

Cherry Picking Human Rights

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It feels like Australia is at a crossroads when it comes to freedom of religion, especially concerning the freedom's intersection with the right to equality and non-discrimination. There have been several parliamentary and government inquiries on the intersection between these rights,¹ as well as numerous reports by federal and state human rights and law reform commissions.² Important changes have been made to federal and state anti-discrimination laws,³ but recent recommendations of the Queensland Human Rights Commission ('QHRC') and the Australian Law Reform Commission ('ALRC') are harbingers of more radical change.⁴

Although these many official reports all appeal to the same international human rights standards, they differ considerably in their specific recommendations for reform. These differences include matters of general principle, such as the overarching objects or purposes to which anti-discrimination laws are directed, as well as the specific reach of prohibitions on direct and indirect discrimination and the scope of exceptions for religious organisations and charities. Let me begin with some examples.

The QHRC has recently recommended that the objects of the Queensland *Anti-Discrimination Act 1991* should include the promotion and protection of the right to equality and the prevention and elimination of discrimination 'to the greatest extent possible'⁵— without mention of any other human rights enshrined in international law and protected by the Queensland *Human Rights Act 2019*, such as the right to freedom of thought, conscience, and religion⁶ guaranteed by art 18 of the *International Covenant on Civil and Political Rights* ('ICCPR').⁷ This runs directly counter to the Federal Government's *Religious Freedom Review* (the Expert Panel of which the author was a member), which recommended that governments should consider the use of objects, purposes, and other interpretive clauses in anti-discrimination

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¹ See, eg, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Legal Foundations of Religious Freedom in Australia* (Interim Report, November 2017); *Religious Freedom Review* (Report, 18 May 2018) ('*Religious Freedom Review*'); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Freedom of Religion and Belief, the Australian Experience* (Second Interim Report, April 2019); Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and Related Bills* (Report, 4 February 2022).

² See, eg, Gary Bouma et al, *2011 Freedom of Religion and Belief in 21st Century Australia* (Research Report, Australian Human Rights Commission, 2011); Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) ch 5.

³ See, eg, *Anti-Discrimination Amendment Act 2022* (NT); *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

⁴ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Final Report and Recommendations, July 2022) ('*QHRC Report*'); Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, 27 January 2023) ('*ALRC Consultation Paper*').

⁵ *QHRC Report* (n 4) 20 (recommendation 2.3).

⁶ *Human Rights Act 2019* (Qld) s 20.

⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('*ICCPR*').

legislation to reflect the equal status in international law of all human rights, *including* freedom of religion.⁸

The QHRC has also recommended that Queensland's already very narrow protections of the freedom of religious schools to preference staff that share their religious ethos be narrowed further still, so that the protection would not apply (for example) to the employment of a science teacher in a religious school.⁹ This also runs counter to the recommendations of the *Religious Freedom Review*, which supported exemptions for religious schools in the area of employment where the discrimination is founded in the precepts of the religion and is based on a publicly available policy that is provided to employees.¹⁰ In addition, the QHRC has recommended the imposition of a positive duty on organisations to eliminate discrimination as far as possible and that the Commission itself be empowered to conduct investigations on its own initiative as a means of proactively ensuring that discrimination is eliminated.¹¹

Another example in this vein is the recent ALRC Consultation Paper *Religious Educational Institutions and Anti-Discrimination Laws*.¹² This Consultation Paper proposes that religious freedom exceptions for religious schools under federal law should be narrowed so that they only apply in circumstances where (a) the participation of the person in the 'teaching, observance or practice of the religion' is a 'genuine requirement of the role', (b) the differential treatment is 'proportionate' to the objective of upholding the religious ethos of the institution, and (c) the criteria for preferencing in relation to religion or belief 'would not amount to discrimination on any other prohibited ground'.¹³ If this were to be implemented, the right not to be discriminated against would trump the right to religious freedom because the exception simply would not apply if the criteria amounted to discrimination on other grounds. To similar effect, the ALRC has proposed that the capacity of religious schools to implement codes of conduct in order to maintain their religious ethos would again be subject to prohibitions of discrimination on other grounds.¹⁴ These proposals, like those of the QHRC, run counter to the recommendations of the *Religious Freedom Review*.

How are these differences of opinion to be resolved? One of the common denominators of the three reports is that they seek to apply international human rights standards to the intersection between religious freedom rights and equality rights. The problem is that the three reports interpret and apply these standards differently.

