'FROM THE EXCEPTION TO THE RULE: DIGNITY, *CLUBB V EDWARDS*[1] AND RELIGIOUS FREEDOM AS A RIGHT'

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Freedom of religion in Australia is in a state of flux. New factors are contributing to the flux. They include: the Royal Commission into Institutional Responses to Child Abuse, the same-sex marriage debate; the Ruddock Expert Panel Report on freedom of religion; the convictions of high-profile prelates and their appeals; the High Court decision in Clubb v Edwards*; and the Federal government response to the Ruddock Report in the form of draft Bills. Responses to each have been tribalistic. One matter of principle that has emerged is the role of human dignity in Australian human rights discourse.*

***Key Words**: freedom of religion – dignity – ICCPR Article 18(3) – statutory interpretation – implied freedom of political discourse - populism – tribalism*

I INTRODUCTION

Freedom of religion in Australia is in a state of flux. It has been so for most of Federation's history.[2] Recently, however, new factors have contributed to the flux. The findings of the Royal Commission into Institutional Responses to Child Abuse[3] adversely affected the standing of religion in the community.[4] During the same-sex marriage debate that coincided with the postal survey in 2017, issues of freedom of religion and expression arose.[5] The Ruddock Expert Panel (the Panel) was appointed to inquire into freedom of religion in Australia.[6] This led to the

[1] Clubb v Edwards; Preston v Avery [2019] HCA 11.

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[2] Renae Barker, State and Religion: The Australian Story (Routledge, 2018). See also Luke Beck, Religious Freedom and the Australian Constitution: Origins and Future (Routledge, 2018).

[3] The Honourable Justice Peter McClellan et al, Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report, 15 December 2017) vol 1-17.

[4] Timothy W. Jones, 'Royal commission recommends sweeping reforms for Catholic Church to end child abuse' The Conversation (online, 15 December 2017) <https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141>.

[5] Ruddock Committee Expert Panel, Cth, Religious Freedom Review: Report of the Expert Panel (2018) 13.

[6] Ibid.

Report of 2018 that made several recommendations.[7] One recommendation in the Report is that there be a positive right to protect religious belief or activity.[8] The Federal government responded to the Report but it is politically uncertain (at the time of writing) whether any of the recommendations or responses will be legislated.[9] The decision of the High Court in two cases challenging legislative restrictions on protests outside abortion clinics, *Clubb v Edwards* and *Preston v Avery,*[10] has introduced new questions regarding freedom of religion.

Until the decision in *Clubb*, there had been scarcely any consideration of the concept of 'dignity' in Australia. This contrasts with its role in international human rights norms and in the constitutional jurisprudence of other countries.[11] While it is true, as Mary Ann Glendon has observed,[12] that it is difficult to define, it has had an important role in the development of rights and freedoms. Rather than operating as a singular juristic concept, rights and freedoms have been articulated and enforced, informed by dignity. Much like other terms that are difficult to define in the abstract, such as 'equality', 'liberty', 'justice', 'rule of law', 'independence', and 'value', given a context, dignity assumes meaning from that context. In human rights law, it operates as an organising principle; it takes its meaning from the purpose to which it is put in respect of rights and freedoms the subject of the normative organisation.

The chameleon quality of 'dignity' is both its virtue and its vice. As Jeremy Waldron has warned, the invocations of 'dignity' in preambles of human rights conventions, constitutions, and in scholarly discourse are too often made loosely.[13] If any invocation is not seriously made, Waldron suggests it is merely

[7] Ibid 5-12.
[8] Ibid 10. See recommendation 16.
[9] Australian Government, Cth, Australian Government response to the Religious Freedom Review (December 2018) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>.
[10] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 Kiefel CJ, Bell and Keane JJ at [6], [47]-[48], [60] and [98]-[99]
[11] Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right (Cambridge University Press, 2015) chs 3, 4 and 5.
[12] Mary Ann Glendon, 'The Bearable Lightness of Dignity' (May 2011) First Things <https://www.google.com/url?q=https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity&sa=U&ved=0ahUKEwig5bOls8zhAhWh7nMBHQw3A8MQFggUMAg&client=internal-uds-cse&cx=012931863361944243753:ft8sxapyb_o&usg=AOvVaw1CWT6mDrX2pgeCvWDM4jX3>.
[13] Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (ed.s), Philosophical Foundations of Human Rights (Oxford University Press, 2015) ch 6. See also the following, cited by Waldron: Jeremy Waldron, 'Dignity and Rank' (2007) 48 European Journal of Sociology, 201; Michael Rosen, Dignity: Its History and Meaning (Harvard University Press, 2012); George Kateb, Human Dignity (Harvard University Press, 2011); Christopher McCrudden, 'Human Dignity in Human Rights Interpretation' (2008) 19 European Journal of

'a piece of decorative rhetoric'.[14] But as former President of the Israel Supreme Court, Aharon Barak, points out, 'human dignity' is now so much a part of human rights and constitutional discourse, that using it as a concept is now unavoidable.[15] Its re-emergence as a seminal concept in human rights has seen a rich legal and philosophical literature flourish.[16]

To just what use dignity may now be put in Australia is the subject of this article. The Ruddock Review identified issues of dignity and a right to freedom of religious belief and activity.[17] If the dignity of religious believers is to be respected, the question is whether it can be by a series of exceptions and exemptions from the operation of discrimination laws.[18] For their dignity to be respected, should there now be a positive right to religious belief and activity, as suggested in the recommendation made by the Ruddock Expert Panel?[19]

Consideration of 'dignity' as part of Australian jurisprudence proceeds in the following parts. In Part 2, its role in human rights instruments and constitutions is examined. In Part 3, the recent High Court decision in *Clubb* is considered for its treatment of the concept of 'dignity'. In Part 4, consideration is given to how dignity and populism represent alternative approaches to reform in respect of religious freedom; and how recent legislative proposals are unclear as to their purpose. Finally, in Part 5, the article concludes that 'dignity', as a concept, could have a role in the conversion of a series of exceptions and exemptions to rights under anti-discrimination laws, but it remains too early to be certain whether that will be the case.

