AJLR
AUSTRALIAN JOURNAL OF
Law & Religion

Volume 2

2023

Articles

Book Reviews

Special Topic Forum

Special Issue: *Religious Freedom, Sexuality, and Gender Identity*

AJLR

AUSTRALIAN JOURNAL OF
Law & Religion

Volume 2 (2023)

The mode of citation of this volume is

(2023) 2 AJLR [page]

Available in print by request and for free online at www.ausjlr.com

Australian Journal of Law and Religion
Room Q-416
487-535 West Street
Darling Heights, QLD 4350
editorsAJLR@gmail.com

Submissions: The *Australian Journal of Law and Religion* publishes scholarship that displays a connection between law and religion. Submissions may include scholarly articles, case notes, book reviews, and contributions to the special topic forum. The journal does not accept submissions simultaneously submitted elsewhere, submissions that are not in English, handwritten submissions, submissions previously published, or submissions consisting of unmodified student work or dissertation chapters. For details on how to submit, please visit www.ausjlr.com/submissions

The *Australian Journal of Law and Religion* acknowledges the traditional custodians of the lands and waterways where the journal is produced and printed. Further, the *AJLR* acknowledges the cultural diversity of Aboriginal and Torres Strait Islander peoples and pays respect to Elders past, present, and future.

ISSN 2653-5122 (Online)
ISSN 2653-5114 (Print)

Logo & Cover Design by Magicdust

Printed by Ligare Pty Ltd, Riverwood, NSW

CONTENTS

Volume 2, 2023

Book Reviews

Special Topic Forum: Religious Freedom, Sexuality, and Gender Identity

Editorial

If one were to judge solely from court cases, parliamentary debates, and arguments on social media, it would seem that religious people and LGBTQIA+ people are implacable foes locked in a ceaseless battle for ascendency over one another. The most extreme partisans are amplified into the loudest voices in order to rally support for the cause (of religious liberty on one side and equality on the other). Each 'battle'— a lawsuit, a draft statute, an offensive remark by a media personality — is portrayed as a crucial, make-or-break moment that, if lost, will turn into a slippery slope and prove disastrous for that 'side'. Viewed from this distorted perspective, rights are a zero-sum game, in which more religious liberty means less equality and more equality means less religious liberty.

But viewing religious people and queer people as natural adversaries is a mistake. 'It's only in mediocre books that people are divided into two camps and have nothing to do with each other. In real life everything gets mixed up.'[1] Every religious group has LGBTQIA+ members — whether or not those individuals feel comfortable sharing that with their fellow worshippers. Similarly, religion and spirituality are part and parcel of the lives of many in the LGBTQIA+ community. We do not now, and never have, lived in a world of straight, cisgender religious people on one side of a line and secular, atheist, queer people on the other side of the line. Faith, sexuality, and gender identity permeate our lives and cross the imaginary boundaries that zealots would have us draw to separate us from one another.

Indeed, people of faith and the queer community have much in common. Both groups know the sense of joy from being able to live their authentic selves in public spaces and not be confined to express their identity in the privacy of their home. Both groups know the stress and pain that comes from being judged by the broader society around them as somehow wrong or inferior. In different times, places, and contexts, each group has had the experience of feeling like the world was against them. And whether it comes during adolescence or adulthood, a crisis of faith or a crisis of identity can bring inner turmoil and self-doubt. Far from being natural enemies, these distinct but related experiences should create natural allies.

As Deagon explains in his new book *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination*,[2] scholars from across the political, religious, and ideological spectrum yearn for a resolution to continuing tensions and have called for a generosity of spirit, for listening and working together in good faith, for empathy, dialogue, and negotiation which results in real compromise.[3] Against those who despair that conflict is intrinsic and intractable, genuine conciliation — some would say an end to the interminable 'culture wars'— is achievable. What's needed is a sidelining of the voices which call for uncompromising outcomes which the other side simply cannot accept. Seeking the perfect can often undermine the pursuit of the good, and dialogue which does not accept the intrinsic dignity and value of all parties is unlikely to win broad support. Traditionalist religious groups need to accept that gay and transgender people are a reality and that they're not going anywhere. They are not a fad or inferior, and are entitled to the equal dignity owed all humankind. Excessive focus on this one issue surely comes at a cost of the ability of religious groups to disseminate their other core teachings. Fair is fair, however, and advocates for

[1] Boris Pasternak, *Doctor Zhivago* (Pantheon, 1958) pt 2 ch 9 s 14.
[2] Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart Publishing, 2023).
[3] Ibid 15.

LGBTIQA+ rights must adjust their expectations by understanding just how deeply rooted binary conceptions of sexuality and gender are in faith traditions around the world. It is not reasonable to demand the sudden uprooting of centuries of theological teachings, viewed by those traditions to be divine in origin, especially as they pertain to the doctrines and practices of a religion in selecting leaders and building communities and institutions for the benefit of its members and the broader society. A 'one-size-fits-all' approach to law and morality, or the imposition of a secular uniformity, diminishes the independence, integrity, and diversity of religious groups; an achievement that took the western world centuries of struggle to accomplish and that has resulted in incalculable social goods such as charities, hospitals, and schools — many of which are religious.

This position — a push for reconciliation — is not one that will please everyone. Strident voices on one side will say it gives the fundamental right of religious liberty short shrift and equally strident voices on the other will say it compromises the fundamental right of equal protection under the law. Some will see it as naïve, wishy-washy, or an exercise in 'both sides-ism'. In our polarised world, the most reasonable voices are often the most quickly dismissed. But in the end, the only alternative to genuine compromise is more of the same aggressive rhetoric and legal/political manoeuvres that diminish all of us.

* * *

Welcome to the second issue of the *Australian Journal of Law and Religion*. This special themed issue on 'Religious Freedom, Sexuality, and Gender Identity' is the result of a scholarly colloquium held at the University of Southern Queensland in October of 2022. A wide variety of voices from a diverse array of perspectives were heard during the colloquium. The resulting conversations were frank, respectful, and provided genuinely constructive feedback to the authors.

The best of the papers presented at the colloquium are collected in the pages that follow. Drawing from the themes in his new book, Alex Deagon explains why the current exemptions for religious groups in the *Sex Discrimination Act* need to be reframed. Mark Fowler discusses the protections that international human rights law may offer religious schools. Timothy Nugent asks the provocative question: can the state constitutionally offer legislative protection for 'statements of belief' without doing the same for other viewpoints? The high-profile move by Victoria to ban so-called 'conversion therapy' for gay and transgender people is discussed by Rhett Martin. Concluding the collection, Rena MacLeod critiques what she perceives as the androcentricity inherent in the overturning of *Roe v Wade* by the Supreme Court of the United States.

To round out the colloquium papers, this issue includes a detailed rejoinder by Nicholas Butler to last issue's article by Neil Foster on whether state anti-discrimination laws can be broader than the Commonwealth's in the context of religious schools. The short essays in this issue's Special Topic Forum include a critique of the way law reform and anti-discrimination commissions cherry-pick international law by Nicholas Aroney, an analysis of the *Sex Discrimination Act*'s definition of gender identity by Patrick Byrne, and an early account of the potential ramifications of Indonesia's new criminal code by noted Boston University scholar Robert W. Hefner. Book reviews cover the highly anticipated *Law and Religion in the Commonwealth* and the thought-provoking *The Transgender Issue*.

For better or worse, the relationship between religious freedom, sexuality, and gender identity has come to the forefront of law and religion studies in Australia. We hope you agree that the material in this special issue makes a meaningful contribution to that ongoing debate.

Alex Deagon
Jeremy Patrick
Co-Editors

May Australian States Impose Sexual Orientation and Gender Identity Non-Discrimination Obligations on Religious Schools? A Rejoinder to Foster

Nicholas Butler*

Section 38 of the Sex Discrimination Act 1984 *(Cth) provides exceptions to various non-discrimination obligations of the* SDA *so that those obligations do not burden religious educational institutions. Legal controversy exists over whether, in light of section 38, a State law that imposes sexual orientation and/or gender identity non-discrimination obligations on religious schools is constitutionally valid under section 109 of the* Australian Constitution*. In Volume 1 of the* Australian Journal of Law and Religion, *Associate Professor Neil Foster argued that such a State law would not be valid. This article, a rejoinder to Foster, considers the jurisprudence of the High Court on section 109, as well as other relevant case law. After considering the case law, it concludes that State laws that impose sexual orientation and/or gender identity non-discrimination obligations on religious schools can be consistent with section 38 of the* SDA *and thus not rendered invalid due to section 109 of the* Australian Constitution*.*

INTRODUCTION

The *Sex Discrimination Act 1984* (Cth) ('*SDA*') was amended in 2013 to expand the attributes on the basis of which discrimination was unlawful under the *SDA* to include sexual orientation, gender identity, and intersex status (along with other attributes).[1] The provisions of the *SDA* relevant to this article as a result of the amendments are ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21.

Section 38 of the *SDA* stipulates that the non-discrimination obligations contained in those five provisions do not apply to religious educational institutions ('religious schools') in connection with discrimination in employment as a staff member of a religious school,[2] contract worker in a religious school,[3] and 'the provision of education or training'.[4] Because of s 38, ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21, collectively, do not prohibit religious schools from discriminating on the ground of 'sex, sexual orientation, gender identity, marital or relationship status or pregnancy' in employment and contract work,[5] and on the ground of all of those attributes except sex in the provision of education and training.[6]

* B.A./LL.B. (Hons), Monash University.

[1] See eg, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1 items 1, 2, 3 amending *Sexual Discrimination Act 1984* (Cth) ss 1, 2, 3.

[2] *Sex Discrimination Act 1984* (Cth) s 38(1) ('*SDA*').

[3] Ibid s 38(2).

[4] Ibid s 38(3).

[5] Ibid ss 38(1)–(2).

[6] Ibid s 38(3).

Although Commonwealth law[7] imposes few sexual orientation and gender identity ('SOGI') non-discrimination obligations on religious schools, various State laws impose obligations on religious schools that are not imposed by Commonwealth law. The validity of such State laws has been called into question due to s 109 of the *Australian Constitution*. Section 109 reads in full:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[8]

Expounding a complete and comprehensive list of every different way in which s 109 operates has proven difficult, and the exact manners in which s 109 operates are disputed.[9] However, it is not in dispute that if a Commonwealth law confers a right that a State law limits, restricts, or denies, the State law is inconsistent with the Commonwealth law, and thus invalid to the extent of that inconsistency.[10] Inconsistency for this reason is considered a type of *direct* inconsistency.

This article will consider whether State laws that impose SOGI non-discrimination obligations on religious schools are, for this reason, directly inconsistent with s 38. Section 10(3) of the *SDA* states that the *SDA* 'is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with' the *SDA*. Therefore, a State law will not be invalid by reason of *indirect inconsistency* with the *SDA*. The conclusion will offer some thoughts on the correct interpretation of s 109; however, its contention will not depend on these points. In advancing its contention, the article assumes the existing precedent from the High Court of Australia on s 109 to be correct and reaches its conclusions within that framework.

