

LEGISLATING FOR RELIGIOUS FREEDOM IN AUSTRALIA: NAVIGATING THE LONG AND WINDING ROAD

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This paper examines the underpinnings of religious freedom in Australia today. It does so by revisiting two High Court cases that explored the scope of section 116 of the Constitution and its impact on the law-making powers of the Commonwealth. It highlights afresh aspects of the state and federal anti-discrimination provisions that constrain religious expression. It examines the report of the Ruddock review into religious freedom carried out in 2018. It reviews the 2019 Israel Folau imbroglio. The paper concludes with some observations about the way in which the current religious freedom Bills proffered by the Morrison government for debate in 2020 do not disturb the symbiotic relationship that exists between religion and law in Australia today.

I INTRODUCTION

When anti-discrimination laws emerged around Australia four decades ago, exemptions were created to allow religious organisations to adopt a “business as usual” approach to their practices. However, the laws were not nuanced enough to tell the courts and administrative tribunals how to balance competing discrimination claims when they arose. They muddled through notwithstanding. But when the issue of marriage equality emerged in 2017, a religious freedom discussion began in earnest.

Over the last two years, debate on a preferred model of religious freedom (and the laws that may be needed) has raged. Legislation designed to guide Australia’s future on this subject is now before the federal parliament. This paper explores the way in which freedom of religion has evolved in this country. It argues that the symbiotic relationship between law and religion that existed at the time of British colonisation has never been expunged. It begins with a short historical overview.

II LAW AND RELIGION IN HISTORICAL CONTEXT

Law and religion are no strange bedfellows. Their histories have been interwoven into a symbiotic relationship over the centuries. Prior to the 18th century, there

was never any doubt that the English monarch ruled by 'divine right'.¹ Nor was there any official doubt in law that God existed.² Until the end of the 18th century, arguments based upon scriptural interpretations of the Bible were acceptable as evidence in the English courts. For example, on July 24, 1797, the case of *The King v Williams* came before the Court of King's Bench, Westminster, presided over by Chief Justice Lord Kenyon. Williams was on trial before a jury for publishing Thomas Paine's *The Age of Reason*. This was an offence because it was alleged that Paine was purporting to elevate human reason above the will of God. In 1794 Paine had written:

I put the following work under your protection. It contains my opinions upon Religion. You will do me the justice to remember that I have always strenuously supported the Right of every Man to his own opinion, however different that opinion might be to mine. He who denies to another this right, makes a slave of himself to his present opinion, because he precludes himself the right of changing it. The most formidable weapon against errors of every kind is Reason. I have never used any other, and I trust I never shall.³

These words were anathema to the authority of King George III. Clearly, then, *ipso facto* it was against the law to espouse them. Paine was not saying that the existence of God was a myth, but he wrote that the Bible was largely mythical, and that miracles were impossible. He was charged with blasphemy and brought before the court. After the evidence had been presented, Lord Kenyon addressed the jury as follows:

Gentlemen, we sit here in Christian assembly to administer the law of the land; and I am to take my knowledge of what the law is from that which has been sanctioned by a great variety of legal decisions. I am bound to state to you what my predecessors in Mr Wollaston's Case (2 Strange, 834) stated half a century ago in

¹ The theory may be traced to the mediaeval conception of God's award of temporal power to the political ruler. By the 16th and 17th centuries national monarchs were asserting their authority in matters of church and of state. The English royalist Sir Robert Filmer (*Patriarcha*, 1648) wrote that the Adam of the Book of Genesis was the first king and that Charles I ruled England as Adam's heir (*Encyclopaedia Britannica*, 15th edition, 1977, volume III, 583). The 'Glorious Revolution' abolished the concept of the 'divine right' and the British monarch reigns today in accordance with the laws made by parliament.

² Courtney Kenny, 'The Evolution of the Law of Blasphemy' (1922) 1(2) *Cambridge Law Journal* 127, 131.

³ Sic. <<http://www.deism.com/theageofreason.htm>>

this Court, of which I am an humble member, namely, that the Christian religion is part of the law of the land.⁴

The consequence of a King (or Queen) ruling by ‘divine right,’ and the determination that Christianity was part of the law of the land, was a co-mingling of theological and legal notions in the day to day running of the state.⁵ This tradition carried on into colonial times. Religious leaders continued to hold the highest positions of societal authority for at least the first three centuries of the American colonies notwithstanding their victory against the English in the War of Independence of 1776.⁶

Hence, any attempt to push law and religion apart from each other in post-colonial times was never going to be easy. An awkward legacy for the laws of Australia should not have been entirely unexpected. What we are left with today are an array of protections, privileges and practices (discussed below) that continue to draw law and religion closer together into a range of relationships despite a purported ‘separation’ of church and state.

It is with this background of awkward alliances and symbiotic relationships that the trajectory of freedom of religion in Australia today is now described, reviewed, and critiqued.

III RELIGION IN CONTEMPORARY AUSTRALIA: CENSUS DATA

In order to put freedom of religion in Australia in contemporary perspective, it is useful to begin with a snapshot of the demographic landscape on the subject of religion found in the 2016 Australian census. What we observe from the data is a general decline in religious observance over time. There is a consequence of this: when almost everyone was religious, there was little perception of a problem because the views of believers (principally Christian) consistently prevailed not only in political and legal terms, but in social policy terms also. Now that Christians constitute only about half of the Australian population, different issues arise.⁷

⁴ Evans Early American Imprint Collection, <<https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;idno=N24276.0001.001>>at 14.

⁵ Even to this day, the King or Queen of England is the official head of the Church of England. The Queen’s executive authority and her role as ‘Defender of the Faith’ remain inextricably mixed.

⁶ E Digby Baltzell, *Puritan Boston and Quaker Philadelphia* (Free Press, 1979) 335.

⁷ These ‘different’ issues largely centre upon the rights of minority groups to access equal treatment before the law, and to have their full identity recognised by the law. Rights and interests of minority groups were previously silenced or made invisible by the prevailing legal, political and social norms

The census revealed that:

- 30 per cent of Australian respondents declared ‘no religion.’
- 51 per cent of Australians declared that they honoured observance to the Christian religion.⁸
- 19 per cent of Australians declared themselves non-Christian adherents, the largest of which is 3 per cent Muslim, and 2.5 per cent Buddhist.

The upshot of this is that 70 per cent of Australian census respondents today refer to having a ‘religious’ life, or at least acknowledge that religion plays some role in their day to day existence.⁹ Consider also that five out of the last six Australian Prime Ministers have, and continue to declare publicly, a Christian faith.¹⁰ Indeed, the evangelical credentials of the current Prime Minister, Scott Morrison, are regularly on display.

IV THE CHURCH AND STATE IN AUSTRALIA TODAY

In order to critique the evolution of religious freedom in Australia, it is appropriate to place into the contemporary law and religion ‘mix’ two key underpinnings: the first, an international obligation, and the second, the reference to religious freedom that we find in the Australian Constitution.