International Law, 655; Christopher McCrudden (ed.), Understanding Human Dignity (Oxford University Press/British Academy, 2013); George Fletcher, 'Human Dignity as a Constitutional Value' (1984) 22 University of Western Ontario, 178; Richard Rorty, Contingency, Irony and Solidarity (Cambridge University Press, 1989) 44–5 and 52–7; Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment (Farrar, Straus and Giroux, 2018).

[14] Ibid.

[15] See above n 11, 38-42; 114-135; 156-159.

[16] See, as examples: Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right (Cambridge University Press, 2015); Michael Rosen, Dignity: Its History and Meaning, (Harvard University Press, 2012); Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment, (Profile Books, 2018); Donna Hicks, Dignity: Its Essential Role in Resolving Conflict (Yale University Press, 2011).

[17] See above n 5, 14, 36, 47 and 62.

[18] Ibid 47.

[19] Ibid 10.

II PART 2: DIGNITY

Dignity is credited in international human rights law and constitutional instruments as a seminal source of rights and freedoms. In its preamble, the *Universal Declaration of Human Rights* (UDHR) links inseparably '*equal and inalienable rights'* and "…the *inherent dignity* of all members of the human family…"[20] This linkage of inherent human dignity with rights and freedoms is repeated in the preamble to *International Covenant on Civil and Political Rights* (ICCPR). The Council of Europe, in the *Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted the UDHR by reference as the foundation for the rights and freedoms provided for in the Convention and emulates the text of the ICCPR. Jurisprudence of the European Court of Justice refers to 'dignity' as a touchstone for rights in extreme violation cases.[21]

In the 1949 German constitution, *Die Grundgezetz für die Bundesrepublik Deutschland*, it is provided, at art. I (1): 'A person's dignity is inviolable. To protect it is the duty of all state authorities.'[22] 'Dignity' also features in other constitutions including the United Kingdom,[23] South Africa,[24] and Israel[25] and as a 'constitutional value'[26] in those of the United States[27] and Canada[28].

[20] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A8/10 (10 December 1948) Preamble, art 1.

[21] Antoine Buyse, 'Dignified Law: The Role of Human Dignity in European Convention Case-Law' (Speech, Utrecht University, 11 October 2016) available at: <http://echrblog.blogspot.com/2016/10/the-role-of-human-dignity-in-echr-case.html> discussing *Selmouni v France* (2000) 29 EHRR 403, Jalloh v Germany (2007) 44 EHRR 32, *Yarsolav Beslousov v Russia* [2016] ECHR 805, and *Christine Goodwin v UK* (2002) 35 EHRR 447.

[22] Die Würde des Menschen ist unantastbar. Sie zu schützen is Verpflichtung aller staatlichen Gewalt. The English translation in the text is that of the authors. See above n 11, ch 13.

[23] For the United Kingdom, see Eweida and ors v United Kingdom [2013] ECHR 37. See also Maria J Valero Estarellas, 'State Neutrality, Religion, and the Workplace', in W. Cole Durham Jr and Donlu Thayer, Religion and Equality: Law in Conflict, (Routledge, 2018) at 42-44; and Rex Ahdar, 'Same-Sex Marriage', in W. Cole Durham Jr and Donlu Thayer, op.cit. at 114.

[24] See above n 11, ch 14.

[25] Ibid ch 15.

[26] Ibid chs 5 and 6.

[27] Ibid ch 11. On the concept of 'dignitarian harm' in discrimination law in the United States, see Freedom' Edge – Religious Freedom, Sexual Freedom, and the Future of America (Cambridge, 2015), Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment, (Farrar, Straus and Giroux, 2018) at 66, 107 - 108;

[28] See above n 11, ch 12.

The concept of dignity is hardly new.[29] Its usage has a long pedigree in Western philosophy[30] and political theory,[31] tracing back to the Renaissance writings on *dignatis* by Giovanni Pico della Mirandola[32] and Gianozzo Manetti.[33] Modern writers widely credit Immanuel Kant as the source of the modern concept of human dignity: the requirement that all human beings be respected is inviolable and cannot be denied even to an evil person.[34] His continued influence can be seen in the work of Jeremy Waldron, [35] Jonathan Sacks, [36] Francis Fukuyama,[37] Michael Rosen,[38] and Donna Hicks.[39] His influence is also evident in the drafting of international and constitutional documents.