STATE LAWS IMPOSING SOGI NON-DISCRIMINATION OBLIGATIONS ON RELIGIOUS SCHOOLS PROBABLY IMPOSE OBLIGATIONS GREATER THAN THOSE IMPOSED BY COMMONWEALTH LAW

The test of inconsistency whereby a State law is said to detract from a right conferred by Commonwealth law was applied in the case of *Dickson v The Queen* ('*Dickson*').[11] In this case, a defendant in a criminal trial was convicted of breaching s 321(1) of the *Crimes Act 1958* (Vic) ('*Crimes Act*') which prohibited conspiracies to commit criminal offences. The defendant challenged s 321 as inconsistent with s 11.5 of the *Criminal Code Act 1995* (Cth) *('Criminal Code*') which also prohibited such conspiracies but was narrower than the Victorian law. The High Court upheld his challenge and struck down s 321. In providing its ratio, the Court observed the following:

[7] Except when quoting, this article will use the term 'Commonwealth law' and 'Commonwealth laws', although the terms 'federal law' and 'federal laws' are interchangeable here.
[8] *Australian Constitution* s 109.
[9] Allan Murray-Jones, 'The Tests for Inconsistency Under Section 109 of the Constitution' (1979) 10(1) *Federal Law Review* 25, 33–40.
[10] Conceptually speaking, a state law found inconsistent with a federal law under s 109 is best considered 'inoperable' rather than 'invalid' because if the conflicting federal law is repealed, the state law immediately resumes force. However, this article will follow the language of s 109 itself and use the term 'invalid' to describe the result of a finding of inconsistency.
[11] (2010) 241 CLR 491 ('*Dickson*').

> The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian *Crimes Act* renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth *Criminal Code*. In the absence of the operation of s 109 of the Constitution, the Victorian *Crimes Act* will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of 'direct collision' because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.[12]

This passage has been cited to justify the conclusion that s 38 prevents a State from enacting a law to prohibit religious schools from engaging in conduct in which, by virtue of s 38, they may engage without contravening the *SDA*.[13] It is argued that State laws which impose SOGI non-discrimination obligations on religious schools impose greater obligations than the *SDA*, rendering those State laws invalid. But one difficulty in invoking *Dickson* to justify a conclusion that State laws imposing SOGI non-discrimination obligations on religious schools necessarily impose greater obligations than the *SDA* is that s 38 does not fit the important description that the Court gave to s 11.5 of the Commonwealth *Criminal Code* in *Dickson*. In *Dickson*, the Court's basis for concluding that s 321 of the Victorian *Crimes Act* imposed obligations greater than those imposed by s 11.5 was expressed as the following: 'What is immediately important is the exclusion by the federal law of *significant aspects of conduct* to which the State offence attaches'.[14]

In identifying 'the exclusion by the federal law of significant aspects of conduct' as the factor suggestive of the conclusion that s 11.5 confers a right, the Court held that s 11.5 conferred a right by virtue of the *conduct* that the section prohibits, and the limits on that prohibition. Section 38, on the other hand, does not quite function the same way. It does not establish and limit liability for unlawful activity solely according to what is done or not done by the alleged wrongdoer. Instead, it limits liability according to circumstances in which the conduct is engaged, and/or who engages in the conduct. Liability is limited if the person (or body) engaging in the discrimination is a religious school, and if the circumstances surrounding the discrimination include 'employment', 'contract work' or 'the provision of education or training'.

Because ss 11.5 and 321 are not highly analogous to s 38 and State laws imposing SOGI non-discrimination obligations on religious schools, the possibility that the Court may rule that such State laws do *not* impose greater obligations than the Commonwealth law should be acknowledged. Nonetheless, it is likely the case that State laws imposing SOGI non-

[12] Ibid 504 [22] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (citations omitted).
[13] Neil Foster, 'Religious Freedom, Section 109 of the Constitution, and Anti-discrimination Laws' (2022) 1 *Australian Journal of Law and Religion* 36 ('Religious Freedom').
[14] *Dickson* (n 11) 505 [25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (emphasis added).

discrimination obligations on religious schools do impose greater obligations than those imposed by Commonwealth law. To exclude certain conduct from attracting legal liability only in some circumstances, or only when that conduct is engaged in by some people or organisations, is still to exclude conduct from attracting legal liability. It seems unlikely that, when the Court refers to 'obligations greater than those provided by the federal law', it intended the word 'greater' to be interpreted so narrowly as to relate to only what the obligations actually are, and not how broadly or widely they apply. This is especially so given the Court's observation in *Dickson* that s 321 'would impose *upon the appellant* obligations greater than those provided by the federal law.'[15] The explicit reference to the appellant suggests that the individual circumstances of the person affected by the State law must be considered, and it is undeniable that religious schools have greater obligations under State laws imposing SOGI non-discrimination obligations than they do under the *SDA*.

THE HIGH COURT'S SECTION 109 DECISIONS DO NOT JUSTIFY THE CONCLUSION THAT EVERY STATE LAW IMPOSING OBLIGATIONS GREATER THAN SIMILAR OBLIGATIONS IMPOSED BY COMMONWEALTH LAW IS INVALID

Academic commentators who argue that s 38 invalidates State laws imposing SOGI nondiscrimination obligations have invoked paragraph [22] of *Dickson*[16] to contend that certain provisions of Victorian and Tasmanian legislation are invalid. Neil Foster gives the example of a 'religious organisation adopt[ing] a policy that would involve not hiring a person advocating and living out a policy that favoured sex outside marriage', noting that such a policy would not be prohibited by the *SDA* but may be prohibited by Victorian legislation.[17] Foster concludes:

> It seems fairly clear that this would be a 'direct impairment' by a State law of a right given by a Commonwealth law through consideration of the operation of s 109. To adapt the language of the *Dickson* judgment, the Victorian law 'would alter, impair or detract from the operation of the federal law by proscribing conduct of the [organisation] which is left untouched by the federal law' and the State law, if allowed to operate, would impose upon the [organisation] obligations greater than those provided by the federal law.[18]

In isolation and removed from its context, the Court's holding in *Dickson* that s 321 was invalid because 'if allowed to operate, [it] would impose upon the appellant obligations greater than those provided by the federal law' does read as a declaration that *any* State law, including a SOGI non-discrimination law, which imposes obligations greater than similar obligations imposed by a Commonwealth law is invalid. However, the Court also made clear that there were other factors relevant to its conclusion that s 321 was inconsistent with s 11.5. These factors especially pertained to the extensive law reform history preceding the enactment of the Commonwealth *Criminal Code*, a history not replicated in the case of s 38. As per the Court:

> Section 11.5 of the Commonwealth *Criminal Code* received detailed consideration by this Court in *R v LK*. The extrinsic material considered in *R v LK* indicated that

[15] Ibid (emphasis added).
[16] See above n 12 and accompanying text.
[17] Foster (n 13) 49.
[18] Ibid.

> the narrower scope of s 11.5 reflects a deliberate legislative choice influenced by the work of what in *R v LK* were identified as the Gibbs Committee and the Model Criminal Code Officers Committee.
>
> What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant 'areas of liberty designedly left [and which] should not be closed up', to adapt remarks of Dixon J in *Wenn v Attorney-General (Vict)*.[19]

In noting that the limits on the criminal liability imposed by s 11.5 were 'designedly left' by the Commonwealth Parliament, and that the Commonwealth Parliament decided that 'significant… areas of liberty… should not be closed up', the Court construed s 11.5 of the *Criminal Code* not only as declaring what is illegal, but also as implicitly declaring what is positively permitted. In other words, the Court considered that s 11.5 confers on the Australian people a positive right to conduct themselves in a manner that falls short of constituting conspiracy according to s 11.5. This construction of s 11.5 is essential to the Court's holding that s 321 was invalid; indeed, the Court labelled it an 'immediately important' point.

The Court's interpretation of s 11.5 is supported by, and consistent with, how the Court contrasted s 11.5 in *Dickson* with the relevant Commonwealth law in *McWaters v Day* ('*McWaters*').[20] In *McWaters*, the Court upheld a State law imposing a stricter prohibition on driving under the influence of alcohol than that imposed by a Commonwealth law prohibiting such driving.[21] The Court distinguished *Dickson* from *McWaters* on the ground that in *McWaters*, it was 'difficult to construe [the State law] as conferring a liberty on a drunken defence member to drive a vehicle on service land provided he or she was still capable of controlling the vehicle.'[22] In declining to characterise the Commonwealth law in *McWaters* as one that confers a liberty, and distinguishing s 11.5 in *Dickson* on that basis, it is clear that the Court considers s 11.5 to be a law conferring a liberty.

A third case supports the view that a Commonwealth law must positively confer a liberty if a State law imposing greater obligations than that Commonwealth law is to be declared invalid. In *Blackley v Devondale Cream (Vic) Pty Ltd* ('*Devondale Cream*'),[23] the respondent faced legal proceedings for paying a wage to an employee lower than the minimum wage set out by a determination made by the Frozen Goods Board, which was set up by the *Labor and Industry Act 1958* (Vic). However, that minimum wage was higher than the applicable minimum wage set out in the Transport Workers (General) Award made by the Commonwealth Conciliation and Arbitration Commission.[24] The High Court ruled the relevant provisions of the Frozen Goods Board determination and the Victorian Act invalid. However, two important points must be made about the judgment.

The first is that although the decision that the Victorian provisions were invalid was 4:1, only a minority of the justices (two out of five) who decided the case subscribed to Barwick CJ's

[19] *Dickson* (n 11) 505 [24]-[25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (citations omitted).
[20] (1989) 168 CLR 289 ('*McWaters*').
[21] Ibid 299 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[22] *Dickson* (n 11) 506 [29] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[23] (1968) 117 CLR 253 ('*Devondale Cream*').
[24] Ibid 255–6 (Barwick CJ).

ratio decidendi that the Victorian laws were directly inconsistent by virtue of imposing greater obligations than the Commonwealth laws.[25] The second is that Barwick CJ himself observed that the Commonwealth law confers a liberty on employers not to pay their employees more than the amount set out in the Commonwealth Award:

> Properly understood, the act and the award, in placing that obligation upon the employer, enacts, in my opinion, that the sum so to be paid is the only sum which by law the employer is obliged to pay.[26]

Thus, from *Dickson*, *McWaters*, and *Devondale Cream*, an inference can be drawn that only those Commonwealth laws which may be construed as conferring a liberty will invalidate a State law that imposes obligations greater than those imposed by the Commonwealth law. For present purposes, the relevant question thus becomes whether s 38 of the *SDA* can be said to affirmatively confer a liberty.

