metres of abortion clinics; *The Health (Patient Privacy) Amendment Act 2015* (ACT) establishes "protected areas" of 50 metres around abortion clinics; *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic), which establishes 'safe access zones' of 150 metres around abortion premises.

24 See for instance, *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, where the High Court upheld a by-law of the City of Adelaide that prohibited preaching or distributing printed material on any road without a permit.

25 John Roskam, 'No-go topics are shaping our politics' *The Australian Financial Review*, 1 October 2015 <<http://www.afr.com/opinion/columnists/nogo-topics-are-shaping-our-politics-20151001-gjywab>>.

26 *Lee v McArthur, McArthur & Ashers Baking Co Ltd* [2016] NICA (24 October 2016).

man and a woman.²⁷ Florists,²⁸ bakers,²⁹ photographers,³⁰ and wedding venue operators³¹ have been sued under state discrimination instruments in the United States in recent years for refusing to participate commercially in same sex wedding ceremonies. This will likely become a significant issue in Australia following the passage of law to expand the definition of marriage, as such a change necessarily expands the scope of 'marital status' discrimination protections.

Most discrimination instruments include some form of limited exemptions for religious purposes. However, these are inadequate to protect religious freedoms. The justifications and deficiencies of these exemptions are discussed in part 3.4 of this paper.

2.5 What are the limits of religious liberty?

In a judgment in the United Kingdom House of Lords, Lord Nicholls noted that

there is a difference between freedom to hold a belief and freedom to express or 'manifest' a belief. The former is a right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified.³²

Qualification to the manifestation of religious liberty should be expected because in some cases religious practices may impact others. The question then becomes, what amounts to impact that can be justify legal intervention? Some have suggested that some actions that have no tangible effect on another person, but have a dignitary effect or the perpetuating of moral stigma, requires a legal solution. However, as Anderson and Girgis explain, this has an exceptionally broad reach, particularly as it relates to the exercise of religious liberties:

...[C]lipping our liberties for imposing dignitary harm would actually require trimming the whole field of religious liberty (and other civil liberties), and not just that small corner of conscience claims centred on complicity in the shadow of a culture war. In a diverse society, after all, religious liberty always creates moral stigma. Religious freedom includes nothing if the rights to worship, proselytise, and convert – forms of conduct (and speech) that can express the conviction that outsiders are wrong.³³

Prohibiting dignitary harm is not only impermissibly broad, but achieves the opposite goal. As the IPA explained in relation to section 18C of the *Racial Discrimination Act 1975*, "dignity" is conceptually impossible to adjudicate sensibly and "necessarily arbitrary, emphasising some sensibilities while failing to account for others."³⁴ Rather, individual autonomy and dignity are conceptually inseparable: laws that require some people to sacrifice their autonomy for the dignitary benefit of others satisfies neither – the loss of autonomy is itself a loss of dignity. Instead, universal rules that formally treat people equally is the foundation of dignity. The creation of legal privileges in anti-discrimination laws undermines formal equality and dignity.³⁵

Restricting religious freedoms to protect against dignitary harms means choosing to make the space for religious freedom so small as to extinguish it altogether.

27 *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423.

28 *State of Washington v Arlene's Flowers Inc* (Wash, No 91615-2, 16 February 2017).

29 *Klein v Oregon Bureau of Labor and Industries*, 289 Or. App. 507 (2017).

30 *Elane Photography LLC v Willock*, 309 P3d 53 (NM, 2013).

31 *Gifford v McCarthy* (NW Sup Ct Appellate Divn, 3rd Dept; 14 January 2016; matter no 520410).

32 *R (Williamson) v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246, [16].

33 Ryan Anderson & Sherif Girgis, 'Against the New Puritanism' in John Corvino, Ryan Anderson and Sherif Girgis, *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017) 170.

34 Chris Berg et al, *The Case for the Repeal of Section 18C* (Institute of Public Affairs, 2016) 20-21.

35 Ibid.

3. The inadequacy of current religious liberty protections

There are several methods in Australian law that are commonly referred to as a sort of protection for religious liberty.