Churches and other religious bodies have also acknowledged 'dignity' as a foundation of fundamental rights, especially religious freedom.[40] The 1965 declaration on freedom of religion, made during the last phase of Second Vatican Council, *Dignitatis humanae*,[41] opens with the words: "[a] sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty."[42]

[29] Remey Debes, (ed.), Dignity: A History (Oxford University Press, 2017). See also Michael Rosen, Dignity: The History and Meaning, (Harvard University Press, 2012).
[30] Ibid.
[31] Jonathan Sacks, The Dignity of Difference: How to Avoid a Clash of Civilisations, (Bloomsbury Publishing, 2002). See also Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment (Profile Books, 2018) above at n 16.
[32] Giovanni Pico della Mirandola translated by A. Robert Caponigri, 'Oration on the Dignity of Man' (Gateway Editions, 1996).
[33] Brian Copenhaver, 'Dignity, Vile Bodies, and Nakedness: Giovanni Pico and Gianozzo Manetti', in Remey Debes (ed.) Dignity: A History (Oxford University Press, 2017) ch 5.
[34] Oliver Sensen, Kant's Conception of Human Dignity (de Gruyter Kantstudien-Ergänzungshefte, 2011, No. 166), 174-212. See also Doris Schroeder, 'How to define dignity and its place in human rights – a philosopher's view' (9 August 2017) The Conversation <https://theconversation.com/how-to-define-dignity-and-its-place-in-human-rights-a-philosophers-view-81785>.
[35] See above n 13.
[36] Jonathan Sacks, The Dignity of Difference: How to Avoid the Clash of Civilisations (Bloomsbury, 2002).
[37] Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment (Profile Books, 2018) chs 4 and 5.
[38] Michael Rosen, Dignity: Its History and Meaning (Harvard University Press, 2012).
[39] Donna Hicks, Dignity: Its Essential Role in Resolving Conflict (Yale University Press, 2011).
[40] Ibid. See also John W O'Malley, What Happened at Vatican II, (Harvard University Press, 2008) ch 7.
[41] John W O'Malley, What Happened at Vatican II, (Harvard University Press, 2008) ch 7.
[42] See the Holy See's website at: <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>.

The Russian Orthodox Church has echoed this sense of human dignity in its *Basic Teaching on Human Dignity, Freedom and Rights*,[43] declaring that "… human rights theory is based on human dignity as its fundamental notion." Similarly, the World Council of Churches has affirmed that it "…works to defend human dignity by addressing human rights from an ethical and theological perspective."[44] The Islamic Network Group has likewise affirmed respect for human dignity in its *First Principles of Religion*, along with freedom of thought and expression, and respect for freedom of religion as fundamental to the religious beliefs of all major faiths.[45]

'Dignity' is central to the 2018 *Punta Del Este Declaration on Human Dignity for Everyone Everywhere*, made to commemorate the 70th anniversary of the *UDHR*.[46] The Declaration is co-sponsored and promoted by diplomat Ján Figel', Special Envoy for Promotion of Freedom of Religion outside the European Union, [47] and church-sponsored religious liberty advocacy group, the International Center for Law and Religion Studies.[48]Although the Declaration, has, of itself, no legal force, its text is anxious to remind readers of the centrality of dignity in international human rights law, harking back repeatedly to the UDHR and, by inference, to the ICCPR and other instruments descending from the UDHR.

Bearing in mind Waldron's warning of its potential use as a mere rhetorical device, it is nevertheless, evident that 'dignity' is undergoing a resurgence in international and constitutional law. So, given the state of flux in which religious freedom finds itself in Australia, the question arises whether 'dignity' has any potential relevance as a juristic principle in Australian domestic law. If so, just what might it be? A compelling case could be made from the extra-judicial

[43] The Russian Orthodox Church, Department for External Church Relations, 'Human dignity as religious and ethical category', The Russian Orthodox Church (Web Page, 2019) <https://mospat.ru/en/documents/dignity-freedom-rights/i/>.

[44] World Council of Churches, 'Human rights: Human rights to enhance human dignity', World Council of Churches (Web Page, 2019) <https://www.oikoumene.org/en/what-we-do/human-rights>.

[45] See First Principles of Religion: Human Dignity, Freedom of Expression, and Freedom of Religion at ING's website at: <https://ing.org/first-principles-religion-human-dignity-freedom-expression-freedom-religion/>.

[46] See website and the Declaration at: <http://dignityforeveryone.org/>.

[47] European Commission, 'Special Envoy Ján Figel'' (Press Release, European Commission, May 2018) <https://ec.europa.eu/europeaid/special-envoy-jan-figel_en>.

[48] See The International Center for Law and Religion Studies at Brigham Young University, Provo, Utah, USA website at: <https://www.iclrs.org/>.

writings of appellate judges[49] that common law and equitable doctrines of remedies are calculated to re-instate, in monetary terms, dignity lost as a consequence of wrong-doing or unconscientious conduct.[50] But the logical place to start for current purposes is the recent decision of the High Court in *Clubb v Edwards*; *Preston v Avery*,[51] given that 'dignity' features so prominently in the reasons of the Court.

III PART 3: *CLUBB V EDWARDS; PRESTON V AVERY*

The High Court heard two appeals from convictions for breaches of prohibitions regarding communications within abortion clinic 'access zones', *Clubb v Edwards* and *Preston v Avery*.[52] They had been removed, respectively, from the Supreme Court of Victoria and the Supreme Court of Tasmania. The Court unanimously dismissed both appeals. In both cases, the appellants failed in their challenges to two laws prohibiting certain communications and activities in relation to abortions in 'access zones' around abortion clinics.

Section 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('the Victorian Act') prohibits a person from communicating in relation to abortions in a manner able to be seen or heard by persons accessing or attempting to access premises at which abortions are provided, if the communication is reasonably likely to cause distress or anxiety. Section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) ('the Tasmanian Act') prohibits protests in relation to terminations that are able to be seen or heard by a person accessing premises at which terminations are provided. The two prohibitions applied within a radius of 150 metres from the abortion clinic.