Not only does this inference explain the Court's various holdings in *Dickson* in a harmonious and coherent manner, it is also supported by well-established principles of statutory interpretation. Although the fulfilment of legislative intention is not the highest priority of statutory interpretation, the legislative intention behind a statutory provision is important. In *Project Blue Sky v Australian Broadcasting Authority* ('*Project Blue Sky*') the Court held that 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.[27] And in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* ('*Alcan Alumina*') the Court held that the 'language which has actually been employed in the text of legislation is the surest guide to legislative intention'.[28]

All this said, it may not be necessary to identify *Dickson*'s broader context in order to distinguish s 11.5 from s 38. Section 11.5 creates, after all, an indictable offence under Commonwealth law, meaning that the trial must be by jury[29] where only a unanimous verdict can be accepted.[30] Victorian criminal law, on the other hand, allows for majority verdicts in some circumstances.[31] The Court identified this discrepancy as key to its conclusion that s 321 of the *Crimes Act* was invalid,[32] yet neither this discrepancy nor any materially similar discrepancy exists in the context of s 38 and State SOGI non-discrimination laws.

The nature of s 11.5 as a criminal law is relevant to limit *Dickson*'s applicability in the present matter as well: there is a rule of statutory interpretation that statutes creating criminal offences may have to be construed narrowly, although the rule is, admittedly, a 'last resort'.[33] To the extent that it does operate, however, it assists in limiting an accused person's criminal liability.

---

[25] Ibid 258 (Barwick CJ and McTiernan J at 259).
[26] Ibid 258 (Barwick CJ).
[27] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').
[28] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ) ('*Alcan Alumina*').
[29] *Australian Constitution* s 80.
[30] *Cheatle v The Queen* (1993) 177 CLR 541, 552 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[31] *Juries Act 2000* (Vic) ss 44, 46.
[32] *Dickson* 499 [2] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[33] *Aubrey v The Queen* (2017) 260 CLR 305, 325 [39] (Kiefel CJ, Keane, Nettle and Edelman JJ) citing *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).

But non-discrimination legislation is construed very differently: because it is considered 'beneficial' or 'remedial' legislation, it is construed with a view to maximising the protections it provides.[34] Inevitably, this means it is construed with a view to maximising the obligations a person has *not* to discriminate against another person. In other words, although the tendency of the courts when dealing with criminal statutes is to limit the liability of the person said to have breached law, the tendency of the courts when dealing with non-discrimination legislation is to do the opposite. Quite clearly, this requires interpreting exceptions to non-discrimination legislation, such as s 38, narrowly. An interpretation of s 38 as limiting the application of State non-discrimination laws, rather than merely limiting the application of the laws it explicitly mentions, is anything but narrow.

THE HIGH COURT HAS EXPLICITLY ACKNOWLEDGED THAT STATE LAWS IMPOSING OBLIGATIONS GREATER THAN SIMILAR OBLIGATIONS IMPOSED BY COMMONWEALTH LAWS ARE NOT NECESSARILY INVALID

Before this article proceeds to address the precise operation of s 38 — that is, whether or not it confers an affirmative liberty — it would be prudent to further substantiate the claim that a State law imposing obligations greater than similar obligations imposed by a Commonwealth law is not necessarily invalid. This claim is not merely inferential or implicit; the High Court has explicitly decided cases accordingly. To ascertain how it has done so, it is necessary to turn to one particular feature of the High Court's s 109 jurisprudence: the Court's identification of Commonwealth laws that are supplementary to or cumulative upon State laws. If a Commonwealth law falls into this category, a State law will not be held to invalidly exceed the obligations that the Commonwealth law imposes.

In *Telstra v Worthing* ('*Telstra*'), the Court unanimously made the following comments about the operation of s 109:

> [I]t is clearly established that there may be inconsistency within the meaning of s 109 although it is possible to obey both the Commonwealth law and the State law. Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided. Thus, in *Australian Mutual Provident Society v Goulden*, in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth *Life Insurance Act*'. *A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question.* But that is not this case.[35]

The first observation that should be made about this distinction is that although in *Telstra*, it was drawn in the context of *direct* inconsistency (as made clear by the Court's usage of the term 'direct collision'), a review of the history of the Court's s 109 jurisprudence shows that the concept of a Commonwealth law being 'supplementary' to a State law was first identified

[34] *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ, McHugh J); *Owners Corporation OC1-POS539033E v Black* (2018) 56 VR 1, 18 [57] (Richards J) ('*Black*').
[35] (1999) 197 CLR 61, 76 [27] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (emphasis added) (citations omitted) (*'Telstra'*).

in the context of *indirect* inconsistency. A State law on the same subject matter as a Commonwealth law will be indirectly inconsistent with that Commonwealth law if the Commonwealth Parliament intended the Commonwealth law to be the only law governing that particular subject matter.

In *Ex parte McLean*, Dixon J identified the existence of the category of supplementary Commonwealth laws in these remarks:

> If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.[36]

Dixon J's reference to 'completely, exhaustively or exclusively' setting out what the law shall be confirms that he was referring to supplementary Commonwealth laws in the context of *indirect* inconsistency. In *Momcilovic v The Queen*, his remarks were described by Gummow J as one 'of the classical formulations by Dixon J of the operation of s 109'.[37]

Given this jurisprudential origin of supplementary Commonwealth laws, it is questionable whether, in order to survive a challenge on the grounds of *direct* inconsistency with a Commonwealth law, a State law should have to be found to be a law to or upon which the Commonwealth law is supplementary or cumulative. In adapting a distinction originally made in the context of indirect inconsistency to cases involving direct inconsistency, the holding in *Telstra* risks blurring the lines between the two categories. That said, there is no logical or conceptual impossibility in applying the distinction to cases of direct inconsistency; it would just apply for different reasons than it would to cases of indirect inconsistency. In cases of direct inconsistency, a Commonwealth law would supplement a State law if the Commonwealth law was not intended to prevent State laws from imposing extra obligations. In cases of indirect inconsistency, a Commonwealth law would supplement a State law if it wasn't intended to be the only law regulating the subject matter. It must also be borne in mind that whether a State law falls into a particular 'category' of inconsistency is not the question of ultimate importance when applying s 109; what is ultimately important is the 'true construction' of 'the particular laws in question'.[38]

The second and more immediately relevant observation that must be made about the category of supplementary Commonwealth laws is that if a Commonwealth law falls under this category, a State law will not be directly inconsistent with the Commonwealth law *even if* the State law imposes obligations broader or more burdensome than similar obligations imposed by the Commonwealth law. *McWaters* is a clear example of this. In that case, s 16(1)(a) of the *Traffic Act 1949* (Qld) made it an offence to drive a motor vehicle 'whilst… under the influence of liquor or a drug'. But ss 40(1)(a) and 40(1)(b) of the *Defence Force Discipline Act 1982* (Cth) only made it an offence to drive a 'service vehicle' in any place, or any vehicle on 'service

[36] (1930) 43 CLR 472, 483 (Dixon J).
[37] (2011) 245 CLR 1, 116 [262] (Gummow J).
[38] Ibid 112 [245].

land', 'while… under the influence of intoxicating liquor or a drug to such an extent as to be incapable of having proper control of the vehicle'. The Queensland law thus imposed broader and more burdensome obligations relating to drink driving than did the Commonwealth law in two separate ways: (1) the Queensland law applied to *all* motor vehicles, not just to service vehicles or vehicles on service land; and (2) the threshold in the Queensland law for unlawful intoxication was merely that the driver was 'under the influence' of alcohol, rather than the higher threshold in the Commonwealth law of the driver being 'incapable of having proper control of the vehicle'. Nevertheless, the Queensland law was upheld by the High Court. (It is immaterial that the Court considered the Queensland law in the context of *indirect* inconsistency; once it declared the law valid, it inevitably declined to declare the law directly inconsistent with the Commonwealth law despite its more burdensome obligations.)

The existence of the category of Commonwealth laws which are supplementary to or cumulative upon State laws allows, at a minimum, for the *possibility* that State laws imposing the SOGI non-discrimination obligations on religious schools covered by s 38 are valid. If s 38 positively confers a right, freedom or liberty on religious schools to engage in SOGI discrimination, then those State laws are clearly invalid. But if s 38 does not do this, then it is a law which is supplementary to or cumulative upon those State laws, and those State laws are valid.

THE OPERATION OF SECTION 38 IS NOT TO CONFER AN ABSOLUTE RIGHT ON RELIGIOUS SCHOOLS TO ENGAGE IN SOGI NON-DISCRIMINATION

Although State laws imposing SOGI non-discrimination obligations on religious schools are valid according to the principles enunciated in *Dickson*, other cases use slightly different, and arguably broader language, in determining if a State law is invalid by reason of inconsistency with a Commonwealth law.

In *Australian Mutual Provident Society v Goulden* ('*Goulden*'), the High Court invalidated s 49K(1) of the *Anti-Discrimination Act 1977* (NSW) ('*ADA*') 'to the extent that it purports to apply to the life insurance business of registered life insurance companies.'[39] The Court deemed s 49K(1) of the NSW *ADA* inconsistent with s 78 of the *Life Insurance Act 1945* (Cth). Section 49K(1) prevented discrimination on the grounds of physical handicap or impairment in the provision of goods and services, which the Court held was inconsistent with the right of a 'registered life insurance company to classify risks and fix rates of premium in its life insurance business in accordance with its own judgement founded upon the advice of actuaries and the practice of prudent insurers'.[40] The Court adopted the language of Dixon J in *Victoria v Commonwealth*,[41] holding that a State law will be invalid if 'it would alter, impair or detract from the Commonwealth scheme of regulation' on a particular issue.[42] Elsewhere in the judgment, the Court ruled s 49K(1) invalid because it 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth Life Insurance Act …'.[43]

[39] (1986) 160 CLR 330, 340–1 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ) ('*Goulden*').
[40] Ibid 337.
[41] (1937) 58 CLR 618, 630 (Dixon J).
[42] *Goulden* (n 39) 337.
[43] Ibid 339.

Like the holding in *Dickson*, this holding has been relied on to justify the conclusion that s 38 of the *SDA* invalidates State laws imposing SOGI non-discrimination obligations on religious schools that are covered by s 38. Neil Foster writes:

> In the circumstances being considered here, it seems clear that the area of law being considered is the question whether a religious body will be liable for discrimination on, say, grounds of sexual orientation. The policy implemented by the Commonwealth law is that in general it will, *but not* where its action is in accordance with its genuine religious commitments (to summarise the effect of ss 37 and 38.) If a state law conditions enjoyment of this privilege on satisfaction of additional requirements, or by removing the privilege altogether, as is done under Tasmanian and Victorian laws, then in doing so it has *qualified*, *impaired*, and to a significant respect *negated*, the scheme set up by the Commonwealth.[44]

Foster is not alone in holding to this view of s 38. Neil Rees, Simon Rice, and Dominique Allen write:

> Conversely, a s 109 inconsistency might exist when State and Territory anti-discrimination legislation *removes or diminishes an exception that a Commonwealth law makes*, so that the State or Territory anti-discrimination [law] prohibits conduct that the Commonwealth legislation would allow[;] [f]or example, s 38 of the *SDA* …[45]

Though not arguing in the specific context of non-discrimination laws, Mark Leeming writes:

> [C]onstitutional inconsistency may be engaged merely by a purported alteration, impairment or detraction from a right, obligation, power, privilege or immunity conferred by federal statute …[46]

Whether a State law imposing SOGI non-discrimination obligations covered by s 38 on religious schools does indeed alter, detract from, qualify, impair, or negate the operation of s 38 depends on what the correctly understood operation of s 38 is. If the correctly understood operation of s 38 is to create an affirmative right, liberty, power, privilege, or immunity for religious schools to engage in the SOGI discrimination addressed by that section, then a State law imposing an obligation on religious schools not to so discriminate is clearly invalid.