Firstly, Australia is directed to the protection of religious freedom under Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) to which we are a signatory.¹¹

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or

informed by the dominant Christian culture. One example is the denial of gay and lesbian couples to marry. The same-sex marriage story is discussed below.

⁸ The majority of Christian respondents in 2016 were Catholic. Catholicism is the preferred religious affirmation of about a quarter of the Australian population.

⁹ It must be acknowledged that there is some flexibility in categorization here. It can be argued that those who chose the ‘no religion’ option may include people who have a spiritual belief but reject formal religion. By the same token those who chose the ‘religious’ option may simply be religious out of tradition (and attend at, say, special occasions) and not participate in regular observance.

¹⁰ John Howard, Kevin Rudd, Tony Abbott, Malcolm Turnbull and Scott Morrison. The exception is Julia Gillard.

¹¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966 <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/freedom-thought-conscience-and-religion-or-belief>>

private, to manifest his religion or belief in worship, observance, practice and teaching ...

Article 26 goes on to say:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, while acceded to by Australia, the ICCPR does not form part of Australian domestic law.¹² It is not entirely helpful to policy-makers either. Article 18 and Article 26 have been used variously by advocates from all sides of the religious freedom debate to provide the normative (and sometimes constitutional) basis for legislative reform, only to reach conflicting conclusions.

The second ‘underpinning’ is section 116 of the Australian Constitution which constrains actions of the Commonwealth government that may infringe upon religious liberty. It reads as follows:

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.

Having written a preamble to the Constitution acknowledging “Almighty God,”¹³ the framers decided to insert s 116 in order to prevent the Commonwealth from going any further than necessary with religious requirements and admonitions.¹⁴

The upshot of this insertion is that no religion can demand that the state, or its people, act in a religious way, or observe some particular religious rites (a situation that obtains, for example, in a theocratic nation such as Iran). At the same time, religions are protected from interference from the state.

¹² It also does not give absolute rights. It is subject to limitations necessary to ensure the rights of others, discussed below.

¹³ ‘Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established ...’

¹⁴ Luke Beck, ‘Clear and Emphatic: The Separation of Church and State under the Australian Constitution’ (2008) 27(2) *The University of Tasmanian Law Review* 2.

One would think, given the above, that it would be rare for the ‘church’ to bother the ‘state’ and for the ‘state’ to bother the ‘church.’¹⁵ But this ‘separation’ of church and state is largely illusory.¹⁶ Indeed, in Australia we find strong and inextricable legal, political and practical links between religion (read ‘Christian’) and the state, born out of our British colonial history¹⁷ and the pre-19th century legal and practical legacies discussed earlier.

There is indeed a significant amount of evidence to assist those advancing the argument that the church and state in this country are in more of a symbiotic relationship than a polarized one.¹⁸ It is upon this evidence that I now elaborate.

V NOT SEPARATION, RATHER SYMBIOSIS

In the paragraphs below, the large volume of evidence that supports an historical and contemporary symbiotic relationship is listed; that is, religions cannot do without the state, and the state cannot do without religion. In pursuing this line of reasoning, I identify a range of protections for religious organisations,¹⁹ a range of privileges for practising religious adherents, and a range of practices that obtain in Australian life that rely upon religious indemnities. I begin with the protections.

A Protections

Religious organisations, and hence their members, from time to time and under specified legislation, get special protections.²⁰ For example, under s 153 of the *Fair Work Act 2009* (Cth) it is unlawful for an employer to take adverse action against a person who is an employee or prospective employee because of the following attributes of the person: ‘[R]ace, colour, sex, sexual preference, age, physical or mental disability, marital status family or [a] carer’s responsibilities,

¹⁵ Refer to the DOGS case discussed below. See also Alex Deagan, ‘Secularism as a Religion: Questioning the Future of the ‘Secular’ State’ (2017) 8 *The Western Australian Jurist* 31, 64.

¹⁶ The ‘separation’ of church and state is only one aspect of religious freedom. See W. Cole Durham Jr and Brett G Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Wolters Kluwer, 2010).

¹⁷ The colonial history rode roughshod over what we now know to have been sophisticated legal systems developed by numerous Indigenous peoples over the previous 60,000 years, see *inter alia* Bruce Pascoe, *Dark Emu*, (Magabala Books, Broome: WA, 2018), 186-190.

¹⁸ See *Church of the New Faith v Comm. Pay-Roll Tax (Vic.)* (1982-1983) 154 CLR 120, 149, per Murphy J.

¹⁹ Primarily but not exclusively Christian.

²⁰ Renae Barker, ‘Burqas and Niqabs in the Courtroom: Finding Practical Solutions’ (2017) 91(2) *Australian Law Journal* 225.

pregnancy, *religion*, political opinion, national extraction or social origin’ (emphasis added).

Moreover, various pieces of legislation in several jurisdictions serve to protect those who may be discriminated against based on their religious observance. As the Australian Human Rights Commission points out,

[d]iscrimination related to religion, religious conviction, religious belief or religious activity can be unlawful under the laws of the ACT, NT, QLD, Tasmania, Victoria and WA. In SA, discrimination on the basis of religious dress or appearance in work or study can be unlawful ... [S]ome people observe particular rules on clothing, appearance or jewellery for religious reasons. For example, some Sikh men wear a turban to [accord with] their religious beliefs. Employers should not discriminate against a person in employment on the basis of their religious dress.²¹

The law also offers some limited protection to Australians who experience overt and worrisome displays of religious bigotry. As a signatory to the *International Covenant on Civil and Political Rights*, Australia is obliged to enact laws prohibiting “any advocacy or national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”²² To that end, there are various state and federal provisions in place that provide for civil remedies in the event of proven religious discrimination.²³

Legislatures have been less enthusiastic about passing laws that address religious vilification. There are only three legislatures that have put in place vilification proscriptions in Australia. In Victoria, a person convicted of “serious religious vilification” faces a fine or six months imprisonment.²⁴ There is a similar penalty for a conviction under a not dissimilar law in Queensland.²⁵ A person convicted of religious vilification in Tasmania²⁶ faces orders for compensation, but not criminal penalties.

²¹ *Religion* (2018) <<https://www.humanrights.gov.au/quick-guide/12091>> accessed 11 August 2019.

²² Article 20 ICCPR.

²³ For example, *Sex Discrimination Act 1984* (Cth); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1988* (Tas); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 2010* (Vic). Note that the Commonwealth, SA and NSW laws do not list ‘religious belief’ as a protected attribute, so remedies are limited in those jurisdictions. See also Greg Welsh, *Religious Schools and Discrimination Law*, Central Press, 2015, 1.

²⁴ *Racial and Religious Tolerance Act 2001* (Vic) s 25.