Clubb had been convicted in the Magistrates Court of Victoria under section 185D of the Victorian Act. Preston had been convicted in the Magistrates Court of Tasmania under section 9(2) of the Tasmanian Act. The appellants challenged their convictions on the ground that each of the respective provisions was invalid. They contended that each provision impermissibly burdened the implied

[49] See, for example, Justice Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (The Sir Ninian Stephen Lecture, 29 April 2016) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj29apr2016.pdf>; and Chief Justice Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (Speech, Centre for Comparative Law, Faculty of Law, University of Hong Kong, 20 October 2016) <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020>.

[50] Ibid.

[51] Ibid.

[52] See the summary and reasons for decision at the Court's website at: <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2019/hca-11-2019-04-10.pdf>.

freedom of communication on governmental and political matters.[53] Both challenges fell to be resolved under the test for invalidity from in *Lange v Australian Broadcasting Corporation*[54] as explained in *McCloy v New South Wales*[55] and *Brown v Tasmania*[56]. That threefold test was set out by Nettle J in *McLoy*;[57]

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Applying the *McLoy* test, the majority on the third element of the test[58] held that the Victorian Act, imposed a burden that was justified by its legitimate purpose, namely the protection of the safety, wellbeing, privacy and dignity of persons accessing lawful medical services. That view was based upon the conclusion that the law was proportionate.[59] In the reasons of the plurality,[60] the third step of the *McLoy* test was satisfied because it had a "…rational connection to the purpose…there [was] no obvious and compelling alternative, reasonably practical, means of achieving the same purpose…"[61] Other members of the Court[62] considered that the challenge to the communication prohibition should be dismissed on factual grounds.[63] It had not been established that Clubb's conduct of handing out the pamphlet involved any political communication. The Tasmanian Act, it was unanimously held, was justified in the burden it imposed.

[53] Ibid.
[54] (1997) 189 CLR 520; [1997] HCA 25.
[55] (2015) 257 CLR 178; [2015] HCA 34.
[56] (2017) 261 CLR 328; [2017] HCA 43.
[57] See *Clubb* at [4] to [5] where the reasons of Kiefel CJ, Bell and Keane JJ cite *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] as modified by *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104]. See also *Browne v Tasmania* (2017) 261 CLR 328 at 375-376 [155]-[156], 416 [277], 478 [481].
[58] Kiefel CJ, Bell and Keane JJ (as a plurality) and Nettle J, concurring in separate reasons.
[59] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 Kiefel CJ and Bell and Keane JJ at [61]-[74]; Gageler J at [157]-[161]; Nettle J at [266]; Gordon J at [389]-[404].
[60] Ibid, Kiefel CJ, Bell and Keane JJ at [6].
[61] Ibid.
[62] Ibid, Gageler J at [162], Gordon J at [389] and Edelman J at [408].
[63] Ibid.

Its legitimate purposes included the protection of the safety, wellbeing, privacy and dignity of persons accessing premises at which abortions are provided and ensuring unimpeded access to lawful medical services.

The issue of dignity arose directly from the wording of the respective statutory provisions under challenge. Section 185A of the Victorian Act has as its purpose "…to protect the safety and wellbeing and *respect* the privacy and *dignity*" of people accessing services and those employed to provide them. Section 185C emphasised the object of 'dignity' by setting out principles that apply to Pt 9A. Among those principles was the re-iteration that the services were an entitlement; [64] that each "person's safety and wellbeing' needed to be protected;[65] and that there needed to be respect for 'the person's privacy and dignity".[66]All members of the Court made reference to dignity in their reasons, but it was in the reasons of the plurality, (with whom Nettle J agreed on the third *McLoy* step), that the significance of dignity was examined in the most detail.

The plurality stressed that significance, first, by reference to the Second Reading speech[67] and observing that 'privacy' and 'dignity' are closely linked.[68] It was noted by their Honours that *the* protection of dignity was an aspect of the purpose of the communication prohibition.[69] Their Honours also cited with approval the extra-judicial writings of former President of the Supreme Court of Israel, Aharon Barak, where he said: "Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole [70] …[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others." [71]

Their Honours went on to observe that the prohibition was consistent with the concept of dignity and placing a limitation, by prohibition, upon the implied freedom of political communication:

> Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person…Within the present

[64] Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015 (Vic) s 185C(a).
[65] Ibid s 185C(b)(i).
[66] Ibid s 185C(b)(ii).
[67] Clubb v Edwards; Preston v Avery [2019] HCA 11 at [47]-[48].
[68] Ibid.
[69] Ibid.
[70] *The Judge in a Democracy* (2006) at 85 (footnotes omitted), cited in Monis v The Queen (2013) 249 CLR 92 at 182-183 [247]; [2013] HCA 4.
[71] *The Judge in a Democracy* (2006) at 86, cited in Monis v The Queen (2013) 249 CLR 92 at 182-183 [247].

> constitutional context, the protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom[72], is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Thus, when in Lange[73] the Court declared that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia", there was no suggestion that any member of the Australian community may be obliged to receive such information, opinions and arguments.'[74] (Footnotes as in the original. Emphasis added with the exception of 'obliged', which is emphasis from the original).