However, there are many reasons for considering this *not* to be the actual operation of s 38, and to consider s 38 to have a more limited operation, one that permits the operation of State laws which impose SOGI non-discrimination obligations on religious schools covered by s 38. Perhaps the most obvious of these is the context of s 38 in the broader *SDA*. In *McWaters*, the Court held that 'common sense and principles of statutory construction demand that the provisions be read in their context'.[47] And as noted in *Project Blue Sky* and *Alcan Alumina*, the legislative intention behind s 38 in the *SDA* is important.

---

[44] Foster (n 13) 50.
[45] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 81 [2.14.24].
[46] Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 149.
[47] *McWaters* (n 19) 297 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

The context of s 38 is that other provisions in the *SDA* contain obligations that would, but for the existence of s 38, and contrary to the Commonwealth Parliament's wishes, burden religious schools. When understood in this context, the legislative intention behind s 38 is clear: to ensure that specifically identified statutory provisions have a more limited application than they would have without s 38. This limited and specific intention falls far short of an intention to prohibit *the States* from imposing the obligations that the Commonwealth Parliament did not wish its own law to impose.

At this point it might be argued that if the Commonwealth Parliament decided not to impose the obligations covered by s 38 on religious schools, its intention was that such obligations would not be imposed on religious schools *by any law or legislature*, including State laws and State Parliaments. More likely, however, is that the Commonwealth Parliament's intention to limit the application of the *SDA* was borne of a view that the Commonwealth should not itself impose the relevant SOGI non-discrimination obligations on religious schools, an intention that supports a view of s 38 of the *SDA* as a law supplementary to State law. That the Commonwealth Parliament singled out ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21 (but no State laws) as not applying to religious schools indicates that it had turned its mind to the question of which statutory provisions should not apply to religious schools, and decided that only those five should not. It would be plausible to suggest, for example, that Parliament acknowledged different States may face different circumstances and should be afforded discretion in the delicate balancing this area requires.

In interpreting statutes, courts frequently consider the issues to which a Parliament can be taken to have turned its mind. But they also commonly hold that where a Parliament has turned its mind to an issue, it should be taken to have intended to take no more action on that issue than the action it did take, and that any action it has not taken on that issue is the result of deliberate choice, rather than an oversight that a court might correct. An example of this interpretative process is found in the Victorian case of *Owners Corporation OC1-POS539033E v Black*.[48]

In this case, a handicapped resident in an apartment sued the owners corporations in charge of the apartment's plan of subdivision, seeking that they improve the building's disability access. The resident relied on ss 44 and 45 of the *Equal Opportunity Act 2010* (Vic) ('*EOA*'), under which she alleged indirect disability discrimination and a failure to make reasonable adjustments for her disability in the provision of services, as well as s 56 of the *EOA*, 'which requires an owners corporation to make alterations to common property in certain circumstances.'[49] The owners' corporations submitted that s 56 exclusively codified 'the circumstances in which an owners corporation might be required to make alterations to common property to accommodate a lot owner's disability', thus excluding any obligations imposed by ss 44 and 45.[50] Justice Richards of the Supreme Court of Victoria rejected this submission, ruling that the 'services' referred to in ss 44 and 45 included disability access to the apartment building. She gave the following reason for this ruling:

> [T]he express exclusion of 'education or training in an educational institution' from the definition of 'services' in s 4 [of the Vic *EOA*]. This exclusion first appeared in the definition of 'services' in the 1995 Act, which was re-enacted in the EO Act in

[48] (2018) 56 VR 1 ('*Black*').
[49] Ibid 2–3 [1]–[4] (Richards J).
[50] Ibid 15 [44]-[45].

> 2010. This indicates that *Parliament turned its mind* to whether any area of activity should be excluded from the wide and inclusive definition of 'services' and, having done so, confined itself to excluding education or training'[51]

Just as the Victorian Parliament turned its mind to the question of which activities should be excluded from the definition of 'services' in the Victorian *EOA*, so too has the Commonwealth Parliament turned its mind to which statutory provisions should be excluded from imposing SOGI non-discrimination obligations on religious schools. And just as the Victorian Parliament confined its exclusion from the definition of services to education and training, so too has the Commonwealth Parliament confined its exclusion from imposing SOGI non-discrimination obligations on religious schools to ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21 of the *SDA*. The Commonwealth Parliament very easily could have added words to the effect of 'any State or Territory law' to the list incorporating the aforementioned five subsections, yet chose not to do so.

Of course, an explicit reference in the Commonwealth law to State laws is not, generally, a prerequisite for inconsistency. The High Court has invalidated many State laws for inconsistency with a Commonwealth law, despite those State laws not being explicitly mentioned by the Commonwealth law. But the calculation is different in those cases where the Commonwealth Parliament has considered that, in order to give certain statutory provisions a more limited application, it is necessary to explicitly and specifically identify those provisions. Here, it is unlikely that an intention to limit a statute's application extends to statutory provisions which have not been so identified.

One important canon of statutory interpretation — *expressio unius est exclusio alterius* ('*expressio*') — also supports a construction of the *SDA* that is supplementary to State law. The phrase is a Latin maxim meaning 'the expression of one thing excludes others'. If applicable in this case, it would mean that statutory provisions *not* listed in s 38 are excluded from non-application to religious schools, by virtue of s 38 expressly listing some provisions. For example, State laws imposing SOGI non-discrimination obligations on religious schools would continue to apply, despite s 38.

It must be noted that *expressio* does not apply to every scenario in which a number of specific items are explicitly listed. There are scenarios in which a particular condition, circumstance, or result that applies to a list of items will also apply to items not on that list. The High Court explained the circumstances in which the maxim applies in *Houssein v Under Secretary, Department of Industrial Relations & Technology (NSW).*[52]

In this case, the applicants had applied to the Industrial Commission of New South Wales to have certain shops registered under s 76A of the *Factories, Shops and Industries Act 1962* (NSW) as shops that could operate under extended shopping hours. When the Commission refused registration, the applicants sought to appeal the refusal. The difficulty for the applicants was that s 84(1)(a) of the *Industrial Arbitration Act 1940* (NSW) ('*IAA*') appeared to prohibit an appeal against the refusal. But s 84(1)(b) of the *IAA* prohibited the issue of writs of prohibition and certiorari in relation to determinations of 'industrial' matters made by the Commission. The applicants argued that the express mention of *industrial* matters excluded

[51] Ibid 20 [65] (emphasis added).
[52] (1982) 148 CLR 88.

non-industrial matters from the prohibition on review of a decision.[53] The Court ruled that *expressio* did not apply in this situation, holding:

> In these circumstances there is no room for the application of the maxim expressio unius. That maxim must always be applied with care, for it is not of universal application and applies only when the intention it expresses is discoverable upon the face of the instrument …[54]

However, the intention behind s 38 is discoverable upon its face alone. As aforementioned, the intention behind it is to ensure that specifically identified statutory provisions have a more limited application than they would have without s 38. This intention is discoverable from the mere text of s 38; the mere text is sufficient to alert a reader to the existence of these statutory provisions and the fact that they would, but for s 38, have broader application. No further inquiries are needed to discover the intention.

The reality of this intention may very well be sufficient on its own to conclude that s 38 is supplementary to State laws, rather than a law that imposes a final standard of obligations on religious schools that no State law may exceed. But if the intention is not sufficient to so conclude, then the matters that to which the Commonwealth Parliament turned its mind, as well as *expressio*, operate to confirm that no State law imposing SOGI non-discrimination obligations on religious schools is nullified by s 38, and that s 38 operates supplementary to State laws.

One final matter may serve to further demonstrate these points. When the Commonwealth Parliament has sought to confer a positive right to religious freedom on a person or body, it has used clear and unequivocal language to do so. For example, s 47B(1) of the *Marriage Act 1961* (Cth) states:

> A body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage…

The use of the word 'may' in this subsection confirms that religious bodies have a positive right not to engage in the described conduct, and therefore, that no State may deny this right via non-discrimination law. The language used is considerably stronger and broader than the limited language of s 38, which merely identifies a small number of statutory provisions which do not apply in specific contexts. It seems unlikely that such divergent language can perform the same function when used for the same subject matter.

THE CASES CITED TO SUPPORT THE PROPOSITION THAT SECTION 38 INVALIDATES STATE LAWS IMPOSING SOGI NON-DISCRIMINATION OBLIGATIONS ON RELIGIOUS SCHOOLS ARE INAPPOSITE

This article has placed much importance on s 38's identification of specific statutory provisions that are to have a more limited application than they otherwise would. Not only does this reality support the view that s 38 is supplementary to or cumulative upon State laws, it also serves to

[53] Ibid 90–2 (Stephen, Mason, Aickin, Wilson and Brennan JJ).
[54] Ibid 94.

distinguish s 38 from the Commonwealth laws in other cases where the impugned State law has been invalidated. Cases that have been cited to argue that s 38 invalidates certain State laws imposing SOGI non-discrimination obligations include *Viskauskas v Niland* ('*Viskauskas*'), *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* ('*Bitannia*') and *Clyde Engineering Co Ltd v Cowburn* ('*Clyde Engineering*').[55]

In *Viskauskas*, the High Court ruled s 19 of the NSW *ADA* was indirectly inconsistent with s 9 of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[56] In *Bitannia*, the New South Wales Court of Appeal held that s 15(4)(b)(i) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) was directly inconsistent with s 52 of the *Trade Practices Act 1974* (Cth) ('*TPA*').[57] And in *Clyde Engineering*, the High Court invalidated ss 6, 12, and 13 of the *Forty-four Hours Week Act 1925* (NSW) on the ground that they were directly inconsistent with an award made pursuant to the *Commonwealth Conciliation and Arbitration Act 1904-1921* (Cth) ('*CCAA*').[58]

Yet neither ss 9(1) or 9(2) of the *RDA*,[59] nor s 52 of the *TPA*, nor the award made pursuant to the *CCAA* identified any specific statutory provisions which, by virtue of the Commonwealth law said to give rise to an inconsistency, were not to apply or were to have their application limited. This fact is of high importance; if the Commonwealth Parliament, when passing a law, declines to create a distinction between laws specifically identified as having a more limited application by virtue of the first law, and laws not so identified, then it appears to intend that all State laws imposing obligations greater than those imposed by the first law are to be treated in the same manner. If the Commonwealth law confers a positive liberty, then it is clear that all State laws which impose obligations greater than similar obligations imposed by the Commonwealth law are invalid. However, if the Commonwealth Parliament *does* choose to create two categories of laws — one being the laws specifically identified as of a more limited application, and the other being the laws not so identified — then there appears to be an intention that this distinction be of some consequence. In other words, the Commonwealth Parliament intends that the specifically identified laws are to have a different operation to the other laws. Quite obviously, there is no point in the Commonwealth Parliament creating these two categories of laws if they are nevertheless to be treated the same way. To treat the two categories of laws the same way would render the explicit inclusion of ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21 superfluous, contrary to basic principles of statutory interpretation.[60] The consequences of drawing this distinction, as opposed to not drawing it, are meaningful,