²⁵ *Anti-Discrimination Act 1991* (Qld) s 124A and s 131A.

²⁶ *Anti-Discrimination Act 1998* (Tas) s 19.

On this subject, other legislatures have been completely silent or decidedly timid,²⁷ and so, it seems, have the courts and tribunals.²⁸ Of the very few complaints that have been taken up by prosecutors in relation to vilification, the most highly publicised was the trial of men associated with *Catch the Fire Ministries*.²⁹ Outspoken Christian fundamentalist pastors Danny Nalliah³⁰ and Daniel Scot were found by the Victorian Civil and Administrative Tribunal to have vilified the Muslim community during an anti-Islam seminar, and in their writings. On appeal,³¹ they succeeded in having the matter referred back to the Tribunal, but it was settled by mediation en route.

B Privileges

There are a range of privileges enjoyed by religious bodies and schools in Australia including the right to hire and dismiss employees, but within limits.³² This is found in the relevant federal anti-discrimination legislation³³ and state and territory equivalents.³⁴

For example, the *Equal Opportunity Act 1984* (SA) s 34(3) gives a broad exemption, and thus a privileged position, to religious schools or educational

²⁷ Note that the proposed new Commonwealth laws (discussed below) appear to elevate religious belief, and, in particular, statements of belief, above other anti-discrimination laws in order to provide broad protections not seen in other regimes. See: Anti-Discrimination Legal Experts Group (ADLEG) submission to the Religious Discrimination Bill — Exposure Draft, Australian Government Attorney-General's Department, 1 October 2019.

²⁸ In the *Anti-Discrimination Act 1977* (NSW) the definition of 'race' includes 'ethno-religious' origin. But the NSW Administrative Decisions Tribunal Appeal Panel has ruled that determining whether there has been discrimination on the basis of race cannot be done by referring to an aggrieved person's religion. See *A on behalf of V and A v NSW Department of School Education* [2000] NSWADTAP 14, 16. See Rick Sarre, 'Can religious vilification laws protect religious freedoms?' *The Conversation* 19 July, 2016 <<https://theconversation.com/can-religious-vilification-laws-protect-religious-freedoms-62283>>

²⁹ *Islamic Council of Vic v Catch the Fire Ministries* [2004] VCAT 2510.

³⁰ Pastor Nalliah was a Rise Up Australia candidate in the 2016 Australian federal election. He advocated a ban on burqas, an end to the building of mosques, and the scrapping of halal certification.

³¹ [2006] Vic Supreme Court of Appeal 284.

³² See *Hozack v Church of Jesus Christ of Latter-Day Saints*, Federal Court of Australia, 1997, per Madgwick J. The court determined that good faith avoidance of injury to religious susceptibilities must be a church's object.

³³ Commonwealth legislation: *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Human Rights Commission Act 1986* (Cth).

³⁴ State and Territory legislation: *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1988* (Tas); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 2010* (Vic).

orders that may, for example, discriminate against a gay or lesbian applicant for a position on staff or membership of the order:

This Division does not apply to discrimination on the ground of sexual orientation, gender identity or intersex status in relation to employment or engagement for the purposes of an educational institution if — (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; ...

Also in section 50(1) of the *Equal Opportunity Act 1984* (SA) one finds the following exemption:

This Part does not render unlawful discrimination in relation to —

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(ba) the administration of a body established for religious purposes in accordance with the precepts of that religion; or

(c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion...

In other words, if, for example, it is a published precept of a particular religion that homosexuality is sinful, then that body may *prima facie* discriminate against any homosexual person in relation to its employment practices.

Moreover, religious groups, as institutions, are permitted a range of tax exemptions found in the *Taxation Administration Act 1953* (Cth). Donors for specified financial donations can claim tax deductibility under the *Charities Act 2013* (Cth) if the donations are for registered bodies including those that are formed for “the advancement of religion.”³⁵

One can also point to the way in which governments in Australia provide religious schools with significant levels of state funding. In the ‘DOGS’ case (named for the organisation — ‘Defence of Government Schools’— that had challenged federal funding of religiously-based schools), the High Court held

³⁵ Kerry O’Halloran, *Religion, Charity and Human Rights* (Cambridge University Press, 2014) 396.

that the Australian Commonwealth cannot be prevented from passing legislation that provides financial assistance to non-government schools.³⁶

Religious schools, too, are empowered to control what they teach. So long as the educational curriculum is being taught, generally speaking, all religiously-based schools can teach their unique religious precepts without being told by the state to desist.³⁷

Finally, under section 127 of the *Evidence Act 1995* (Cth) '[a] person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.' This privilege is still enshrined in Commonwealth legislation despite the confessional coming under intense scrutiny by the Royal Commission into Institutional Responses to Child Sexual Abuse in 2017. The confidentiality of the confessional indeed came under direct fire in the Royal Commission's final report.³⁸

In response, South Australia (and later Victoria) adopted the recommendation of the Royal Commission and passed legislation³⁹ that forces priests to divulge evidence of sexual abuse that may emerge from the confessional.⁴⁰ The Victorian Act, like the South Australian Act, designates religious ministers as mandatory reporters of abuse suspicions, alongside police, teachers, medical practitioners and early childhood workers.⁴¹

C Practices

There are a number of practices permitted by Australian law that take account of the proclivities of religious adherents. Federal law, for example, allows ordained

³⁶ *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559.

³⁷ Emma Rowe, *Religion in Australian Schools: An historical and contemporary debate* (24 August 2017) *The Conversation* <<https://theconversation.com/religion-in-australian-schools-an-historical-and-contemporary-debate-82439>>. See also: Marion Maddox, *Taking God to School: The End of Australia's Egalitarian Education?* (Allen & Unwin, 2014)

³⁸ Recommendation 16.48. <<https://www.childabuseroyalcommission.gov.au/media-releases/final-report-released>>

³⁹ *Children and Young People (Safety) Act 2017* (SA) Chapter 5, Part 1, especially s 30(3)(e); *Children Legislation Amendment Act 2019* (Vic).

⁴⁰ Hadeel Al-Alosi, 'The Melbourne archbishop said he'd rather go to jail than break confession confidentiality. A new bill could send him there.' *The Conversation*, August 15 2019. <<https://theconversation.com/the-melbourne-archbishop-said-hed-rather-go-to-jail-than-break-confession-confidentiality-a-new-bill-could-send-him-there-121869>>

⁴¹ The Acts do not have the support of the Catholic Church. Given that its ministers were responsible for almost two thirds of the sexual abuse allegations investigated by the Royal Commission, the effectiveness of the law remains entirely moot. See Keith Thompson, 'Should Religious Confession Privilege Be Abolished In Child Abuse Cases?' (2017) *The Western Australian Jurist* 8, 95-136

religious ministers to perform weddings under the *Marriage Act 1961* (Cth) without the training and qualifications that are required of non-religious celebrants. And what might surprise a lot of Australians (who do not regularly listen to the live broadcasts of the Australian parliament) is that all parliaments, State and Federal, start every parliamentary sitting day with a Christian prayer, followed by the Lord's Prayer.⁴²

There are other practices, too, that deserve mention in this category. Firstly, a significant proportion of government welfare payments (other than pensions) are outsourced to the religious sector for distribution. Indeed, if it were not for the infrastructure and largesse of institutions such as Anglicare, Catholic Centacare,⁴³ Uniting Care and the like, it would be very difficult for Australian government welfare systems to meet the demand.