Later in the reasons, their Honours reiterated the competence of Parliaments to pass laws to prevent communications that would offend dignity:

> Further, a law that prevents interference with the privacy and dignity of members of the people of the Commonwealth through co-optation as part of a political message is consistent with the political sovereignty of the people of the Commonwealth and the implied freedom which supports it[75].
>
> … The implied freedom is not a guarantee of an audience; a fortiori, it is not an entitlement to force a message on an audience held captive to that message[76]. As has been noted, it is inconsistent with the dignity of members of the sovereign people to seek to hold them captive in that way.
>
> A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message accords with the political sovereignty which underpins the implied freedom[77]. A law that has that effect is more readily justified in terms of the third step of the *McCloy* test than might otherwise be the case. (Footnotes as in the original)[78]

While not stated in either the statute or the reasons of the High Court, but, as it appears, was in fact so in the instant case, the reasonable anticipation would be that those most likely to test the limits of the prohibitions would be motivated

[72] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17]; *McCloy v New South Wales* (2015) 257 CLR 178 at 206 [42], 257 [215]-[216], 280 [303], 283-284 [317]-[318].
[73] (1997) 189 CLR 520 at 571.
[74] Clubb v Edwards; Preston v Avery [2019] HCA 11 at [51].
[75] Cf *McCloy v New South Wales* (2015) 257 CLR 178 at 206-207 [42] -[45], 220-221 [93].
[76] *Hill v Colorado* (2000) 530 US 703 at 729; *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449 at 723-724; *R v Spratt* (2008) 298 DLR (4th) 317 at 339-340 [82]-[84].
[77] *McCloy v New South Wales* (2015) 257 CLR 178 at 206-207 [42]-[45], 220-221 [93].
[78] *Clubb v Edwards; Preston v Avery* [2019] HCA 11 at [60]; [98]-[99]. See also [78], [82] and [101].

by religious belief. There is no express reference to ICCPR Article 18 in the reasons of the Court. But the reasoning of both the plurality and Nettle J is consistent with ICCPR Article 18(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.

With or without invocation of either the UDHR or ICCPR, the decision in *Clubb* has opened consideration of dignity as a part of Australian jurisprudence.

What the decision adds to current law on protection of political communication, apart from re-iterating the decision in *McLoy* on the three-stage test, is that the implied freedom in the Federal Constitution may be limited by State laws when the protection of dignity is at stake, whether or not the political communication has a religious motivation.

IV PART 4: WHERE TO WITH DIGNITY, LIBERTY, AND EQUALITY?

A *A Choice: Dignity or Tribalism*

Seeing disputes through a lens of dignity is unfamiliar in Australian human rights discourse. Prior to *Clubb*, dignity received no treatment in appellate decisions. In a human rights context, dignity has the potential to change Australian human rights discourse. By adopting a paradigm with dignity as the objective, the tone of any debate would change. Opponents would be regarded as humans seeking recognition and dignity. This, at least, is a central contention in Donna Hicks' *Dignity: Its Essential Role in Resolving Conflict.*[79] Dignity, as a social value, conduces to liberal democracy by respectfully seeking both to liberate and treat equally, rather than encouraging opponents to scramble for majoritarian advantage. Speaking in terms of human dignity would bring Australia into better alignment with international human rights norms.

Francis Fukuyama, in *Identity: The Demand for Dignity and the Politics of Resentment*,[80] has characterised the culture wars as a struggle for dignity. Among other examples, Fukuyama cites same-sex marriage as an endeavour to gain dignity:

> Take, for example, the gay marriage movement, which has spread like wildfire across the developed world in the first decades of the twenty-first century. This

[79] See above n 39.
[80] See above n 37, 16.

> does have an economic aspect, having to do with rights of survivorship, inheritance, and the like for gay or lesbian unions. However, many of those economic issues could have been and were in many cases resolved through new rules about property in civil unions. But a civil union would have had lower status than a marriage: society would be saying that gay people could be together legally, but their bond would be different from that between a man and a woman. This outcome was unacceptable to millions of people who wanted their political systems to explicitly recognize the equal dignity of gays and lesbians; the ability to marry was just a marker of that equal dignity. And those opposed wanted something of the opposite: a clear affirmation of the superior dignity of a heterosexual union and therefore of the traditional family. The emotions expended over gay marriage had much more to do with assertions about dignity than they did with economics.[81]

Viewing same-sex marriage in dignitarian terms represents a major departure from the jingoistic and emotional debate in Australia during the recent plebiscite leading to the Parliamentary vote changing the law.[82] The 'no' case depended in large measure upon the slogan 'It's okay to vote no'; while the 'yes' campaign depended upon the inherent attraction of the concept of 'equality'. Arguments on both sides eschewed reason and espoused emotion. In that debate, as in other debates where the religious and non-religious points of view are opposed, discussion of human rights principles readily give way to populism and slogans. Opponents are considered enemies rather than interlocutors. Any concession in debate can be regarded as a betrayal. William Galston describes this as 'tribal sentiment', which he identifies as being among the various manifestations of populism that are destructive of liberal democracy.[83] He describes this tribalistic behaviour as manifest in the United States in terms that will be all too familiar to Australians:

> Populism is unambiguously and unashamedly tribal. It legitimates sentiments that liberal democratic principles suppress. This is one of its main sources of strength. Tribes ascribe merit to their members and inferiority to non-members, usually in stereotypical terms. This gives rise to the remarkably stubborn phenomenon of prejudice. Even when members of a tribe are persuaded through reason and experience that their prejudice is unwarranted, the sentiment persists. Populist

[81] Ibid.
[82] David Lipson, 'SSM Yes campaign in danger of going off the rails', ABC News (online, 22 September 2017) <https://www.abc.net.au/news/2017-09-22/ssm-yes-campaign-in-danger-of-going-off-the-rails/8975074>.
[83] William A Galston, Anti-Pluralism: The Populist Threat to Liberal Democracy (Politics and Culture) (Yale University Press, 2018) 132-3.