[55] Foster (n 13) 47.
[56] *Viskauskas v Niland* (1983) 153 CLR 280, 292–3 (Gibbs CJ, Mason, Murphy, Wilson, and Brennan JJ) ('*Viskauskas*'). Whether the Court ruled s 19 *directly* inconsistent with the RDA is debatable. At 292–3, the Court strongly alluded to direct inconsistency; however, at 291, the Court held that '[t]here is no direct inconsistency between the Commonwealth Act and the New South Wales Act' because 'it is obviously possible for a person to obey both laws by refraining from committing any act of racial discrimination.'
[57] *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 [115]-[119], [124] (Basten JA, Hodgson and Tobias JJA agreeing) ('*Bitannia*').
[58] *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 467 (Knox CJ, Isaacs, Gavan Duffy, Rich and Starke JJ) ('*Clyde Engineering'*).
[59] Section 9(3) of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') does identify s 9(1) of the *RDA* as having no application 'in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia'; however, s 9(3) was not relevant in *Viskauskas*.
[60] *Project Blue Sky* 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

and cases involving Commonwealth laws that do *not* make the distinction thus have little bearing on Commonwealth laws that *do* make it — such as *SDA* s 38.

There is another case — *Central Northern Adelaide Health Service v Atkinson* ('*Atkinson*')[61] — which has been suggested to support the view that s 38 invalidates SOGI non-discrimination obligations imposed on religious schools by State laws. Importantly, it does involve a law identifying certain specific statutory provisions as having a more limited application than they otherwise would — s 8(1) of the *RDA*. Section 8(1) is thus more analogous to s 38 than the laws considered in other cases, which, given one of *Atkinson*'s holdings, assists the argument that s 38 invalidates certain State non-discrimination laws. Nevertheless, *Atkinson* still does not ultimately support this conclusion, for reasons which will be explained.

In *Atkinson*, the Supreme Court of South Australia considered whether s 65 of South Australia's *Equal Opportunity Act 1984* ('SA *EOA*') was directly inconsistent with *RDA* s 8(1). Section 65 read:

> This Part [Part 4 of the SA *EOA*] does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular race.

Section 8(1) read:

> This Part [Part 2 of the *RDA*] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

The court upheld s 65, but only on a narrow ground. It held that the reference in the section to a 'scheme or undertaking' was limited only to a scheme or undertaking which 'addresses the objects of the *Equal Opportunity Act*.'[62] However, a majority of the court ruled that were s 65 to be interpreted literally, without the term 'scheme or undertaking' being given a narrow meaning, then the section would be invalid. The majority was unpersuaded by the submission of South Australia's Solicitor-General (who argued the case for the health service) that s 65 was valid because, even if it was read literally, it only curbed the application of the SA *EOA*, and not the application of the *RDA*. The majority ruled that '[o]n its face, s 65 could permit and authorise racial discrimination in circumstances that would directly conflict with the Convention and the *Racial Discrimination Act*.'[63]

Given *Atkinson*'s holding that the exception contained within s 65, if construed literally, would not merely affect the scope of the SA *EOA*, but would also challenge Commonwealth law, it is argued that *Atkinson* supports a construction of s 38 as not merely affecting the scope of the *SDA*, but as also challenging State law. Neil Foster writes:

> The *Atkinson* case is formally the reverse of the situation we are considering; in that case there was a defence under state law which was absent in Commonwealth

[61] (2008) 103 SASR 89 ('*Atkinson*').
[62] Ibid 116 [113] (Gray J, Kelly J agreeing).
[63] Ibid 117 [116]-[118].

> law. But the logic leads to the conclusion that if there is a defence under Commonwealth law, in a law dealing with discrimination on the basis of sexual orientation, but that defence is missing from a state law on the same topic, then the state law will be inoperative under s 109 to the extent of the clash.[64]

Facially, it does appear that *Atkinson* supports a construction of s 38 as *authorising*, rather than merely *not prohibiting*, such discrimination. If this is the correct construction of s 38, then State laws imposing SOGI non-discrimination obligations on religious schools are clearly invalid.

However, *Atkinson* involves a Commonwealth law *prohibiting* conduct that a State law provided was *not* prohibited. The situation regarding s 38 is the reverse: the Commonwealth law provides that certain conduct is not prohibited, while the State law does prohibit it. Where the Commonwealth Parliament *prohibits* certain conduct, it clearly intends the prohibition to apply to every State. But where it does not do so, it does not necessarily intend that the conduct be *permitted* in every State. This principle is a natural function of the reality that for a parliament to simply not legislate on a particular type of conduct — one way or another — is not the same as affirmatively authorising the conduct. But for this principle, the States could never prohibit any conduct absent a Commonwealth law explicitly authorising them to do so. Such a law has never been a requirement for a State law prohibiting certain conduct to be valid.

It is for this reason that, *despite* s 8(1) of the *RDA* limiting the application of specific statutory provisions — as does s 38 — *Atkinson* still does not support the proposition that s 38 invalidates certain State laws. In *Atkinson*, the Commonwealth exception created by limiting the *RDA*'s application was *narrower* than the exception in the SA *EOA*. But the exception in s 38 is *broader* than the exceptions available in State law. For the reasons set out in the previous paragraph, the logic supporting the former scenario does not apply to the latter scenario.

Of course, the majority's logic in *Atkinson* is far from the only logic on which courts have relied when invalidating State laws for direct inconsistency with Commonwealth law. The inability to apply *Atkinson*'s logic to s 38 does not conclusively prove that s 38 is valid. Rather, it leaves open the *possibility* that, even if *Atkinson* is assumed to be good law, s 38 is a mere absence of prohibition, rather than a law that affirmatively confers a liberty. For the reasons previously outlined in this article, s 38 falls into the former category, even if *Atkinson* is good law.

There are, however, compelling reasons *not* to consider *Atkinson* good law. Justice Bleby dissented from the majority's finding that s 65 would have been directly inconsistent with s 8(1) but for the narrow construction it was given. He justified this conclusion by noting that s 65 'does not excuse or render lawful an act which is prohibited under the *Racial Discrimination Act*' and that 'an act which may come within the exception described in s 65 might nevertheless be prohibited under the *Racial Discrimination Act*.'[65]

Furthermore, the logic applied by the majority of the court in *Atkinson* was rejected in a comparable case. In *Cawthorn v Citta Hobart Pty Ltd* ('*Cawthorn*')[66] the Supreme Court of Tasmania considered whether the disability access requirements that building developers were

[64] Foster (n 13) 53.
[65] *Atkinson* (n 60) 95 [17] (Bleby J).
[66] (2020) 364 FLR 110 ('*Cawthorn*').

required to meet by Tasmanian law were directly inconsistent with the *Disability (Access to Premises - Buildings) Standards 2010* ('Commonwealth Standards') and/or s 34 of the *Disability Discrimination Act 1992* (Cth) ('*DDA*').

Importantly, s 34 (similarly to s 38) states that if a person acts in accordance with a disability standard, such as the Commonwealth Standards, then Part 2 of the *DDA* (except for Division 2A) does not apply to that action. A majority of the court ruled that despite s 34, the Tasmanian laws were *not* directly inconsistent with the *DDA* or the Commonwealth Standards. The majority considered it 'significant' that 'when a person complies with a disability standard, *the DD Act does not declare that person's conduct to be lawful, but renders inapplicable provisions that would make it unlawful*'[67] thus placing great importance on s 34 identifying certain statutory provisions as of a more limited application.

The majority's decision was later reversed by the High Court, though only on procedural, not substantive, grounds. The Supreme Court had heard the case as an appeal from Tasmania's Anti-Discrimination Tribunal, but on appeal from the Supreme Court, the High Court ruled that the Tribunal had correctly determined that it did not have jurisdiction to hear the complaint and reinstated its decision not to do so.[68] Nevertheless, even though it is not binding on any court, the Supreme Court of Tasmania's holding in *Cawthorn* provides persuasive judicial support for the proposition that Commonwealth laws providing exceptions to other Commonwealth laws which prohibit certain conduct are not necessarily directly inconsistent with State laws that prohibit that same conduct.

STATE LAWS IMPOSING SOGI NON-DISCRIMINATION OBLIGATIONS ON RELIGIOUS SCHOOLS DO NOT ALTER, IMPAIR OR DETRACT FROM THE OPERATION OF SECTION 38

In order to determine whether a State law detracts from the operation of a Commonwealth law, it is necessary to determine what the operation of that Commonwealth law is — in this case, s 38. If the operation of s 38 is to confer a right on religious schools to engage in SOGI discrimination of the kind prohibited by ss 14(1)(a), 14(1)(b), 14(2)(c), 16(b), and 21, then State laws that prohibit such discrimination by religious schools are invalid. However, it has already been demonstrated that the Commonwealth Parliament enacted s 38 with the intention of ensuring that the five aforementioned provisions of the *SDA* did not have an effect that the Commonwealth Parliament did not intend them to have, but which the provisions would have had but for s 38. This conclusion is likely sufficient to determine that such State laws do not 'alter, impair or detract from' the operation of s 38. In the event, however, that more is needed to reach this conclusion, the following further observations are made.

Even where a State law imposes SOGI non-discrimination obligations on religious schools, the State law does not have the effect of undermining the operation of s 38. Because the intention behind s 38's operation is to avoid the unintended consequence of SOGI non-discrimination obligations being imposed on religious schools *via the SDA*, the intended operation of s 38 thus appears to be to ensure that no complaint may be made alleging unlawful SOGI discrimination by a religious school that relies on the aforementioned five provisions of the *SDA*, and that no judicial finding of unlawful SOGI discrimination by a religious school may rely on those five

[67] Ibid 117 [16]-[17] (Blow CJ, Wood J agreeing) (emphasis added).
[68] *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476, 496 [86] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

provisions. In other words, s 38's intended operation is to give effect to the Commonwealth's view that the Commonwealth should not impose the relevant SOGI non-discrimination obligations on religious schools. The inability to rely on the five provisions of the *SDA* for a discrimination complaint against a religious school is just as strong in a State that imposes SOGI non-discrimination obligations on religious schools as it in a State that does not impose such obligations. The operation of s 38 thus remains unchanged, irrespective of State laws. If s 38 is said to create a right, liberty, power, privilege, or immunity for religious schools, that is limited to the right not to face legal proceedings *under the SDA* for SOGI discrimination.