Secondly, Australian parliamentary parties allow 'conscience' votes on issues such as abortion, stem cell research, assisted suicide, prostitution, and (until 2017) same-sex marriage, each of which excites (or excited) public debate largely, although not exclusively, based upon religious ideologies and premises.⁴⁴

All of this is not to say that religious practitioners can consider themselves totally aloof from the scrutiny of the law. True, as stated in Article 18(3) of the ICCPR, '[f]reedom 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.' But the freedom to practise religion is nevertheless qualified: religious practitioners must observe the criminal law and any obligations in anti-discrimination legislation where exemptions do not apply. And in civil law matters, the High Court has made it clear that church business practices can be reviewed by the courts.

[Courts] will seek to avoid entanglements in what are substantially issues of religious doctrine where there is no applicable legal norm or specific judicial

⁴² The status of the prayer is currently the subject of a Senate Inquiry: Parliament of Australia, *Proposal to replace the parliamentary prayer with an invitation to prayer or reflection* (2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Procedure/Parliamentaryprayer>

⁴³ Now Catholic Care in some jurisdictions.

⁴⁴ For commentary on conscience votes see: <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp20> and <https://www.researchgate.net/publication/227774621_Conscience_Voting_in_the_Australian_Federal_Parliament>

competence. But courts will reject the notion that religious organisations, as such, are somehow above secular law and exempt from its rules.⁴⁵

That is, if a church business practice, contract or administrative decision falls outside of its private constitutional authority or rules, aggrieved parties can ask the courts for a ruling on whether or not that is the case, and receive remedies if the grievance is found to be sound in law or in fact.⁴⁶

Moreover, if a religious order were to advocate child marriage, or female genital mutilation, for example, or any other practice that was illegal or deemed unacceptable in modern Australia, the state would intervene and prosecute the organization or ban the unacceptable practice without the risk of challenge under s 116. Indeed, an Australian government could ban a religion if it were, for example, deemed to be a threat to the state.⁴⁷

None of the above facts and observations should raise too many alarm bells, however. Rex Ahdar⁴⁸ usefully weighs up why Australian law-makers should respect religious exemptions generally — he cites principles of dignity, fairness, and the fact that religions have been a foil for totalitarianism — and, in contrast, why we should not. In considering this latter category, he makes the observation that all laws carry with them a burden for some people, and the religiously inclined should simply accept that fact.⁴⁹ He recites the need for the law to recognise the role of the state in ensuring that the freedom one gives to a religion's practitioners, devotees and adherents to practise as they desire does not infringe upon the right of other persons to be free from the consequences of that practice. The state, he argues, must protect the security of any person who may be affected by others' religious practices, pronouncements and edicts.⁵⁰ Ahdar's perspicacious reflections are caught up well in the famous aphorism: 'my right to swing my fist ends where the other man's nose begins.'⁵¹

⁴⁵ *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95, 121 per Kirby J.

⁴⁶ *Wyld v Attorney-General for NSW* (1948) 78 CLR 224. In this case the High Court considered the extent to which secular courts are competent to determine matters of theology and practice, and confirmed that there is no bar.

⁴⁷ The *Jehovah's Witnesses* case on this point is discussed below.

⁴⁸ Rex Ahdar, 'Exemptions for Religion or Conscience under the Canopy of the Rule of Law' (2017) 5(3) *Journal of Law, Religion and State* 185.

⁴⁹ *Ibid* 208.

⁵⁰ *Ibid* 209.

⁵¹ This quotation has been attributed to at least five people: Oliver Wendell Holmes, Jr., John B. Finch, John Stuart Mill, Abraham Lincoln, Zechariah Chafee, Jr.

VI THE HIGH COURT, THE CONSTITUTION, AND RELIGIOUS FREEDOM

Let me return, for the purposes of looking to the future of religious freedom in Australia, to s 116 of the *Australian Constitution* and two of the leading Australian High Court cases that assist us with its interpretation. One was set in wartime, and the other involved taxation issues. They provide further examples of the symbiotic relationship between law and religion in Australia today.⁵²

A *The Jehovah's Witnesses case*

This Second World War case involved the religious beliefs of the Christian religion known as Jehovah's Witnesses.⁵³ In January 1941, acting pursuant to the *National Security (Subversive Organisations) Regulations 1940*, the Australian government declared, by regulation, that Jehovah's Witnesses were 'prejudicial to the defence of the Commonwealth' and to the 'efficient prosecution of the war.' This was because Witnesses profess that their allegiance to God is superior to any allegiance that may be owed to the government of the day, and, by extension, its laws. Jehovah's Witnesses, in other words, could not, therefore, be relied upon (said the government) to be allies in wartime. Immediately after this declaration, police occupied the premises of the organisation's headquarters.

Lawyers for the Witnesses challenged the regulation on a number of fronts, including the role that s 116 plays in separating church and state. Eventually the matter came before the High Court. If one reads the outcome (in favour of the Witnesses), one might think that the s 116 argument succeeded, but that was not the case. The High Court struck out the regulation as unconstitutional not because of any assertion of religious freedom or because of any clear separation of religion and state, but because the passage of the specific regulation was deemed by the Court to exceed the government's power over matters to do with 'defence.' Indeed, the court stated, *obiter*, that s 116 had *not* been infringed.

But I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to

⁵² The link with anti-discrimination law is made later in this article. It is not a straightforward link, because, from a constitutional perspective, the two concepts are very different. Australia's anti-discrimination laws derive from its international human rights obligations using the external affairs power s 51 (xxix), and s 116 is concerned with limiting the Commonwealth's power to enact legislation.

⁵³ *Adelaide Co. of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered government.⁵⁴

The constitutional ‘guarantee’ of freedom of religion was thus interpreted very narrowly.

It is clear, according to this judgment, that, if it wishes to, any Australian government can constrain freedom of religion if a religious group is going to foment disorder and threaten the security of the country, especially in time of war.⁵⁵ This position was reinforced sixty years later in *Kruger v Commonwealth*,⁵⁶ where the High Court stated that laws that have the effect of indirectly prohibiting the free exercise of religion are not invalidated by s 116.