3.1 The Australian Constitution

Prior to and in the aftermath of the same sex marriage postal survey, several commentators and politicians attempted to allay the concerns about the impact of changing the law would have on religious liberty by referring to the purported protection contained in section 116 of the Australian Constitution.³⁶

Section 116 of the Australian Constitution reads:

Commonwealth not to legislate in respect of religion

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.

There are two significant factors that make section 116 an unreliable protection for religious freedoms. Firstly, section 116 is explicitly a restriction on the Commonwealth governments. It provides no protection from laws passed by State parliaments, which incidentally is where the threat to religious freedoms principally arises.

Secondly, the High Court has interpreted this provision quite narrowly. In the Court's view, the limb restricting the Commonwealth from making a law 'prohibiting the free exercise of any religion' refers to laws that have a direct, explicit purpose of restricting religious practices. Essentially this permits the Commonwealth to pass laws that incidentally affect those practices, particularly where there is a compelling government interest. The main principles of section 116 were laid out in *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) where Chief Justice Latham explained that in interpreting the provision account had to be taken of other important interests, meaning a law restricting religious liberty could be valid if it was not an 'undue' restriction that was aimed at achieving an important government interest.³⁷ The Court reaffirmed in the 1997 case of *Kruger v Commonwealth* that Section 116 will only apply where a law has a purpose to prohibit religious freedom, with Justice Gaudron stating that 'it makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws' that restrict that same freedom.³⁸

Notably, the Tasmanian state constitution also contains a provision that guarantees freedom of religion. However, this provision has not been tested in the courts.

³⁶ Paul Kelly, 'Same sex marriage debate must produce a bill for religious freedom,' *The Australian*, 27 September 2017 <<https://www.theaustralian.com.au/opinion/columnists/paul-kelly/same-sex-marriage-debate-must-produce-a-bill-for-religious-freedom/news-story/165c988622984a8fea7e8fc388a2af5c>>.

³⁷ 67 CLR 116, 128.

³⁸ *Kruger v Commonwealth* (1997) 190 CLR 1.

3.2 Anti-detriment provisions

In the midst of the same sex marriage debate, some supporters of religious liberty proposed introducing religious anti-detriment laws alongside amendments to the *Marriage Act 1961*. An anti-detriment provision would effectively be an anti-discrimination measure by another name, and would not secure religious freedom. This attempt to give to religious Australians a kind of legal privilege would likely be ineffective or backfire, as the IPA explained in 2017:

[Anti-detriment provisions represent] a concerning step towards a privilege framework where faith-based complainants embrace victim status to justify using the power of the state to bring to bear against their oppressors.

Not only is this futile for Christians – according to the proponents of identity politics Christianity is a historical institution of oppression that can never benefit from victimhood status – this framework really only benefits the state, where ultimately everyone loses out on freedom.³⁹

3.3 A charter of rights

The State of Victoria and the Australian Capital Territory both have enacted statutory human rights charters that purport to protect certain activities or freedoms from legislative restriction. These instruments are effective only as symbolic statements in the law in support of the principles contained within the document. However, even the symbolic value is diluted by including in the charter values that effectively conflict with the values underlying religious freedom, such as the right to protection against discrimination.

Notably, the Victorian charter does not create a legal right for a person to challenge laws that restrict their freedoms. Additionally, the charter includes a proviso that such rights can be overridden when it is necessary and reasonable, and the Victorian parliament can pass any law that expressly overrides the charter.

3.4 International law

The Commonwealth government has undertaken to be bound by a number of international treaties and agreements that relate to civil liberties such as freedom of religion. The most significant in this area is clause 18 of the International Covenant on Civil and Political Rights (the ICCPR).

Even if relying on international law was desirable as a means to protect religious liberty, it is nonetheless ineffective. International treaties are not automatically incorporated into domestic law – they must be implemented by the Commonwealth parliament, relying on the Constitutional external affairs power. Although Australia is a signatory to the ICCPR, the instrument has not been implemented by the government.