> politicians understand this and appeal to their supporters by giving voice to views elites regard as beyond the pale, gleefully violating a norm known in the United States as "political correctness." When leaders breach these restraints, it produces a sense of release for their followers, much as comedy does. It also encourages people to imitate their leaders, with dangerous consequences for individual security and social order. In circumstances of scarcity or threat, the dyad of same and different gives way to the dyad of friends and enemies.[84]

Just in which direction Australian human rights discourse will proceed, dignity or tribalistic populism, is an open question. But if history is any predictor of future conduct,[85] it will take some major shifts in perspective before dignity triumphs over tribalism. Some indication as to future direction may also come from the current debate on federal religious freedom legislation and whether populism triumphs over principle.[86]

B *Dignity, Liberty, and Equality in Australian Jurisprudence after Clubb*

Considering dignity as an organising principle in its human rights context internationally, at the apex of human rights regimes, and its recent treatment it received in *Clubb*, it is legitimate to inquire regarding its future in Australian human rights discourse in relation to liberty and equality. Dignity faces an uncertain future in Australia despite its treatment in *Clubb*. It has had scarcely any previous role before the Victorian legislation at the heart of the decision in that case. How it might be interpreted in other legislative contexts is not clear. Its future is also dependent in large measure upon how notions of equality and liberty develop in Australian law. This is so especially in the case of liberty where it is sought in the form of freedom of religion. The future of dignity also depends upon whether Australia adopts as part of its domestic law the international instruments that proclaim dignity as a fundamental key in the operation of other human rights norms.

Equality seems secure as a feature of the legal landscape. It is at the centre of anti-discrimination laws that protect minorities from unequal treatment. If

[84] Ibid.

[85] For a concise history of Australian debate on human rights, a bill of rights, and same-sex marriage, see Carolyn Evans and Cate Read, *Religious Freedom as an Element of the Human Rights Framework*, chapter 2 in Paul Babie, Neville Rochow, and Brett Scharffs (ed.s), Freedom of Religion or Belief: Creating Constitutional Space for Fundamental Freedoms (Forthcoming, Elgar, 2019).

[86] As to the tension between a populist and principled approach to freedom of religion, see the speech of Justice Derrington, 'Of Shields and Swords' (Speech, Freedom 19 Conference, 4 September 2019) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>.

anything, the likelihood is that equality will strengthen its grasp on human rights in Australia if and when more protected attributes are added to legislative regimes. Minorities who may face discrimination because of their race, age, marital status, gender, and sexual preference are already protected. But as other minorities are shown to be discriminated against because of distinguishing attributes, those attributes may also be protected by new laws.

And now, to be added to the list, it seems, is 'religious belief or activity in a range of areas of public life'.[87] Despite the current move towards a freedom of religion statute, it remains uncertain how the continued struggle for freedom of religion will fare. Religion, by its very nature, discriminates. It must do so in order to preserve the ethos that derives from any religious belief. Believers of any religion also seek to be free to declare and manifest their beliefs. But for statutory exemptions under anti-discrimination laws, the liberty to engage in certain religious practices that are discriminatory would collide with the equality granted by those laws. This is especially the case when the religious discrimination is against those of sexual minorities who possess protected attributes.[88]

There is no agreement in Australia as to how freedom of religion should be secured, or even whether it needs any further protection at all. While some argue for freedom of religion to be a right secured by a federal bill of rights,[89] others, vehemently opposed to anything resembling a bill of rights, seek some other solution.[90] Indeed, there is debate as to whether the claims of religious discrimination are not confected.[91] And there is an inquiry being conducted by the Australian Law Reform Commission regarding the ambit of existing religious

[87] Religious Discrimination Bill 2019 (Cth) cl 3.

[88] Neil Foster, 'Balancing Religious Freedoms Rights is not "Discrimination"' on Law and Religion Australia, Wordpress (17 November 2017) <https://lawandreligionaustralia.blog/2017/11/27/balancing-religious-freedom-rights-is-not-discrimination/>.

[89] See above n 85.

[90] Freedom for Faith, *Protecting Diversity: Toward a Better Legal Framework for Religious Freedom in Australia* <https://freedomforfaith.org.au/images/uploads/FFF_submission_Ruddock_Jan_15th.pdf>; Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion?', (2019) 93 ALJ 708. See also discussion in Carolyn Evans and Cate Read, Religious Freedom as an Element of the Human Rights Framework, chapter 2 in Paul Babie, Neville Rochow, and Brett Scharffs (ed.s), Freedom of Religion or Belief: Creating Constitutional Space for Fundamental Freedoms (Forthcoming, Elgar, 2019).

[91] See, for example, Martine Daley, 'Stop The Lies: The Trans-Woman At The Centre Of The Religious Freedoms Bill Speaks Out' New Matilda (online, , 30 September 2019) < https://newmatilda.com/2019/09/30/stop-the-lies-the-trans-woman-at-the-centre-of-the-religious-freedoms-bill-speaks-out/>.

exemptions in anti-discrimination laws and whether they are too broad.[92] The future of freedom of religion is Australia is thus far from secure.