The real problem for the plaintiffs in this aspect of their claim lies in demonstrating that the Ordinance is a law “for prohibiting the free exercise of any religion.” ... It does not follow that there is only one purpose to be discerned in a law; there may be more than one. The question should therefore be asked: was a purpose of the Ordinance to prohibit the free exercise of the religion of the Aboriginals, to whom the Ordinance was directed? It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose.⁵⁷

The presumption that Parliament does not intend to interfere with common law rights and freedoms thus remains rebuttable.

B *The Church of Scientology case*

In 1983 the High Court offered another perspective on the interpretation of s 116. The specific vehicle was the case of *Church of the New Faith v Commissioner of Payroll Tax (Vic)*.⁵⁸

⁵⁴ (1943) 67 CLR 116, 131-132 per Latham CJ.

⁵⁵ See generally James Richardson, ‘The Sociology of Religious Freedom: A structural and socio-legal analysis’ (2006) 67 *Sociology of Religion* 271; James Richardson, *Regulating Religion: Case Studies from Around the Globe* (Kluwer, 2004).

⁵⁶ *Kruger v Commonwealth* (1997) 190 CLR 1 (the ‘Stolen Generations’ case)

⁵⁷ *Ibid*, 86 per Toohey J. See also Denise Meyerson, ‘The Protection of Religious Rights under Australian Law’ (2009) 3 *Brigham Young University Law Review* 529, 542

⁵⁸ (1983) 154 CLR 120.

The Victorian Tax Office wanted to tax Scientology (officially, the Church of the New Faith) as a business rather than as a church. A church enjoys, under Australian law (as noted above), a largely tax-free status. A business does not. While Scientology refers to itself as the *church* of Scientology, Crockett J in the Victorian Supreme Court (at first instance) was not convinced that it was a religion. Crockett J was of the opinion that it was a business cloaked in religious accoutrements. He found that “religion is essentially a dynamic relation between man and a non-human or superhuman being”⁵⁹ and, in his view, the doctrines of Scientology were “not sufficiently concerned with a superhuman, all powerful and controlling entity.”⁶⁰ On appeal by the church, the Court of Appeal agreed.

On further appeal, however, the High Court reversed the outcome, and determined that the Victorian Supreme Court was wrong. It held that the Church of Scientology *had* discharged the onus of showing that it had a ‘religious’ purpose. The court reiterated the imperative of religious freedom:

Religious freedom is a fundamental theme of our society. That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or judiciary to determine what religion is, this poses a threat to religious freedom.⁶¹

The judgments offered a number of definitions of ‘religion.’ Most commonly adopted since⁶² is the one put forward by Mason ACJ and Brennan J in their joint judgement.

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.⁶³

Thus, in determining what does and what does not fall under the required definition of religion, the High Court has been generous to fringe dwellers: a ‘religious’ belief can be a belief in a principle so long as that belief is pursued

⁵⁹ *Church of the New Faith v Comm. Pay-Roll Tax (Vic.)* (1983) 1 VR 97, 111.

⁶⁰ *Ibid* 110.

⁶¹ *Church of the New Faith v Comm. Pay-Roll Tax (Vic.)* (1983) 154 CLR 120, 150 per Murphy J.

⁶² This definition has been adopted by the Australian Bureau of Statistics 1266.0 - *Australian Standard Classification of Religious Groups* (ASCRG), 1996.

⁶³ (1983) 154 CLR 120, 136 per Mason ACJ and Brennan J.

under the guidance of canons of conduct that give effect to that belief. By extension, we can safely assume that the term ‘religious observance’ is given considerable latitude by the law.

What can we determine from these two cases? The lesson is that no religion (the definition of which is to be drawn widely) is aloof from the intervention of the state if it behaves in a manner that poses a danger to Australians. But in all other matters, religions should be given a significant amount of freedom. In support of this, and by reason of the principle of ‘legality,’ courts will presume that no parliament will be deemed to have intended to interfere with freedom of religion unless this intention was made unambiguous and clear.⁶⁴

All of this conjecture remained largely moot, and probably would have remained a ‘sleeper’ for lengthy period of time, but for the advent of the same-sex marriage campaign that led to the 2017 postal plebiscite,⁶⁵ and consequent ‘marriage equality’ legislation that passed both houses of the federal parliament almost unanimously in December 2017.⁶⁶ For the purposes of guaranteeing the passage of the Bill, the Liberal/National Coalition government of Malcolm Turnbull foreshadowed asking former Attorney-General Philip Ruddock to lead an ‘expert panel’ to review the issue of religious freedom, and to report back to the parliament. The government fulfilled this promise in due course, and convened an *ad hoc* committee early in 2018.

In general terms, the following questions were to be pursued: How much protection for religious practices is required? Where does s 116 fit into the contemporary debate?⁶⁷ What is the appropriate scope of the exemptions to anti-discrimination laws, including at the State level? I turn to that inquiry and their findings now.

VII THE RUDDOCK REVIEW OF 2018

The *ad hoc* expert panel consisted of Mr Ruddock, along with the current president of the Australian Human Rights Commission, Rosalind Croucher,

⁶⁴ The principle of legality requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. Refer *Momcilovic v R* (2011) 245 CLR 1 per French CJ, 46; also see *Canterbury Municipal Council v Moslem Alaway Society Ltd* (1985) 1 NSWLR 525 (per McHugh J, 544).

⁶⁵ Opened 7 November 2017, closed 15 November 2017.

⁶⁶ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

⁶⁷ True, s116 helps define the relationship between the state and religion, but that relationship becomes contested when it comes to anti-discrimination law which aims to serve broader functions, including protecting minority groups from harm or disadvantage or unfair treatment.

barrister and former judge Annabelle Bennett, Catholic lawyer, religious commentator and human rights advocate Father Frank Brennan, and legal academic Nicholas Aroney.

This was not the first time that an inquiry had been made into religious freedom,⁶⁸ but it was a highly significant one, given the political climate in 2017-2018 that accompanied the drafting of the marriage equality legislation.

The Ruddock panel received over 15,500 submissions.⁶⁹ Religious organisations, including the Anglican Archdiocese of Sydney, Christian Schools Australia, the Catholic Church, and the Freedom for Faith group, called for an entirely novel and discrete piece of legislation: a religious freedom statute that would affirm the right of religious institutions to uphold their values, especially when it came to matters of employment practices and educational policies.⁷⁰ Other (predominantly secular) groups (and more 'progressive' faith-based Christian groups) called for the *status quo*, and questioned the need for any new protections. Other interested groups, such as the National Secular Lobby,⁷¹ rejected any new legislative protections for religious adherents and offered amendments to current anti-discrimination legislation designed to limit the power of religious organisations to dictate their own terms.

The panel reported to the Turnbull government in May 2018,⁷² but the report was not released by the Morrison government⁷³ for seven months.⁷⁴ There had been widespread reports (by way of leaks) that suggested that the review was going to recommend amendments to the anti-discrimination laws in order to make it clear that religious schools and institutions were not bound to adhere to

⁶⁸ Human Rights and Equal Opportunity Commission, *Article 18 Freedom of religion and belief*, 1998.