It is true that religious schools in States that impose the SOGI non-discrimination obligations addressed by s 38 would, assuming they wish to engage in SOGI discrimination, find s 38 a cold comfort. But the intended operation of s 38 is not to guarantee that such schools can do as they please when it comes to SOGI discrimination, but instead to ensure that the *SDA* does not overreach in a way the Commonwealth Parliament does not desire. There are multiple rational explanations as to why the Commonwealth Parliament may have chosen this operation of s 38, a relatively limited operation in comparison to conferring on religious schools a positive right to engage in SOGI discrimination. It may have done so as a necessary political compromise to successfully amend the *SDA* to add sexual orientation and gender identity as protected attributes. It may have done so to ensure that Commonwealth investigative and judicial resources were not tied up deciding claims against religious schools and could instead be deployed to claims that the Commonwealth Parliament considered a higher priority. Yet even if the Commonwealth Parliament wished to not impose the *SDA*'s obligations on religious schools for fear of violating those schools' religious freedom, it does not necessarily follow from this that it intended to prevent *the States* from imposing identical obligations on religious schools. The Commonwealth Parliament can form a view that a particular right should not be infringed in a particular way, and yet also *not* seek to impose its view of that right on State Parliaments. It is true that in *Dickson*, it decided to impose its view of the right in question on State Parliaments by enacting s 11.5. However, the text of s 38, discussed in the previous section of this article, and the differences between s 38 and s 11.5, strongly indicate that even if s 38 reflects the Commonwealth Parliament's view of the right to freedom of religion, it did not intend to enforce its view of that right against the States.

The limited capacity of s 38 to deliver a *practical* benefit to religious schools located in States that impose SOGI non-discrimination obligations on religious schools does not indicate that the *legal* operation of s 38 has been undermined. Section 38 is not 'qualified', 'impaired', or 'negated' owing to its inability to better protect these schools, because even where it cannot deliver that specific practical benefit to religious schools, there are other things that it can and does do, things which point to an operation intended by the Commonwealth Parliament that remains intact.

CONCLUSION

In the author's opinion, the Court's jurisprudence on direct inconsistency between State and Commonwealth laws would benefit from revision to reflect the following proposition: a Commonwealth law cannot *implicitly* confer a positive right on Australians that no State may deny; instead, such conferrals must be made *explicitly*. It does not logically and inevitably follow from the fact that, when prescribing certain conduct, the Commonwealth Parliament has left certain other conduct unprescribed, it intends to confer a right on Australians to engage in the unprescribed conduct that no State may deny. For example, the Parliament may have

intended that certain conduct concerning a particular subject matter be prohibited across the country, while leaving the decision on whether to prohibit other conduct concerning that subject matter to the States. Nor is it self-evident that a State law detracts from the operation of Commonwealth law merely because it imposes broader obligations than the Commonwealth law; a Commonwealth law does not do less merely because a State law does more. Put another way, no one is relieved of obligations under Commonwealth law merely because a State law imposes further obligations. Such a jurisprudential revision would not prevent the Commonwealth Parliament from overriding State laws that prohibit broader categories of conduct that the Commonwealth law; it would merely have to explicitly state this intention to do so.

It is important to state that such a jurisprudential revision would not limit the application of the principle of legality. That principle is an important protection of rights and freedoms in Australia, and is expressed as follows:

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[69]

For the Court to revise its s 109 jurisprudence as suggested would not weaken the practice of not interpreting statutory provisions in a manner that restricts fundamental rights where possible. Nor would it limit the power of the Commonwealth Parliament to confer rights on Australians. It would simply mean, so that this important area of constitutional law be simplified, that a Commonwealth law would not be interpreted as conferring a right on Australians unless it explicitly states that it does so.

However the Court's direct inconsistency jurisprudence might be improved, it seems highly likely that State laws imposing SOGI non-discrimination obligations on religious schools are not necessarily inconsistent with s 38 of the *SDA*, and thus can be valid despite s 109 of the Constitution. Although such laws impose greater obligations than the *SDA*, the *SDA* is supplementary to State law, rather than a law that imposes a final set of obligations that no State law may exceed. Furthermore, such laws do not alter, impair, or detract from the operation of s 38.

[69] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) quoting *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J).

Reconciling Freedom and Equality for Peaceful Coexistence: On the Need to Reframe the Religious Exemptions in the *Sex Discrimination Act*

Alex Deagon*

In this article I evaluate the capacity for the religious exemptions in the Sex Discrimination Act *(Cth) to provide peaceful coexistence through reconciling freedom and discrimination. The exemptions provide that religious educational institutions can directly discriminate against staff and students on the basis of sexual orientation and gender identity if they do so in good faith and in accordance with their religion to avoid injury to the religious susceptibilities of adherents to that religion. The exemptions fail to provide peaceful coexistence through reconciling freedom and discrimination for two reasons. First, the exemptions are offensively and irrelevantly targeted at sexual minorities, undermining the dignity of diverse staff and students. Second, in their form as exemptions, they frame the communal rights of people of faith as a grudging exception to a general prohibition against discrimination, positioning religious institutions as seeking a special privilege to maliciously make decisions based on prejudice. Reframing the exemptions as positive associational rights simultaneously addresses these twin failures by 1) removing the stigmatic focus on sexual minorities, 2) supporting equality, and 3) providing a necessary and robust legal protection for religious educational institutions to select and regulate members of their community to maintain a religious ethos, thus supporting religious freedom. The recognition of positive rights for religious institutions contributes to peaceful coexistence by promoting diverse approaches to the public good while avoiding the hostile targeting of sexual minorities.*

INTRODUCTION

In this article I draw from chapters in my book *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination*[1] to evaluate the capacity for the religious exemptions in the *Sex Discrimination Act 1984* (Cth) ('*SDA*') to provide peaceful coexistence, which means promoting diverse approaches to public good through reconciling freedom and equality. The exemptions provide that religious educational institutions can directly discriminate against staff and students on the basis of sexual orientation and gender identity if they do so in good faith and in accordance with their religion to avoid injury to the religious susceptibilities of adherents to that religion. The exemptions fail to provide peaceful coexistence in the sense defined above for two reasons. First, the exemptions are offensively and irrelevantly targeted at sexual minorities, thus undermining the dignity of diverse staff and students. Second, in their form as exemptions, they frame the communal rights of people of faith as a grudging exception to a general prohibition against discrimination, thus positioning

* Senior Lecturer, Queensland University of Technology. The author discloses a formal affiliation with the *Australian Journal of Law and Religion*. The *AJLR*'s conflict-of-interest procedure was followed in the acceptance of this article for publication.

[1] Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart, 2023).

religious institutions as seeking a special privilege to maliciously make decisions based on prejudice. Reframing the exemptions as positive associational rights simultaneously addresses these twin failures. First, such a reframing removes the stigmatic focus on sexual minorities and thereby supports equality. Second, it provides the necessary and robust legal protection for religious educational institutions to select, preference, and regulate members of their community to maintain a religious ethos, thereby supporting religious freedom. The recognition of positive rights for religious institutions contributes to peaceful coexistence by promoting diverse approaches to public good while avoiding the hostile targeting of sexual minorities.

RELIGIOUS EXEMPTIONS IN THE *SEX DISCRIMINATION ACT*

Section 5A of the *SDA*, for example, states that discrimination occurs on the ground of sexual orientation where, in equal circumstances, the aggrieved person is treated less favourably than a person of a different sexual orientation by reason of the aggrieved person's sexual orientation. Sections 5 to 7A of the Act provide an equivalent provision for discrimination on other grounds. Sections 14 to 27 of the Act provide for instances of discrimination in specific areas. For example, s 14 of the Act states '[i]t is unlawful for an employer to discriminate against a person on the ground of the person's … sexual orientation' in 'determining who should be offered employment or in the terms and conditions on which employment is offered', or 'by dismissing the employee'. Sections 14 and 16 of the Act provide that it is not lawful to discriminate against employers or contract workers on the basis of protected attributes (such as sex, sexual orientation, gender identity, pregnancy, and so on) in the context of employment. Section 21 of the Act provides that it is not lawful to discriminate in the provision of education on the basis of these attributes. Sections 37 and 38 of the *SDA* provide exemptions for religious bodies and educational institutions established for religious purposes. Section 37(1) states that none of the sections outlined above affect the ordination, appointment, training, or selection of members of any religious order, or any other act or practice of a body established for religious purposes which conforms to the doctrines of that religion or that is necessary to avoid injury to the religious susceptibilities of adherents of that religion. This effectively means any religious body or community has the freedom to select, appoint, and train a person without constraint from anti-discrimination law, which is a robust protection for the freedom of a religious community.[2]

The more contentious religious exemptions are contained in s 38 of the *SDA*:

> (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

[2] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 131.

> (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
>
> (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Similar to s 37, s 38(1) specifies that nothing in the relevant paragraphs of s 14 renders it unlawful for a person to discriminate on the ground of sexual orientation in connection with employment as a member of an education institution conducted in accordance with the doctrines of a particular religion. Section 14 does not apply if the discrimination occurs in good faith and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. Essentially, this means religious schools can 'discriminate' on the basis of any sex-related attribute (or put positively, select, preference, and regulate) for their communities in order to uphold the religious ethos of that school.

EVALUATION OF THE EXEMPTIONS

Targeting Sexual Minorities

The desirability of these exemptions has been questioned.[3] The consensus which once supported religious exemptions no longer exists. Many have called for the repeal of all exemptions as enshrining unjust discrimination.[4] It must be emphasised that the claim from religious bodies is not a right to discriminate, but a right to positively select and preference members with beliefs and behaviour consistent with their ethos, in the same way that other ethos communities (such as political parties) are allowed to do. Nevertheless, Parkinson notes that the exemptions have come under sustained attack recently as, in the view of opponents, they give religion a licence to unjustly discriminate.[5] Parkinson observes that the religious freedom and anti-discrimination debate has been 'polarised', 'divisive', 'alienating', and 'unhelpful'; it undermines the dignity of Christians and the LGBT community by creating a 'paradigm of conflict' which fails to acknowledge the intrinsic good of both sides and the common ground they have.[6]

---

[3] See, eg, Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 56.
[4] See, e.g., Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 4-6 ('Associational Freedom').
[5] Patrick Parkinson, 'The Future of Religious Freedom' (2019) 93(9) *Australian Law Journal* 699, 701–2 ('Future of Religious Freedom').
[6] Ibid 700.

The locus of this conflict is centered around the religious exemptions in the *SDA*. The perception is that discrimination because of religion is exclusive and immoral, an affront to the equal dignity of members of the LGBT community. The exemptions, on this view, undermine peaceful coexistence because they treat members of the LGBT community with prejudice which causes financial and dignity harms. Termination for being in a same-sex relationship, for example, leads to serious harm to the dignity of the employee because 'they may experience this not only as a rejection of their sexuality and the worth of their relationship, but also as a rejection by their religious community'.[7] As such, Evans and Ujvari contend that the present exemptions as they stand go too far, acknowledging that religious schools 'play an important role' and are 'deserving of some protection of their distinctive worldview', but stating that such protection is 'consistent with the idea that that they should be subject to more aspects of discrimination law than is currently the case in Australia'.[8] In particular, they criticise permitting discrimination to avoid 'injuring religious susceptibilities' on the basis that the phrase is 'rather vague', 'provides little guidance', and that 'religious freedom does not normally protect religious sensibilities'.[9] This ambiguity and lack of clarity undermines peaceful coexistence by increasing the probability of harm because an employee or student is unable to know the circumstances in which they may be discriminated against.