One approach might be to reorient the debate away from the relevant international human rights standards. There is some suggestion of this in the QHRC report, particularly in its recommendation that references to international human rights instruments should be *removed* from the preamble to the *Anti-Discrimination Act 1991*. The QHRC's reason for this recommendation is that the *Human Rights Act 2019* is already modelled on the ICCPR.¹⁵ The

⁸ *Religious Freedom Review* (n 1) 1 (recommendation 3). The *QHRC Report* (n 4) opposes the inclusion of a reference to religious freedom in the objects clause of the Qld *Anti-Discrimination Act* because this would elevate one of the rights protected by the Qld *Human Rights Act* above others; at 80. This is difficult to square with the QHRC's recommendation that the objects clause refer *specifically* to the right to equality and non-discrimination.

⁹ *QHRC Report* (n 4) 29–30 (recommendation 39).

¹⁰ *Religious Freedom Review* (n 1) 2 (recommendations 5, 62) [1.245–1.246].

¹¹ *QHRC Report* (n 4) 25–6 (recommendations 15–17). See also the reports of other State inquiries recommending the introduction of positive duties in similar terms, cited in *QHRC Report* (n 4) 48.

¹² *ALRC Consultation Paper* (n 4).

¹³ *Ibid* 22–4 (Proposition C).

¹⁴ *Ibid* 25–8 (Proposition D).

¹⁵ *QHRC Report* (n 4) 20 (recommendation 2.3).

problem with this argument is that the *Human Rights Act* departs significantly from the *ICCPR* in several important respects, as the Commission itself acknowledges much later in its report.¹⁶ The most important differences are threefold. Firstly, the stringent requirements for the justification of limitations on rights established by the *ICCPR* are substituted in the Queensland Act by a considerably less demanding limitations clause. Secondly, whereas the *ICCPR* maintains that the freedom to have or adopt a religion or belief (the *forum internum*) is an absolute right that cannot be limited under any circumstances, the Queensland Act in principle allows such restrictions to be imposed if they satisfy its general limitations clause. Thirdly, there is no provision in the Queensland Act corresponding to art 18(4) of the *ICCPR*, which requires states to have respect for the liberty of parents ‘to ensure the religious and moral education of their children in conformity with their own convictions’.¹⁷

The UN Human Rights Committee has declared that this parental right ‘cannot be restricted’.¹⁸ The right extends, according to art 13 of the *International Covenant on Economic, Social and Cultural Rights*, to the liberty of parents ‘to choose for their children schools, other than those established by the public authorities’ in order to ensure the religious and moral education of their children in conformity with their own convictions.¹⁹ These principles of international human rights law are of direct relevance to the rights of schools to maintain their distinctive religious ethos. However, the QHRC momentarily toys with the sidelining of these rights on the ground that its terms of reference only require it to consider the compatibility of the *Anti-Discrimination Act* with the *Human Rights Act*.²⁰ The QHRC then proceeds, nonetheless, to consider how to balance these rights, adverting to the international standards at some length.²¹

The terms of reference underlying the ALRC Consultation Paper likewise direct the ALRC to recommend reforms to Commonwealth anti-discrimination laws in a manner consistent with Australia’s international human rights obligations, including those protected by the *ICCPR*.²² The ALRC Consultation Paper accordingly undertakes a lengthy review of these international obligations.²³ There is no outright suggestion in the Consultation Paper that these standards might be sidelined. However, in designing its specific proposals, the approach adopted in a selection of other countries and jurisdictions seems to have been more decisive than the relevant international human rights standards. This is suggested by the way in which the ALRC’s substantive reform propositions are mirrored by provisions enacted in the countries and jurisdictions selected for comparison,²⁴ whereas the analysis of the international human rights standards is relegated to an Appendix which addresses some of the issues at length, but at the level of principle, not specific reform proposal.²⁵ The ALRC explains that it has undertaken a review of these overseas jurisdictions ‘to gain an insight into comparative

¹⁶ Ibid 369.

¹⁷ Nicholas Aroney and Benjamin Saunders, ‘Freedom of Religion’ in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart, 2019) 285–312, 292–3.

¹⁸ UN Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev 1/Add.4 (30 July 1993).

¹⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13(3).

²⁰ *QHRC Report* (n 4) 369.

²¹ Ibid 370–2.

²² *ALRC Consultation Paper* (n 4) 3.

²³ Ibid 10–12 [19]–[28], 39–44 [A.1]–[A.28]. The remainder of this article draws on the author’s submission to the ALRC in response to the Consultation Paper.

²⁴ Ibid 18 n 67, 21 n 76, 24 n 87, 26 n 91, 32 n 102, 49 nn 160–163.