⁶⁹ The Ruddock panel <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review/review-submissions>>

⁷⁰ The main issue here was whether church schools could prohibit staff from publicly advocating against the teachings of the school, for example, on gay marriage, or advocating that the Christian scriptures demanded that a gay person repent or suffer eschatological consequences. A not unrelated matter is the extent to which a church, in this instance, the Catholic Church, can be forced to demand of its priests that they break the seal of the confessional if a person were to confess to having abused, or thinking of abusing, another person, especially a child.

⁷¹ <<https://www.nationalsecularlobby.org/stand-up-for-secularism/>>

⁷² Religious Freedom Review, Report of the Expert Panel, 18 May 2018. <<https://apo.org.au/node/210586>> Also <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review>>

⁷³ There had been change of leadership in Australian politics with the elevation of the religiously conservative Scott Morrison to replace Malcolm Turnbull on 24 August 2018.

⁷⁴ The change of Prime Minister (Turnbull to Morrison) presumably delayed matters. The government also needed time to prepare its response, noting that it would become an election issue for the May 2019 election.

any anti-discrimination legislation. These leaks gave rise to widespread and often unhelpful speculation and disputation.⁷⁵

The report, when it was finally released in mid-December 2018, made a number of recommendations, and classified them into three groups; firstly, recommendations for legislative amendments before the federal Parliament was prorogued for an election in 2019; secondly, recommendations that could be put to the people at the May 2019 election; and, thirdly, issues to be referred to the Australian Law Reform Commission for further consideration and deliberation.

It is useful for us to look at the content of these three classifications.

A *Short term change issues*

There were five matters that the committee affirmed should be attended to by legislation (state and federal) without any further delay:

The *Charities Act 2013* should be amended to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose' for being eligible for 'charities' status.

Education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a classroom where instruction on religious or moral matters is proceeding. Moreover, they should ensure that these policies are applied consistently.

Appropriate legislative amendments should be progressed to make it clear that religious schools have a discretion to make (or not make) available their facilities, or to provide goods or services, for a marriage ceremony.

Those jurisdictions that have not abolished statutory or common law offences of blasphemy should do so.

The governments of New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief.

Few people would disagree that there was little that was controversial about these recommendations.

B *Mandate-seeking matters*

⁷⁵ <<https://www.theguardian.com/australia-news/2018/oct/11/ruddock-religious-freedom-review-what-is-it-and-what-do-we-know-so-far>>

In the second category, namely the matters that the Liberal/National Coalition government could put to the electorate, the Ruddock panel recommended that they:

- consider amendments to the *Racial Discrimination Act 1975* to render it unlawful to discriminate on the basis of a person's religious beliefs (including atheism) or religious activities;
- consider providing exceptions and exemptions for religious bodies, religious schools and charities regarding these potentially discriminatory practices;
- enact legislation that adds "religious belief or activity" as a protected attribute, rendering it unlawful for anyone to discriminate (in relation to work, education, access to premises, goods, services, accommodation, land, sport and clubs) on the basis of such a belief or activity (including on the basis that a person does not hold any religious belief) and thereby 'cover the field.'⁷⁶

C Matters for further examination

In relation to the third category, the panel recommended that the following two matters be referred to the Australian Law Reform Commission for further investigation. Posed as questions, they were expressed in the following way:

Should the Commonwealth government amend the *Sex Discrimination Act 1984* (Cth) to:

- provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status, (and if so with what provisions)?
- provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status, (and if so with what provisions)?

The Morrison government's written response to the report was supportive, generally speaking.⁷⁷ Be that as it may, no amendments followed in early 2019, and none of these matters was presented to the May 2019 election with any specificity (let alone with a draft bill), although it was Coalition policy

⁷⁶ "Religious belief or activity" as a protected attribute is not found currently in anti-discrimination legislation in NSW and SA, hence this legislation would be designed to make the law uniform in Australia by overriding state laws where they are in conflict.

⁷⁷ <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>>

throughout the campaign that some form of legislation for religious freedom was on their agenda.⁷⁸

Following the May 18, 2019 election victory for the Coalition, the Morrison government affirmed that it would carry through with its pre-election commitment to legislate for religious freedom.⁷⁹ It announced that it would bring to the parliament legislation to make religion a ‘protected’ attribute in a new Religious Discrimination Act, establish a new statutory position of Freedom of Religion Commissioner in the Australian Human Rights Commission, develop a Human Rights Legislation Amendment Bill, and support the Australian Human Rights Commission to increase community awareness of the importance of these matters.⁸⁰ One commentator summarised their position as follows: “[Schools and religious orders] want to be able to teach a view of marriage that no longer accords with the law of the land, and to employ staff who will hold to this view of the world.”⁸¹

In the hiatus between government promises and the foreshadowed legislative Bill in 2019, an extraordinary event occurred involving the celebrated Tongan Australian rugby player Israel Folau and his employer, Rugby Australia. It is to that matter that I now briefly turn.

VIII THE ISRAEL FOLAU IMBROGLIO

On April 10, 2019, committed Christian, Israel Folau, posted on social media (his Instagram account) the following words by way of admonition:⁸²

“Warning: drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists, Hell Awaits You. Repent! Only Jesus Saves.”

His foray into matters eschatological should not have been totally unexpected. In 2017 he had tweeted that he was not supportive of same-sex marriage being legalised. In 2018 he commented (on Twitter) that God’s plan for homosexuals was “HELL ... Unless they repent of their sins and turn to God.”⁸³

⁷⁸ For a useful and more critical commentary on the review report see Jeremy Patrick, ‘Evidence of Absence in the Ruddock Report’, (2019) 93 ALJ 747.

⁷⁹ <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review>>

⁸⁰ Australian Government Response to the Religious Freedom Review, December 2018. <<https://www.pm.gov.au/media/government-response-religious-freedom-review>>

⁸¹ Paul Kelly, ‘Labor Faces Key Test on Religious Discrimination Bill’ *The Australian* June 5, 2019, 12.

⁸² Sic. A paraphrase of 1 Corinthians, 6: 9-10.

⁸³ Patrick Walsh, ‘Folau v Rugby Australia: Protecting a business’ brand in the age of social media.’ *The Bulletin* (Law Society of SA) July 2019, 12.

It would not be uncommon to hear such sentiments from a fundamentalist's pulpit, and, as such, it is fair to say that no one would have paid any heed to the message except that Israel Folau was a highly paid and celebrated football player under contract with Rugby Australia. He was thus contractually committed to its Code of Conduct which affirms, in its diversity policy, a non-discriminatory approach to sexuality. Players are required to:

Treat everyone equally, fairly and with dignity regardless of gender or gender identity, sexual orientation, ethnicity, cultural or religious background, age or disability. Any form of bullying, harassment or discrimination has no place in Rugby.