Arguably, the courts may interpret ambiguous terms or phrases in legislation in a way that complies with international laws. This was specifically applied in *Minister for Immigration and Ethnic Affairs v Teoh*,⁴⁰ where the High Court accepted the view that a breach of natural justice had occurred where the immigration department at the time failed to invite an affected party to make a submission on whether a deportation order should be made, allegedly contrary to the Convention on the Rights of the Child. However, this has not been applied in relation to clause 18

39 Morgan Begg, 'The Right Way to Debate Religious Freedom,' (2017) 69(4) *IPA Review* 51, 53.

40 (1995) 183 CLR 273.

of the ICCPR. Regardless, this mechanism for protecting religious liberty has several shortcomings, such as:

- The statute being challenged needs to be of such ambiguity that the Court would permit itself to consider international treaties
- Australia is a signatory to many treaties, some of which cut across each other. Relying on international treaties gives to a judge discretion which treaty will apply in a certain dispute. The legal community is sympathetic to positive rights and discrimination law⁴¹, and there should be no expectation that the courts will back negative rights contained under the umbrella of religious liberty.
- Rule by international treaty is anti-democratic and less accountable, and should be opposed on principle.

3.5 Exemptions in discrimination laws

While anti-discrimination laws at a state and federal level and similar instruments are the primary area of conflict for freedom of religion, many of those laws include provisions that, in a limited number of circumstances, shield churches and faith-based organisations (such as schools or social welfare agencies). These exemptions are commonly limited to the extent where the so-called discriminatory activity of the church or faith-based body is “reasonable” to comply with the doctrines of that religion. For instance, educational and other bodies established for a religious purpose are exempt under sections 37 and 38 of the Commonwealth’s *Sex Discrimination Act 1984* where its acts or practices conform to the “doctrines, tenets or beliefs” or “teachings” of that religion or is “necessary to avoid injury to the religious susceptibilities of adherents of that religion”. This language is emulated in the anti-discrimination laws of the states.⁴² In the absence of broader protections for religious liberty, these exemptions are certainly justified. However, they are deficient in several ways, as this section will explain.

3.5.1 The justification for exemptions

Exemptions for religious institutions are important for both religious institutions as well as wider society. Religious institutions and communities frequently engage in important services by operating schools and hospitals, as well as a multitude of welfare services to poorer Australian. If the law makes it onerous – or impossible – for religious communities to undertake these important activities by demanding they conform to particular views on gender equality and sexual identity politics, society risks driving these religious communities out of the public sphere altogether.

More fundamentally, exemptions are especially important for religious bodies, as their employment decisions and decisions of who to associate with are essential to retaining their religious character. Faith based schools for instance are established to pass on their values to the next generation. These schools require autonomy over who can be employed in that school in order to ensure its religious character is not diminished, and to ensure students are given a religious education that many parents expect when they enrol their children in such schools. To take these choices away from religious bodies would also risk driving these religious communities

41 See for instance the comments from the peak Australian legal representative body in response to proposals to include protections for religious freedom in the 2017 amendments to the *Marriage Act 1961*: Law Council of Australia, ‘New Bill an Extraordinary Winding Back of Anti-Discrimination Laws Under Cover of Same-Sex Marriage’ (Media Release, 13 November 2017).

42 Anti-Discrimination Act 1977 (NSW) s 56; Equal Opportunity Act 2010 (Vic) ss 80-84; Anti-Discrimination Act 1991 (Qld) s 109; Equal Opportunity Act 1984 (WA) s 73; Equal Opportunity Act 1984 (SA) ss 50, Anti-Discrimination Act 1998 (Tas) ss 50, 52.

from the public sphere, and in the process denying a fundamental right to freedom of religion.⁴³

As religion is marginalised in the public square, it remains to be seen that these exemptions will be enough to sustain religious freedom.

3.5.2 How exemptions are not sufficient to protect religious liberty

While some form of exemption for religious acts and practices are necessary to protect religious liberty in the current legal landscape, there are several shortcomings of exemptions in their current form. This paper has identified 3 key limitations.