C *The Government Response on Freedom of Religion*

Most recently, the federal government responded to the Ruddock Expert Panel recommendation that there be Commonwealth freedom of religion legislation.[93] It has done so by releasing Bills said to be responsive to the lack of protection for religious belief and expression. The legislation is still in draft and the subject of public comment. The significant feature of the draft legislation architecture is to prohibit religious discrimination. The government has, thus, sets its face against calls for a right to freedom of religion as either a stand-alone right or as a part of a bill or charter of rights. Apart from exposure to comment from the public, it has also yet to pass through Parliament, not all members of which are convinced of the need for such legislation. The proposed legislative package was released on 29 August 2019, featuring as its centrepiece the *Religious Discrimination Bill 2019* (Cth), which the government claims to provide comprehensive protection against discrimination on the basis of religious belief or activity.[94] The same Bill, if passed, would establish a new office of Freedom of Religion Commissioner.[95] This Bill purports to implement recommendations 15 and 19 of the Ruddock Report.[96] The second Bill in the package is the *Religious Discrimination (Consequential Amendments) Bill 2019* (Cth) which makes consequential amendments to existing Commonwealth legislation to support the introduction of the *Religious Discrimination Bill*. Third, the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth), if passed, would amend the *Charities Act 2013* (Cth) and the *Marriage Act 1961* (Cth) so as to provide certainty to charities and religious education institutions.

[92] Australian Law Reform Commission, 'Review into the Framework of Religious Exemptions in Antidiscrimination Legislation' (Media Release, Australian Law Reform Commission, 10 April 2019) <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.

[93] The Attorney-General for Australia's Department, 'Morrison Government delivers on religious reforms' (Media Release, Attorney-General for Australia, 29 August 2019) <https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx?fbclid=IwAR1PizVI_iZLtVyV6yE5id5UoAZPpUwTL35tbvfRONx6ojocwr_nsEkSETU>.

[94] Ibid.

[95] See above 54.

[96] See above n 54. The Ruddock Report is available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>.

The draft legislation has attracted a great deal of criticism. Part of the criticism is that the draft is *ad hoc*, responding to events and controversies rather than principle.[97] It would seem that the draft legislation has pleased few.[98] It is not appropriate here to rehearse those criticisms that have been made of the Bill. And it should be remembered that the Exposure Draft may bear little or no resemblance to the law that is ultimately passed. However, in the current context of a discussion of the relationships that dignity, liberty and equality have to each other, it is appropriate to draw attention to a matter that, so far, seems to have escaped major focus among critics: the objects clause.

It should be borne in mind that the Bill announces itself by its long and short titles to be an anti-discrimination law, nominating a protected characteristic. Anti-discrimination laws have as their purpose equality for those possessing a protected attribute; and do so in the circumstances described by the particular law. There may be exemptions permitting limited discrimination. But this is a limited freedom to discriminate, according to the terms of the exemption. Liberty, in the broadest sense, is not granted by anti-discrimination laws; rather it is granted by bills and charters of rights; or it may be granted by statutes that express themselves in terms of rights and freedoms as if part of such a bill or charter. Clause 3 seems, at least on one possible reading, to characterise the Bill as *both* an anti-discrimination law and a grant of broader rights and freedoms.

Clause 3(1) provides the objects of the Bill:

[97] *Religious Discrimination Bill 2019 (Cth)* cl 8(3). See: Michelle Grattan, 'Religious Discrimination legislation would hit big companies harder than small business', The Conversation (online, 29 August 2019) <https://theconversation.com/religious-discrimination-legislation-would-hit-big-companies-harder-than-small-business-122623>.

[98] See, for example: Rosie Lewis, ''Serious problems' put Anglicans off religious freedom bill' The Weekend Australian (online, 1 October 2019) <https://www.theaustralian.com.au/nation/politics/major-problems-with-draft-religious-discrimination-bill-says-anglican-church/news-story/7185821043fed70deb07e1608a46b341>; Judith Ireland, ''Harm bar' too high: Uniting Church warns on religious discrimination laws' The Sydney Morning Herald (online, 4 October 2019) <https://www.smh.com.au/politics/federal/harm-bar-set-too-high-uniting-church-warns-on-religious-discrimination-laws-20191003-p52x92.html>; Noel Towell, ''Sinful and dirty': Fears for women under new religious freedom laws' The Age (online, 4 October 2019) <https://www.theage.com.au/national/victoria/sinful-and-dirty-fears-for-women-under-new-religious-freedom-laws-20191004-p52xpm.html>; and Christian Schools Australia, 'Religious Freedom Legislation Package Released' (Media Release, Christian Schools Australia, 1 October 2019) <https://csa.edu.au/religious-freedom-legislation-package-released/>. See also preet, 'Splitting the Bill: How the feds could cut through division on religious freedom', Headlinez Pro (Blog Post, 16 Sep 2019) <https://headlinezpro.com/splitting-the-bill-how-the-feds-could-cut-through-division-on-religious-freedom/>.

> (1) The objects of this Act are:
>
> (a) to **eliminate**, so far as is possible, **discrimination against persons on the ground of religious belief or activity in a range of areas of public life**; and
>
> (b) **to ensure**, as far as practicable, **that everyone has the same rights to equality before the law, regardless of religious belief or activity**; and
>
> (c) to ensure that people can, **consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief**. (Emphasis added)

As would be expected from an anti-discrimination law, the clause nominates the protected attribute, 'religious belief or activity in a range of areas of public life'; this is not the same as the freedom granted by an exemption from a general prohibition against discrimination, (what Isaiah Berlin described as a 'negative liberty').[99] It is rather a positive right not to be the subject of .discrimination, the breadth of which depends upon how the clause is interpreted, Breadth depends upon the extent to which the Bill, if passed into law, would invoke Article 18 of the ICCPR. That Article confers the right to freedom of thought, conscience and religion. It is not a negative freedom one would expect to be conferred by an anti-discrimination statute.