After the 2018 Twitter post, Folau received a formal warning. As a result of the 2019 post to Instagram, a three-person panel was convened to determine whether there had been a breach of the Code and to pronounce on any consequences. On 17 May 2019, the panel determined that Folau should be dismissed by Rugby Australia for breaching its Code. Dismissal followed.

The Folau case then became the subject of a great deal of discussion from all points of the political spectrum. Some saw the case as a *cause célèbre* for the push for laws that would loosen prohibitions on hate speech. Others pointed out that there is no law against homophobic speech, Rugby Australia's right to demand compliance was questionable, and Folau's contract, in referring to the Code, contained terms that were unjust and amounted to an unreasonable restraint of trade.⁸⁴

Folau's legal argument was that the committee's decision breached s 772(1) (f) of the *Fair Work Act 2009* (Cth) which says that a person's employment cannot be terminated on the basis of his or her religion. He was supported by the Australian Christian Lobby which raised \$2.1 million in 24 hours after calling upon its membership to fund Folau's legal team.⁸⁵ On the other hand, s 772 (2) (a) of the Act appears to give Rugby Australia an exemption from legal action in the case of a dismissal if "the reason is based on the inherent requirements of the particular position concerned..." The Folau case was headed to the Federal Circuit Court until 4 December 2019 when the parties reached an out of court

⁸⁴ Brad Norington and Janet Albrechtsen, 'Izzy's for real: I want to play.' *The Australian* 1 August 2019, 1, 8.

⁸⁵ The ACL is now under investigation by the charities regulator, the Australian Charities and Not-for-profits Commission (ACNC), regarding allegations that the ACL's fundraising for Folau breached its charter by going further than simply "to "promote religion."

settlement that involved the payment of an undisclosed sum to Folau, and an apology to him from Rugby Australia.

IX LEGISLATING FOR RELIGIOUS FREEDOM: THE COALITION'S DRAFT BILLS

Into the law and religion milieu in 2019 came the much-heralded draft federal legislation on religious freedom. The Draft Bills foreshadowed by federal Attorney-General Christian Porter were released late in August 2019. There are three bills proposed, namely a:

Religious Discrimination Bill 2019: to prohibit discrimination on the grounds of religious belief or practice;

Religious Discrimination (Consequential Amendments) Bill 2019: which guides the implementation of the above provisions, including installing a complaints mechanism at the Human Rights Commission;

Human Rights Legislation Amendment (Freedom of Religion) Bill 2019: to extend human rights law to charities and religious organisations, and to create a new Freedom of Religion Commissioner with the Human Rights Commission.

Submissions from the general public on the Draft Bills was invited and the website was left open until October 2, 2019, with the final Bills to be presented to federal parliament at some point in time in 2020.

There are two key themes found in these Draft Bills. Firstly, they are designed to shield from discrimination claims religious institutions and individuals who seek to express a religious belief or make a religious statement, and, secondly, they are designed to make it more difficult for large employers to dismiss employees or members who are simply expressing their religious beliefs, or who may refuse to employ or admit them on the basis of previously expressed views.

How would this work? Let's look at some examples.

The first is provided by the case of Archbishop Julian Porteous of Tasmania who, in 2015, sent out leaflets to schools (in advocating against same-sex marriage) saying "messing with marriage is messing with kids." A complaint was lodged with the Tasmanian Human Rights Commission alleging that the booklet was offensive to non-traditional parents, and was hence discriminatory. The complaint was later dropped. But will the Draft Bills, if passed, allow this sort of complaint to succeed? No. A statement of belief (in this case on a Christian view

of marriage) is not “discrimination” under the proposed law, and hence could not activate the *Anti-Discrimination Act (Tas)*.⁸⁶

Moreover, the Draft Bills would create exemptions in relation to hiring practices, although this is a little odd, if not unclear,⁸⁷ given that most State and Territory laws already allow exemptions for religious groups in their human relations operations in so far as it is a genuine occupational requirement, and is advertised as such. Indeed, the *Sex Discrimination Act 1984* (Cth) currently has a range of such exemptions that allow for discrimination on the basis of sex, sexual orientation, marital status or relationship status if it occurs “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”⁸⁸

More controversially, the Draft Bills prohibit employers from writing into contracts codes of conduct that may indirectly discriminate on the grounds of religion. Large employers (described as those with a turnover of \$50 million or more) can only escape the prohibition if the code of conduct is necessary and reasonable to avoid “unjustifiable financial hardship.” There are also controversial issues regarding the provision of health care and the discrimination claims that may emerge. The Draft Bills effectively forbid employers demanding that a health care provider provide services to their employees if it would be against his or her religious beliefs. This leaves the employer in a ‘Catch 22’ situation. By way of illustration, under the proposed provisions employers cannot require a doctor or pharmacist to provide the ‘morning after’ pill to an unmarried woman (for example), but if the doctor or pharmacist do not provide her with this service, they could face legal action under existing laws for discrimination on the basis of marital status.⁸⁹

⁸⁶ Moreover, under clause 41 of the Draft Bill, the Tasmanian and all other state and territory anti-discrimination laws are explicitly excluded as applying with respect to statements of religious belief. This has given rise to concerns about the relationship between state and federal anti-discrimination laws, including constitutional concerns.

⁸⁷ Michael Sexton, ‘Much sound and fury, little religious clarity’ *The Australian*, 6 September 2019 online.

⁸⁸ *Sex Discrimination Act 1984* (Cth) s 38.

⁸⁹ See: Anti-Discrimination Legal Experts Group (ADLEG) submission to the Religious Discrimination Bill — Exposure Draft, Australian Government Attorney-General’s Department, 1 October 2019.

The Bill has received a great deal of general commentary.⁹⁰ The Law Council of Australia said it could legalise “offensive” views.⁹¹ The National Secular Lobby declared that the Bill allows a “soft theocracy” where secular anti-discrimination law will be used to privilege religious belief.⁹²

The Attorney-General foreshadows sending the ‘exemption’ features⁹³ to the Australian Law Reform Commission (ALRC) and the Human Rights Commission (HRC) for further development.⁹⁴ The ALRC is tasked in any event with preparing a discussion paper by April 2020, with a final report due by December 2020.

X DISCUSSION: FINDING AN ACCEPTABLE PATH

Australians have, generally speaking, the freedom to behave as they like, and say what they like, but they are subject to common law and legislative restrictions in this regard.⁹⁵ This axiom extends to those who make pronouncements of a ‘religious’ nature (either in sympathy or derision). True, freedom of religion underpins Australia’s heritage and reflects our multi-cultural landscape and hence must be preserved, but so must the forty-year Australian history of anti-discrimination law be accorded its lawful due. Finding a suitable compromise position that can accommodate these divergent aims and ease consequent tensions is never easy.