²⁵ Ibid 39–49 app A. The particular cases examined in the appendix were found not to be specifically relevant to the issues being addressed: see *ALRC Consultation Paper* 42–3 [A.19]–[A.21]. Moreover, the appendix only addresses Propositions A and B, not Propositions C and D.

practice', and it claims that its proposals are 'consistent with' the law in 'a majority', in 'a number', or in at least one, of the jurisdictions considered.²⁶

One of the significant problems that can bedevil research of this kind is the problem of case selection.²⁷ To avoid 'cherry-picking' cases or jurisdictions that suit the personal preferences of the individual researcher, rigorous social science inquiry is based on exacting principles of inductive inference designed to maximise the reliability of research findings. One of these principles is that the considerations guiding the selection of cases or jurisdictions are clearly articulated in advance of the research. If only a subset of all relevant jurisdictions can be closely assessed, it is also important that those selected for examination are genuinely representative. The field of comparative law studies is littered with research that lacks inductive validity due to the tendency of scholars to select jurisdictions that are most familiar or most amenable to their cultural assumptions and expectations, without regard to the many cases or jurisdictions that contradict their preferred outcomes.²⁸ Rigorous principles of case selection should also be applied in the field of international human rights law, where ambiguous or vague treaty provisions need to be interpreted in the light of the jurisprudence and practices of the wide diversity of states that are parties to the treaty.²⁹ The tendency of traditionally trained lawyers to focus on the authoritative decisions of courts within particular legal systems can be 'less helpful, even misleading' for international lawyers seeking to make doctrinal claims involving cross-country generalisation.³⁰

The ALRC properly acknowledges that the research upon which it relies is based only on a 'preliminary review' of a small selection of jurisdictions.³¹ However, other than a vague and passing reference to them as being 'comparative',³² the Consultation Paper offers no explanation for the choice of these particular jurisdictions and no reflection on whether they are a representative sample of countries that are parties to the *ICCPR*. The jurisdictions specifically discussed by the ALRC are England, Ireland, New Zealand, and the European Union, as well as several unidentified member states within the EU. While there are obvious cultural relationships between Australia and these countries, the selection is heavily weighted to English-speaking and European countries. A sufficiently representative sample of the 173 countries that have ratified the *ICCPR* would need to include many more non-English speaking and non-European jurisdictions to provide reliable indicators about how the relevant provisions of the *ICCPR* have been implemented throughout the world. Even among English-speaking countries, there appears to have been no consideration of relevant jurisprudence from Canada or the United States, for example.³³

²⁶ Ibid 18 [48], 20 [53], 23–4 [60], 26 [66], 28 [72], 47 [A.38], [A.49] app [A.47].

²⁷ Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125.

²⁸ Ran Hirschl, 'Comparative Methodologies' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019) 11–39, referring to 'result-driven' research that lends credence to the accusation of 'cherry-picking'.

²⁹ Katerina Linos, 'How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics' (2015) 109(3) *American Journal of International Law* 475–485, 475.

³⁰ Ibid 476.

³¹ *ALRC Consultation Paper* (n 4) 5–6 [5].

³² Ibid 28 [72].

³³ For the American jurisprudence, see *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 565 US 171 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 140 S Ct 2049 (2020); *Civil Rights Act of 1964* § 702(a), 42 U.S.C. § 2000e-1(a) (2012).

These omissions are significant. The EU Council Directive establishing a general framework for equal treatment in employment and occupation,³⁴ on which both the ALRC and the QHRC rely,³⁵ offers significantly more protection for the freedom of religious organisations than would be allowed under both sets of recommendations. Unlike the ALRC's proposals, the EU Council Directive clarifies that certain forms of differential treatment engaged in by a religious organisation simply 'do not constitute discrimination',³⁶ whereas the ALRC proposes that the practices of religious institutions should continue to be protected only by 'exceptions' which allow 'discrimination' in certain circumstances. The Consultation Paper does not acknowledge this important difference or consider its significance.³⁷

The ALRC's proposals also define the scope of the proposed exceptions more narrowly than the EU Directive and require religious educational institutions to comply with more conditions in order to benefit from them. In particular, the ALRC proposes that a religious educational institution would not benefit from the exception if the criteria it uses in preferencing staff would 'amount to discrimination on another ground'.³⁸ Similarly, the ALRC suggests that the freedom of a religious educational institution to impose a code of conduct should be 'subject to ... prohibitions of discrimination on other grounds'.³⁹ Again, this is inconsistent with the EU Directive, which states categorically and without qualification that any 'difference of treatment' based on religion or belief that meets the conditions set out in the article 'shall not constitute discrimination'.⁴⁰