The reference to "consistently with Australia's obligations with respect to freedom of religion and freedom of expression" appears not to be made merely for interpretive purposes. Australia has no federal bill or charter that would otherwise make the Covenant part of domestic law. It would appear this reference, veiled though it may be, betrays an actual intention to make the ICCPR part of domestic law by this very clause. This reading of the clause is consistent with the reference made in the phrase "with respect to freedom of religion and

[99] Isaiah Berlin, Liberty, 'Two Concepts of Liberty' (Oxford University Press, 2017) 168-169. See also Alan Ryan, 'Isaiah Berlin: Contested Conceptions of Liberty and Liberalism' in Joshua L. Cherniss and Steven B. Smith (1st ed, The Cambridge Companion to Isaiah Berlin, Cambridge University Press, 2018) 212, 216.

freedom of expression, and subject to specified limits…"; this could only be reasonably interpreted as an invocation of Article 18 (3) of the ICCPR:

> 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.

Clause 3(2) of the Bill[100] does not solve any mystery as to how the first sub-clause is to be interpreted. Neither sub-clause supplies specific references to international instruments. Instead, the reader is left to infer meaning from the phrases used in sub-clause 3 (2); and they also appear implicitly to invoke the ICCPR. In clause 3 (2) there are references to 'the indivisibility and universality of human rights' and 'the principle that every person is free and equal in dignity and rights'. The fact is that, in Australia, there is no such 'indivisibility' or 'universality' and no freedom and equality in 'dignity and rights'. That is there is none unless this legislation itself is purporting to make it so. Without invoking the ICCPR as part of Australian domestic law, what meaning or role could be given to 'dignity' in such an objects clause? Pursuant to what other legislative instrument could 'dignity' be invoked in relation to 'equality' and 'liberty' other than as the organising principle under the ICCPR?

To complete the reasoning that clause 3 may have wider effect than at first appears, it should be remembered in relation to the words 'Australia's obligations', that as an ICCPR State Party, Australia is indeed bound to implement rights and freedoms as contained in the Covenant.[101] It is a positive duty.[102] If the draft legislation is designed to discharge that duty, as it appears to be, not only does it adopt Article 18 as a part of domestic law, but, by necessary implication, also the ICCPR preamble, which provides for, *inter alia*, "recognition of **the inherent dignity** and **of the equal and inalienable rights** of all members of the human family is the foundation of freedom, justice and peace in the world." (Emphasis added.) Recalling Waldron's warning of the potential use of 'dignity' as a mere rhetorical device, one has to be cautious in dismissing the possibility that sub-clause (2) uses dignity as a mere flourish. Equally, one

[100] In giving effect to the objects of this Act, regard is to be had to:
(a) the indivisibility and universality of human rights; and
(b) the principle that every person is free and equal in dignity and rights.

[101] See above n 5, 25.
[102] Ibid.

must give meaning to the repeated references to language throughout the clause that would appear to invoke international human rights norms. Thus, it is at least arguable to say that the effect of clause 3 is to place dignity at the centre of the rights and freedoms the subject of the Bill.

As Kiefel CJ, Bell and Keane JJ noted in *Clubb*,[103] citing Barak, dignity is central to all human rights. It is both the source from which all other human rights are derived and what unites the human rights into a whole.[104] In keeping with Kantian doctrine, human dignity regards a human being as an end, not as a means to achieve the ends of others.'[105] In essence, dignity is the diametric opposite of populism and tribalism. Whether the Bill is a product of populism or instantiates dignity as its antidote remains to be seen.

V PART 5: CONCLUSION

Dignity is a relatively new phenomenon on the Australian human rights horizon. Its relationship to liberty and equality is yet to be considered. On one interpretation of the *Religious Discrimination Bill 2019* (Cth), should it become law, it represents a significant step for Australia to bring itself into alignment with its international obligations. If it does become law and that interpretation is accepted, it also would seem to accept dignity as an organising principle. If the Bill is construed to have adopted Article 18 of the ICCPR, there is an argument that dignity is also invoked as the unifying lodestar. But that would make the Bill much more than an anti-discrimination law. It will operate as if a provision in a bill of rights.

None of this is certain. The Bill has yet to pass through the public comment stage and debate in Parliament. Neither of those review processes is likely to be guided by principle. Rather, the forces of self-interest and tribalism are likely to have their influence. Even if clause 3 is left intact through those processes, how the law would be construed will depend upon the facts of the cases that present it for consideration and the arguments that are presented. And all of that remains to be seen.

All of the uncertainty regarding dignity, liberty, and equality could, of course, be overcome by clear wording in a bill of rights that expressly adopted

[103] Ibid at [47]-[48].
[104] *The Judge in a Democracy* (2006), 85 (footnotes omitted), cited in *Monis v The Queen* (2013) 249 CLR 92 at 182-183 [247]; [2013] HCA 4.
[105] *The Judge in a Democracy* (2006), 86, cited in Monis v The Queen (2013) 249 CLR 92 at 182-183 [247].

relevant covenants and international human rights instruments. Of all outcomes, that would seem the least likely.