⁹⁰ For example, Liam Elphick, Amy Maguire, Anja Hilkemeijer, ‘The government has released its draft religious discrimination bill. How will it work?’ *The Conversation*, 29 August 2019 <<https://theconversation.com/the-government-has-released-its-draft-religious-discrimination-bill-how-will-it-work-122618>>

⁹¹ Anne-Louise Brown, ‘Consultation on draft Religious Discrimination Bill welcomed by Law Council’, Media release 29 August 2019. Also Paul Karp ‘Religious discrimination bill could legalise race hate speech, Law Council warns’ 4 September 2019, @Paul_Karp.

⁹² Ambassadors for the National Secular Lobby, ‘Action on the Religious Discrimination Bill’ Media release, 4 September 2019.

⁹³ Others have argued that other novel features such as the new compliance burden on big business, employees’ rights, indirect discrimination, and health practitioner conduct rules should be sent to the ALRC as well. See: Anti-Discrimination Legal Experts Group (ADLEG) submission to the Religious Discrimination Bill — Exposure Draft, Australian Government Attorney-General’s Department, 1 October 2019.

⁹⁴ This would include setting out in clear language whether all legislative exemptions that currently purport to allow a religious organisation or school to discriminate actively against any person on the basis of their sexuality be removed.

⁹⁵ *Attorney-General (SA) v Corporation of the City of Adelaide* (The Street Preachers Case) (2013) 249 CLR 1, 145, per Heydon J.

There is an accommodation position advocated by Paul Monk.⁹⁶ It is his view that there should be no restriction on religious practices provided that the rules and rituals, observances and practices do not violate the civil and criminal law, or infringe upon the freedom and dignity of others. In return, members of civil society, as part of a civic ‘compact’, have a duty not to scorn or ridicule the cherished dogmas, values and traditions of religious believers. How this would be enforced, however, is not clear. Equally unclear are the acceptable thresholds.

Will these Draft Bills pass into law? It is very unlikely in their current form, given that the Coalition does not control the Senate and has a wafer thin majority in the House of Representatives. Moreover, they are being criticised by conservatives and progressives alike. One useful suggestion is that the Bill should not be presented as an indivisible whole. Sarah Moulds⁹⁷ advocates splitting the Bill to ensure that the controversial matters do not jettison the less controversial.⁹⁸ One thing is sure: the Draft Bills will surely fail unless they are negotiated carefully and skilfully, and have bipartisan or cross-bench support.

XI CONCLUSION

Australia’s laws, guided partially (and somewhat obscurely) by s 116 of the *Constitution*, and underpinned by our international obligations, currently attempt to steer a middle path between two unacceptable extremes regarding religious freedom. At the one extreme, a theocratic model⁹⁹ allows governments to arrogate to themselves the right to determine all matters of state according to their spiritual ‘path’ and interpretation. At the other extreme, a highly secular model allows religious faith to be ignored, or controlled,¹⁰⁰ or pilloried in public life, where choices made on ‘religious’ grounds are dismissed, and anti-discrimination laws obliterate any concessions to religious observance. Neither of these extremes is justifiable in a vibrant democracy.¹⁰¹ Fortunately, neither obtains currently in Australia.

⁹⁶ Paul Monk, *Credo and Twelve Poems: A Cosmological Manifesto*, (Barrallier Books, 2015).

⁹⁷ Sarah Moulds, ‘Splitting the Bill: How the feds could cut through division on religious freedom’, *Indaily*, 16 September 2019, <<https://indaily.com.au/opinion/2019/09/16/splitting-the-bill-how-the-feds-could-cut-through-division-on-religious-freedom/>>

⁹⁸ The process should be as follows. The Bill should be presented solely to offer practical protections for religious beliefs in federal anti-discrimination law where State and Territory laws are weak, adding a new protected attribute “religious belief or activity”.

⁹⁹ One can think of Iran or Saudi Arabia in this context.

¹⁰⁰ One can think of China in this regard.

¹⁰¹ A useful pictorial contrast of these extremes is contained in W. Cole Durham Jr, ‘Perspectives on Religious liberty: A comparative Framework’ in Johan D van der Vyver and John Witte Jr, *Religious*

All religious faiths in Australia have the freedom to meet, to worship, to teach, and to proselytise. As indicated above, religions can dictate, to a large extent, their own terms. Their adherents have the protection of an array of disparate state and federal anti-discrimination legislative enactments if they feel they have been targeted unfairly on the basis of their religious practices. If they believe that they have been vilified by virtue of these beliefs, then there are some legislative provisions in some jurisdictions that offer them protection. It is thus difficult to assert that religious freedom in Australia is under serious threat.¹⁰² There may be some degree of uncertainty about the future direction of religious freedom in Australia at the moment, but it is not in crisis, nor facing imminent doom.

The choices for Australian legislators now are, rather, located in the 'give-and-take' middle ground that recognises that multi-faith traditions are an important part of the Australian cultural 'quilt', but that legislative measures that protect Australians who may be offended by these traditions are also essential for preserving the common weal. What is uncontested is that religious observance and faith should never be pilloried, and that those who profess no faith should not be derided. What will remain contested until the final vote in the religious freedom legislation is taken in the federal parliament later in 2019 or 2020 is the extent to which religious organisations can be situated in a category of their own, apart, if not aloof, from the legislative requirements that apply to non-religious groups.

I have made the case that in the evolution of religious freedom in Australia the symbiosis between law and religion that existed for centuries has never gone away. It has, however, been modified by demographic shifts and legislative developments. Nevertheless, it still undergirds the Australian political and social landscape. Because of this axiom, any such symbiosis must be celebrated, not feared; it must be negotiated, not dictated.

Human Rights in Global Perspective: Legal Perspectives (Martinus Nijhoff Publishers, 1996) 1, 18 figure 3; updated in W. Cole Durham Jr and Brett G Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Wolters Kluwer, 2nd, 2019), 125, and simplified in Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019), 29.

¹⁰² In countries around the world such as Iraq, China, Myanmar and India, religious devotees such as Christians, Muslims, Sikhs, Jews, and those who pursue the Bahá'í faith (to name but a few) continue to be persecuted and even killed for their beliefs. That has never been the case in Australia, nor is it ever likely to be the case. See Robyn Whitaker, 'Christians in Australia are not persecuted, and it is insulting to argue they are,' *The Conversation*, May 30, 2018. <<https://theconversation.com/christians-in-australia-are-not-persecuted-and-it-is-insulting-to-argue-they-are-96351>>

I remain confident that, with some tweaking of current laws, Australians will be able to continue to enjoy freedom of religion and belief, and freedom *from* religion and belief with or without new legislation. If there is to be a new Act, legislators must ensure that it encourages tolerance and denies bigotry any oxygen. If we can adhere to this commitment, the long and winding road that leads to a plateau of religious freedom that is acceptable to all will be less difficult to navigate.