Hilkemeijer and Maguire also argue that the s 38 exemptions are inconsistent with international human rights law, particularly that of the European Court of Human Rights ['ECtHR']. First, they also note that the law is imprecise because 'injury to religious susceptibilities' is a broad and vague basis upon which the power to discriminate can be legitimately exercised.[10] Second, the scope of religious institutional autonomy to regulate members depends on whether the member is part of the religious community and employed for religious purposes, or whether they are merely an employee engaged in 'secular' activities. The exemptions do not allow for such distinctions, and also do not allow for any balancing of rights to privacy and equality for the employee with the religious autonomy of the organisation.[11] They 'allow a religious school to dismiss a teacher on the ground of their sexual orientation where the sexual orientation of that teacher has no negative impact on the church's ability to teach its religious doctrine'.[12] The fact that it may be difficult for dismissed teachers to find employment must also be taken into account.[13] The lack of precision in the exemptions, as already noted, undermines peaceful coexistence by increasing the probability of harm suffered by those who may be discriminated against – including not only a dignity harm, but also a material harm in terms of needing to find other employment.

Ultimately, the exemptions are offensively and irrelevantly targeted at sexual minorities, undermining peaceful coexistence, when what religious schools really need is a

[7] Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 135 ('Right to Equality').
[8] Evans and Ujvari (n 3) 56.
[9] Ibid 53.
[10] Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93(9) *Australian Law Journal* 752, 757.
[11] Ibid 757–60. It should be noted that this criticism relies on the problematic religious/secular distinction, which is addressed below.
[12] Ibid 760.
[13] Ibid 760–1.

> freedom to conduct their educational functions through a curriculum and in a manner which is consistent with their religious ethos, delivered by and within a community of like-minded others. Their wish is to make suitable appointments based on the alignment of fundamental beliefs and practices … Substitution of legislation to similar effect, in place of the existing schools exemptions, could remove some of the impassioned hostility from current debate, in particular by enabling them to require employees to act in a manner that demonstrates loyalty to their religious ethos, rather than misplaced sexuality-focused exceptions and exemptions.[14]

So the exemptions fail to uphold peaceful coexistence because they offensively and unnecessarily target sexual minorities. However, religious bodies nevertheless require the legal right to select, preference, and regulate their members to cultivate their communal ethos as a function of religious freedom.

Exemptions as a Problematic Form

Aroney and Parkinson suggest that the exemptions are also problematic because they do not acknowledge institutional autonomy or the communal rights of people of faith to set up and operate such institutions as they see fit. Instead these rights are implicitly framed as 'concessions' to religious 'susceptibilities' and as a grudging exception to a general prohibition against any kind of discrimination.[15] Neil Foster has also persuasively contended that framing religious freedom protections as 'exemptions' from anti-discrimination laws might give the impression that powerful religious lobby groups are simply bullying politicians into giving them a special privilege to engage in otherwise unlawful conduct (which is not an unfounded concern).[16] In this sense, even those friendlier to the exemptions in principle may question whether they are the best means of promoting peaceful coexistence, for the exemptions not only fail to articulate the proper basis for the freedom of religious communities in the sense of patiently and humbly supporting diverse pursuits of the good, but they also create a perception of religious bodies (such as religious schools) engaging in poor behaviour by seeking special privileges to discriminate based simply on prejudice. There seems to be a common reluctance to maintain the exemptions in their current form. Yet there must be an alternative.

Eliminating or narrowing the exemptions without an equivalent replacement would 'reduce greatly the freedom of religious organisations to have staffing policies consistent with their identity and ethos'.[17] Some schools may not have a strong religious identity and may not mind, but others see their religious ethos as critical to the identity and operation of the school. Freedom of religion contains a corporate dimension which, in such circumstances, needs to be accommodated.[18] Any association or community cannot exist without the ability to define the terms and character of the association and its members, including in matters of ideology (eg, political parties) and practices (eg, sexual morality). This is not a blanket freedom for people of faith to discriminate. In a school setting, transparency, clarity, and consistency are essential

[14] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 62.
[15] Aroney and Parkinson, 'Associational Freedom' (n 4) 23.
[16] Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 385, 389 ('Balancing Clauses').
[17] Parkinson, 'Future of Religious Freedom' (n 5) 702.
[18] Ibid 702–3.

to convey expectations of belief and conduct to prospective staff so they can make an informed decision whether they accept the employment with its attendant conditions.[19]

It is true that those who are discriminated against clearly 'suffer significant harm to their dignity, emotional well-being and in some cases their economic security'.[20] However, Walsh notes that the religious community which incidentally engages in discrimination in the process of maintaining a particular ethos consistent with its religious beliefs 'will typically suffer much greater harm' if there are no laws protecting its ability to make these crucial decisions. Such harm to the religious community could include 'severe emotional distress from the violation of their faith commitments', the 'impairment of their relationship' with the rest of their faith community, and becoming the subject of 'protests, boycotts and complaints to anti-discrimination tribunals with the frequent result' that they will be forced to cease either their religious ethos or their activities — both fatal to the existence and nature of the community.[21] Conversely, in terms of comparing the severity of the harm, in the vast majority of cases the party discriminated against can simply choose another option at minimal cost. In terms of the frequency of the harm, given increasing support for vulnerable persons and groups (especially among the young) and potential financial incentives for the religious party to accept their requests, it is increasingly unlikely that discrimination will occur. The failure to realise that harm to the religious party from not protecting their freedom overrides harm to the party being discriminated against only results from simply refusing to give the religious party's beliefs and interests any significant weight.[22] So, providing religious schools with alternative legal infrastructure to operate in accordance with a religious ethos reconciles freedom and equality because it promotes diverse approaches to the good while also avoiding the discriminatory nature of the current exemptions which undermine peaceful coexistence by explicitly and unnecessarily targeting sexual minorities.

Facilitating the religious freedom of schools to select, preference, and regulate their community contributes to peaceful coexistence in another sense. It is important to note that the incidental ability to 'discriminate' in this context actually preserves equality between religious and non-religious communities. An example already mentioned to illustrate this principle is political parties. Political parties, by their nature, discriminate on the basis of political opinion. It would be absurd for the law to compel a particular political party to hire someone who repudiates the ethos of the party in thought or conduct, and the law has long recognised this ability for political parties to 'discriminate' in this way.[23] A more direct example is that an LGBT Pride organisation (a type of ethos group) could lawfully decide to exclude someone like Fred Phelps as a member, despite general anti-discrimination laws prohibiting discrimination on the basis of religion or political beliefs. A similar notion applies to religious schools. So, in other words, since peaceful coexistence entails affirming dignity by treating people equally, religious communities should have freedom to select, preference, and regulate their members in the same

[19] Aroney and Parkinson, 'Associational Freedom' (n 4) 25.
[20] Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35(2) *University of Tasmania Law Review* 106, 126 ('Religious Liberty'). Walsh expands on the specific nature of such harms in Walsh, 'Right to Equality' (n 7) 127–36.
[21] Walsh, 'Religious Liberty' (n 20) 127.
[22] Ibid 127–8. See Nicholas Aroney and Benjamin Saunders, 'Freedom of Religion in Australia' in Matthew Groves, Daniel Meagher, and Janina Boughey (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 285, arguing that there needs to be greater recognition of the wrongness and harm which results from compelling religious parties to act contrary to their conscience.
[23] Aroney and Saunders (n 22).

way other ideological groups have the freedom to select, preference, and regulate their members.

Hence, the s 38 exemptions in the *SDA* rightly provide significant freedom for religious schools as a kind of religious community, but not in a way which promotes peaceful coexistence. The exemptions unfairly and unnecessarily target sexual minorities, giving the impression of a special privilege to maliciously discriminate. New legal infrastructure broadly in the form of positive associational rights is required to remove this impression while simultaneously maintaining the ability for religious communities to select, preference, and regulate their members in accordance with their religious ethos.

POSITIVE ASSOCIATIONAL RIGHTS

Protecting Associational Freedom

Professor Reid Mortensen articulates the foundational principles undergirding the balance of freedom and equality:

> [O]ne inherent paradox in *all* discrimination laws is that, although they aim to protect social pluralism, the principles of equality they usually promote also present a threat to the protection of religious pluralism in the political sphere. This occurs when, despite the traditional recognition of rights of religious liberty, the discrimination laws apply to religious groups that deny the moral imperatives of, say, racial, gender or sexual orientation equality. In this respect, Caesar has generally been prepared to render something to God through the complex exemptions granted in the discrimination laws to religious groups and religious educational or health institutions.[24]

Mortensen therefore claims that to 'honour rights of religious liberty, a religious group is probably entitled to broad exemptions from the operation of sexual orientation discrimination laws'.[25] More emphatically, the right to free exercise in the Constitution 'does not suggest a "balance" to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty'.[26] While accepting these contentions in principle, the current exemptions do not uphold peaceful coexistence. They are 'irrelevantly' and 'offensively targeted at sexual minorities,' and do not provide what is really needed 'which is the ability of such organisations to maintain their religious ethos generally, in terms of both the committed beliefs and conscientious practices of their employees'.[27] As such, although the exemptions are problematic, they cannot simply be eliminated without any replacement.