As many as 25 European states have implemented the EU Directive into their national law.⁴¹ The ALRC Consultation Paper selects only two of these for its comparative analysis, Ireland and the United Kingdom (the latter of which, of course, is no longer a member of the EU). However, many of the 25 EU member states have incorporated protections for the freedom of religious organisations in terms closely aligned with the language of the EU Directive, thus conferring wider protections for religious organisations than proposed by the ALRC Consultation Paper.⁴²

Some EU countries offer considerably wider protection of freedom of religious organisations than required by the EU Directive. In Croatia, it is not discrimination for an organisation to place a person in a less favourable position 'if this is required by the religious doctrine, beliefs or objectives' of any 'public or private organisation'.⁴³ In Germany, sensitive to state repression of religious organisations during the Nazi era, difference of treatment on grounds of religion or belief by a religious organisation is not discrimination if this is a justified occupational requirement having regard, inter alia, to the 'self-perception of the religious

³⁴ Council Directive 2000/78/EC of 27 November 2000 on Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16 ('EU Council Directive').

³⁵ QHRC Report (n 4) 379.

³⁶ EU Council Directive (n 34) art 4(2).

³⁷ See Aroney and Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47 *University of Western Australia Law Review* 43, at 53, 57 and 59.

³⁸ ALRC Consultation Paper (n 4) 22–4 (Proposition C).

³⁹ Ibid 25–8 (Proposition D).

⁴⁰ EU Council Directive (n 34) art 4(2). The conditions set out in art 4(2) do not include the requirement that the conduct must not constitute discrimination on some other ground.

⁴¹ Isabelle Chopin and Catharina Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2021* (Publications Office of the European Union, 2023) 72.

⁴² For example, *Protection Against Discrimination Act 2003* (Bulgaria) art 7(3); *Anti-Discrimination Act 2008* (Czech Republic) s 6(4); *Equal Treatment Act 2008* (Estonia) art 10(2). None of these provisions are discussed in the ALRC Consultation Paper.

⁴³ *Anti-Discrimination Act 2008* (Croatia) art 9(5).

society or association' considered in light of the 'right of self-determination' of the organisation.⁴⁴ Furthermore, it is stated that the prohibition on difference of treatment 'shall not affect' the right of religious organisations 'to be able to require their employees to act in good faith and loyalty in accordance with their self-perception'.⁴⁵ These provisions exist in the context of the German Basic Law, which guarantees 'freedom of association to form religious societies' and the right of those societies to 'confer [their] offices without the involvement of the State'.⁴⁶

Rather than refer to these and similar jurisdictions, the ALRC Consultation Paper cites the example of Ireland, which amended its law in 2015. The Consultation Paper says that these changes brought Irish law 'into line with European law'.⁴⁷ However, a comparison of the two regimes reveals that the Irish law is now more restrictive of the freedom of religious organisations than is required by the EU Directive, because it adds the requirement that the treatment must not constitute discrimination on other grounds.⁴⁸

The problem of cherry picking is a very real one. It is a temptation to which scholars, advocates, and even law reform commissions can easily succumb. While more rigorous and systematic research will not provide all the answers to the profound difficulties that these issues present for policy makers, it can provide a constraint on our very human tendency to confirmation bias. One is reminded of a point made by the UN Special Rapporteur on the Freedom of Religion or Belief when he observed that those states that adopt 'more secular or neutral governance models' may be prone to 'run afoul of article 18(3) of the Covenant if they intervene extensively, overzealously and aggressively in the manifestation of religion or belief alleging the attempt to protect other rights'.⁴⁹ One is also reminded of Jonathan Fox's startling finding that, contrary to expectations, Western democracies actually engage in more government-based religious discrimination than many countries of Asia, Africa, and Latin America.⁵⁰

⁴⁴ *Allgemeines Gleichbehandlungsgesetz* [General Law on Equal Treatment] (Germany) 18 August 2006, para 9(1).

⁴⁵ *Ibid* para 9(2).

⁴⁶ Basic Law for the Federal Republic of Germany (1949), art 140, incorporating art 137 of the Weimar Constitution (1919).

⁴⁷ *ALRC Consultation Paper* (n 4) 26 [66].

⁴⁸ *Employment Equality Act 1998* (Ireland) s 37(1A).

⁴⁹ Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion and Belief* (28 February 2018) UN Doc A/HRC/37/49 [47].

⁵⁰ Jonathan Fox, *Thou Shalt Have No Other Gods before Me: Why Governments Discriminate against Religious Minorities* (Cambridge University Press, 2020) chs 5, 7, and 8. These findings were based on a dataset cataloguing the treatment of 771 religious minorities in 183 countries over the period 1990 to 2014.