1. Scope of exemptions is limited to religious institutions

Exemptions typically don't apply to individuals or proprietors of commercial enterprises who want to engage in a profit-making enterprise but to do so in a way that enables to live in accordance with their conscience and religious beliefs. As the outcome of *Christian Youth Camps v Cobaw* demonstrates, even a faith based body that is established for a religious purpose but incorporates for whatever reason does not necessarily satisfy the legal requirements of being so established. As explained in part 2.4 of this paper, there is a considerable amount of precedent demonstrating the threat to individuals and small business operators from anti-discrimination instruments.

2. Requires courts to make determinations on what legitimate religious beliefs are

Since most exemptions in anti-discrimination laws are limited to the reasonable acts and practices that conform to certain religious doctrines or beliefs, it requires the courts to make determinations on what legitimate religious beliefs are. In *Christian Youth Camps v Cobaw Community Health Service*,⁴⁴ the majority of the Supreme Court of Victoria effectively lectured the faith-based group on how it should have interpreted its own faith, with the majority concluding that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Apostles' Creed and Nicene Creed, neither of which mentioned sexual activity.⁴⁵ Redlich JA in dissent noted how improper this was:

Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety. The tribunal was neither equipped nor required to evaluate the applicants' moral calculus.⁴⁶

But the majority did nonetheless. The Court concluded that Christian Youth Camps could not make use of the religious exemptions, as it was not a body established for a religious purpose. Inevitably, the nature of the exemptions as drafted invite the judiciary to make theological determinations from a secular perspective, often on matters of significant public debate.

43 Neil Foster, "'Exemptions' in discrimination laws applying to churches" on *Law and Religion Australia* (21 May 2016) <<https://lawandreligionaustralia.blog/2016/05/21/exemptions-in-discrimination-laws-applying-to-churches/>>.

44 [2014] VSCA 75.

45 Neil Foster, 'Victorian challenge to religious freedom of faith based organisations' on *Law and Religion Australia* (8 September 2016) <<https://lawandreligionaustralia.blog/2016/09/08/victorian-challenge-to-religious-freedom-of-faith-based-organisations>>.

46 *Christian Youth Camps v Cobaw Community Health Service Limited* [2014] VSCA 75, [574].

3. Structure of the laws makes exemptions vulnerable to attack

Defending exemptions in the law is a politically difficult exercise. This is due to the structure of the law that essentially forces advocates for liberty to instead defend legal loopholes for religion.

The nature of discrimination laws is to reverse the presumption of liberty. This refers to the assumption that, absent of a specific law, a person is presumed to have the ability to act freely, to associate freely, and to live according to their conscience. Anti-discrimination laws make a sweeping declaration that broad categories of conduct are illegal, and puts the onus on the acting parties to justify why their conduct should enjoy the benefit of an exemption.

Despite this reversal, many secular commentators and activists view these exemptions as loopholes that confer an unfair legal privilege to religious institutions. This is an unfair characterisation: to explain these exemptions as akin to a loophole or a privilege is a gross distortion of those words. For instance, a legal privilege refers to a special right in the law created for a particular class or group of people. The main prohibitions contained in anti-discrimination laws that confer a special legal right on particular groups to initiate litigation against others would be more appropriately described as a privilege. The retention of freedom from those same laws via an exemption – a freedom that existed prior to the creation of such laws – cannot be properly regarded as a privilege.⁴⁷

The consequence of structuring the law in this form is that the remaining exemptions for religious liberty are vulnerable to maintain. At the Commonwealth level, the Australian Labor Party and The Greens have both now proposed reviewing or removing religious exemptions to anti-discrimination laws, with the ALP 2016 election platform declaring that “no faith, no religion, no set of beliefs” should ever be used as an instrument of discrimination.⁴⁸

47 Morgan Begg, ‘The Right Way to Debate Religious Freedom,’ (2017) 69(4) *IPA Review* 51, 52.

48 The Greens 2016 election platform included a policy to remove “religious exemptions to federal anti-discrimination law”. The ALP 2016 election platform stated that “Labor will review national anti-discrimination laws to ensure that exemptions do not place Australians in a position where they cannot access essential social services.” (ch 9, p 139).

4. The path forward for protecting religious liberty

Religious beliefs affect every aspect of the lives of many people. As such, laws that can affect how a person is able to live according to those religious beliefs can be found in a wide range of areas of law. From health and medicine, education, business and employment and participation in public debate, the scope of laws that could infringe on the religious freedoms of a person is potentially without limit and unknowable.

With several national reviews and inquiries having now been conducted in relation to religious liberty,⁴⁹ it is now time for the state and federal governments of Australia to address the concerns raised in those inquiries and in this report to begin repealing laws that affect the ability of people to freely exercise their religious beliefs. This report provides a starting point for reformers by identifying the major areas of concern regarding the protection of religious liberties. In particular, the following three issues must be addressed:

- **Freedom of speech:** Protecting religious freedom would require at the first instance securing freedom of speech, by repealing section 18C of the Commonwealth *Racial Discrimination Act 1975*, as well as similar state anti-vilification laws and local laws that unduly restrict activities like street preaching. It would also mean abandoning the current so-called donation law reform which would expand the disclosure requirements for any entity that incurs a certain amount of expenditure for making public comments about an issue that is likely to be before electors in an election.
- **Freedom of association:** Laws that undermine freedom of association or restrict decisions about employment business relationships with is a significant threat to religious freedoms. Addressing this would require the repeal of most, if not all anti-discrimination instruments currently in force. In the absence of wholesale repeal of anti-discrimination laws, the narrow exemption provisions for religious organisation should be redrafted as a general protection for freedom of conscience for all Australians, including individuals and businesses.
- **Freedom of education:** Religious values are an intrinsic part of our Western heritage, but similar to the legacy of Western Civilisation, religion is unmentioned or treated negatively in Australia's aggressively secular National Curriculum. The right of parents to inculcate their values to the next generation consistent with liberal democratic values, must be protected.

Undertaking these reforms are important on a number of levels. Allowing people to exercise religious beliefs is analogous to freedom of conscience. This goes to the heart of what it means to be an individual and is the elementary human right inherent to each person. It is also beneficial for society that religious practices and beliefs are allowed to flourish. Aside from charitable works and the provision of public services, religious morality is an important bulwark against an oversized state, as Alexis de Tocqueville noted.⁵⁰

49 *Article 18: Freedom of Religion and Belief* (Australian Human Rights Commission, 1998); *Conviction with Compassion: A Report on Freedom of Religion and Belief* (House of Representatives, 2000); *Freedom of religion and belief in 21st century Australia* (Australian Human Rights Commission, 2008-2011); *Freedoms Inquiry* (Australian Law Reform Commission; 2014-16); *Inquiry into the status of the human right to freedom of religion or belief* (Parliamentary Joint Committee; 2016-17); *Religious freedom review* (Department of Prime Minister and Cabinet, 2017-18)

50 See historian Ralph Raico's commentary of de Tocqueville in Ralph Raico, *The Place of Religion in the Liberal Philosophy of Constant, Tocqueville, and Lord Acton* (Ludwig von Mises Institute, 2010) 57-106.

Even more broadly, these reforms would address a wider point about the state of Australian democracy. No discussion of these issues can legitimately take place without acknowledging the centrality of freedom of speech to religious freedoms. Restrictions on speech about religious issues inevitably flow into political debates and questions of political processes. Accordingly, freedom of religious speech is not distinct from freedom of speech more generally, and is no less fundamental to a liberal democratic society as Australia was designed to be.

The vulnerability of religious liberty highlights again the wider vulnerability of many of the fundamental rights that taken for granted in Australia. For instance, the IPA's annual audit of Commonwealth legislation reveals that fundamental legal rights such as the presumption of innocence and the right to silence are persistently and increasingly undermined by federal and state governments.⁵¹ Securing religious liberties may not ensure the health of Australia's liberty democracy in every respect, but it is clear that to ensure the health of Australia's liberal democracy, securing religious liberty is a crucial part of that agenda.

⁵¹ See most recently Morgan Begg, 'Legal Rights Audit 2017' (Institute of Public Affairs, Occasional paper, 2017).

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