As discussed above, Hilkemeijer and Maguire argue the exemptions are inconsistent with European human rights law for two fundamental reasons: the law is imprecise because injury to religious susceptibilities is a vague basis to exercise the exemption; and the law is overly broad because it does not take into account whether the person is engaged in secular or religious

[24] Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18(2) *University of Queensland Law Journal* 208, 231 (emphasis in original).
[25] Ibid 228–29.
[26] Ibid 231.
[27] Aroney and Taylor (n 14) 61–2.

activities, and the grounds of dismissal could be unrelated to religion.[28] They propose that a better option for reform is either a law requiring the school to demonstrate that it is necessary to employ staff who adhere to the school's religious faith (the narrowest option) or a law allowing schools to discriminate if they can demonstrate that the discriminatory action is a genuine occupational requirement and that it satisfies a reasonableness test.[29]

There are a number of questionable assumptions in and consequences of these arguments and proposals by Hilkemeijer and Maguire. First, ECtHR jurisprudence is mixed on the matter of religious institutional autonomy. There are no clear principles and so one can also point to cases and themes which support robust institutional autonomy.[30] Parkinson states 'there are cases that could be cited on either side'.[31] In one seminal case, the ECtHR observed that religious communities exist in organised structures and the 'autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords'.[32] A Council of the European Union Directive acknowledges the right of religious organisations to require employees to adhere to the ethos of the organisation.[33] Thus, Aroney and Taylor note that in a number of cases the ECtHR has found in favour of the religious institution when an employee has breached the institution's ethos, 'even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights'.[34] For example, dismissals of teachers of religious doctrine and educators in religious educational facilities were not found to breach the rights of applicants in the ECtHR:

> In some, perhaps most, religious schools loyalty might not be expected from those employees who are not engaged in representing the ethos of the organisation by functions such as chaplaincy or religious education. In some other schools, however a wider range of employees (perhaps even all of them) may be commissioned to promote the religious calling of the school. Their terms and conditions of employment would presumably reflect this in some way. The faith-based calling of a school, and the degree to which there is an expectation that the staff in question share that faith and will be actively engaged in promoting its mission, become the distinguishing features justifying them being contractually bound to remain loyal to the ethos of the organisation. This is not that far removed from the political allegiance expected of those employed by political parties and lobbyists.[35]

Second, the assumption that there is a relevant distinction between 'religious' and 'secular' activities is incorrect. Moulds also makes this mistake when she argues that the fact that

[28] Hilkemeijer and Maguire (n 10) 756–61.
[29] Ibid 763–5.
[30] See, eg, Julian Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 57-58, 70-71; Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020) 174-175; Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press, 2018) 68-70.
[31] Parkinson, 'Future of Religious Freedom' (n 5) 702.
[32] *Sindicatul "Păstorul Cel Bun" v Romania* [2013] V Eur Court HR 41, 63 [136].
[33] The Council of the European Union, *Directive: Establishing a General Framework for Equal Treatment in Employment and Occupation*, Doc No 2000/78/EC, 27 November 2000, establishing a general framework for equal treatment in employment and occupation.
[34] Aroney and Taylor (n 14) 58.
[35] Ibid 60.

religious bodies are significantly involved in providing a range of essential public services such as education, healthcare, adoption, aged care, and other commercial activities raises the question whether the exemptions which exist in relation to 'core' religious activities should be extended to the provision of these public services.[36] For many religious communities, all activities are religious. There are no purely secular activities and for many religious associations the provision of public services in accordance with the ethos of the religion is a core activity of the religion. The mathematics teacher can be a religious mentoring and guidance position which acknowledges the beauty and precision in the understanding of God's creation, and the groundsman can be a religious mentoring and guidance position in the cultivation and care of God's creation, just as much as the religious studies teacher is a mentor and guide in understanding religion.[37] Religion 'embraces a broad number of activities including freedom to choose leaders, establish seminaries and schools, prepare and distribute religious texts', and serve the community through 'day-care centres and food kitchens.'[38] As Ahdar and Leigh observe, '[o]pponents in the debates about the application of equality norms to religious ethos employers have been to a very large degree talking past each other because of their fundamentally incompatible starting points about the nature of employment'; in particular, the secular or 'instrumental' view that is about outcomes and functions, as opposed to the religious 'organic' approach which sees work as a vocation in the context of service to God and fulfilling the religious mission of an organisation; '[a] liberal, pluralist, society can only flourish by permitting diverse groups within civil society, and that includes, we suggest, organisations that are religiously exclusive'.[39]

This is because religion is a communal and social matter which ought to be passed on to future generations through institutions which shield religion from overly regulatory states. Efforts should be made to accommodate both democratic priorities and the autonomy of religious communities.[40] Refusing accommodation of difference involves several 'dangerous' assumptions, including courts determining what are and are not 'core beliefs' of the religion (e.g., the nature of marriage), that religion should be irrelevant in the context of public services, and concordantly, that religion is irrelevant in the public sphere.[41] 'The idea that religious organisations should be wholly subject to the demand of the civil law reflects the increasing indifference of many to religion... If the institutions of any religion are, without hesitation or any weighing of the effects made, subject to the demands of the law, whatever their own doctrines, secular interests are bound to come to dominate those of a religious nature'.[42]

So Parkinson argues that simply removing exemptions and replacing them with genuine occupational requirements grounded in secular understandings of religion would 'greatly reduce the freedom of religious organisations to have staffing policies consistent with their identity and ethos'.[43] Many schools see their religious ethos as central to the educational mission of the school and consider this requires all staff to believe and act consistently with

[36] Moulds (n 2) 119.
[37] See, eg, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 157; Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 161 n 46.
[38] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 37) 377.
[39] Ibid 374.
[40] Roger Trigg, *Equality, Freedom and Religion* (Oxford University Press, 2012) 157.
[41] Ibid 119.
[42] Ibid.
[43] Parkinson, 'Future of Religious Freedom' (n 5) 702.

that ethos.[44] This includes both staff who are involved in leadership and direct teaching (such as the Principal and teaching staff), and staff who are involved in administration and maintenance (such as receptionists and groundskeepers). It might be objected that schools should only be empowered to select or preference the former kind of 'core' staff, but there is no simple line between core and non-core staff when it is possible that all staff will be interacting with students and having conversations about religious matters. It is entirely possible that students may strike up a conversation with a receptionist or a groundskeeper, and if in the course of that conversation the student discovers the staff member believes or acts inconsistently with the school ethos, this could significantly undermine the consistent propagation of the school ethos. This does not mean it will always be possible for schools to hire such a staff member. The exigencies of the education industry and the particular circumstances of the school may mean it is necessary for the school to temporarily hire a person who does not fit the school ethos. This does not mean adherence to the ethos is not a genuine occupational requirement to work at the school on a permanent basis. That is why a right to preference staff in accordance with an ethos is just as important as a right to select — this recognises the realities of needing to provide a specialised service while not undermining the religious ethos which is the foundation and framework for providing that service. As such, rather than exemptions, including for genuine occupational requirements only, the law should be expressed as a positive associational right allowing schools to select and preference staff, which would also be consistent with international law.[45]

Third, and following from this, an exemption or right which places the decision in the hands of a secular tribunal to decide whether an activity is 'religious', an occupational requirement is 'genuine', a staff member is 'core', or a discriminatory action is 'reasonable', runs significant risk of imposing a secular perspective on a theological question, which would severely undermine the freedom of religious communities.[46] It is true that the imprecision of the current exemptions in terms of injury to religious susceptibilities is vague and unhelpful.[47] However, as I have noted elsewhere, religious 'convictions' or 'beliefs' may be more clear terms than sensibilities or susceptibilities, at least insofar as religious beliefs of organisations can be ascertained to see if these convictions are injured.[48] That will be a question of fact in any given situation and courts should accept the testimony of the religious communities on this rather than acting as a secular arbiter of a theological dispute, which would damage peaceful coexistence by undermining the freedom of the community to define their own beliefs.[49]

Religious group autonomy is also not merely an aggregation of individual rights; this is a secular 'liberal' and deficiently 'atomistic' approach which 'seriously undermines religious freedom' by allowing government interference in the group to satisfy individual rights.[50]

---

[44] Ibid.
[45] Ibid; Aroney and Taylor (n 14) 56–62. This proposition is considered below.
[46] Neil Foster, 'Respecting the Dignity of Religious Organisations: When Is It Appropriate for Courts to Decide Religious Doctrine?' (2020) 47(1) *University of Western Australia Law Review* 175 ('Respecting the Dignity of Religious Organisations'); Alex Deagon, 'The "Religious Questions" Doctrine': Addressing (Secular) Judicial Incompetence' (2021) 47(1) *Monash University Law Review* 60–87 ('Religious Questions Doctrine').
[47] See, eg, Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 53.
[48] Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 282.
[49] See Foster, 'Respecting the Dignity of Religious Organisations' (n 46); Deagon, 'Religious Questions Doctrine' (n 46).
[50] Ahdar and Leigh, *Religious Freedom in the Liberal State* (n 37) 376.

Robust freedom for religious communities better upholds peaceful coexistence because it acknowledges the group itself as possessing legal identity and rights as a result of the intrinsically collective dimension to religious freedom and the centrally communal component of manifesting religion.[51] Consequently, '[r]eligious group association may [and must] sometimes trammel individual rights' because that is intrinsic to the definition of association itself; the ability to associate necessarily entails the ability to exclude, and it is up to the association to put standards in place to make these decisions in relation to leadership, membership, employment, and external activities.[52] As a reasonable accommodation, individuals have a right to leave the group if they wish and, if they like, form a new association with others of similar mind. As a general principle, and putting aside situations where no meaningful right of exit exists, it is not for the state to force a religious body to change its ethos to suit belligerent or disgruntled individuals.[53]

Thus, freedom of religion is not merely individual. When exercising this right, humans usually do so in community, which means they require an appropriate infrastructure to practice their religion. As a function of protecting freedom, strong legal protection of associational freedoms and associational autonomy through positive rights for religious educational institutions is required. Reasonable accommodations of difference are part of a flourishing diverse community which coexists peacefully.

A Human Rights Act?

A better approach than exemptions is to 'see the limits drawn around discrimination laws as an integral part of a structure designed to reflect the relevant human rights as a whole'.[54] In other words, since equality and religious freedom are both positive rights under international law, and there is no hierarchy of human rights, it is more accurate to provide positive protection for religious freedom which reflects its status as a human right alongside and not inferior to the right of equality. So rather than framing religious freedom protections as exemptions to anti-discrimination laws which intuitively subordinates religious freedom to equality, Aroney advocates for positive rights to select and preference staff who adhere to the beliefs and observe the practices of the religious group in question.[55] He concludes:

> Given that international human rights law recognises that religious freedom extends to the establishment and maintenance of religious, charitable, humanitarian and educational institutions, and the right to establish associations with like-minded people includes the right to determine conditions of membership and participation within such organisations, consideration should be given to protecting freedom of religion in the context of anti-discrimination laws through the enactment of statutory affirmations of the positive right of religious bodies to select staff who share their religious beliefs so as to maintain the religious ethos of the organisation ... that is a consequence of living in a diverse society which respects religious freedom.[56]

[51] Ibid 375-377.
[52] Ibid 392.
[53] Ibid 392–4.
[54] Neil Foster, 'Balancing Clauses' (n 16) 389.
[55] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion' (2019) 93(9) *Australian Law Journal* 708, 716, 719 ('Freedom of Religion').
[56] Ibid 720.

For these reasons I propose positive associational rights as an alternative to exemptions. As Wolterstorff contends, natural human rights are grounded in the intrinsic dignity of God loving all human persons 'equally and permanently' as persons of worth, and so this is a more robust framework for reconciling religious freedom and equality to create a peaceful coexistence.[57] But the form of positive associational rights for the freedom of religious communities is contentious, particularly the issue of whether such rights should be recognised through separate legislation, or through some kind of human rights charter.[58] Hobbs and Williams argue that the solution for the weak protection of religious freedom in Australia is a human rights act or charter of rights which places freedom of religion in the context of limitations and balances required by considering other human rights such as equality.[59] Freedom of religion should be 'positively protected' rather than conceived through exceptions.[60] They reject a religious discrimination act on the basis that this is a narrow lens to view religious freedom which will provide a limited scope for religious freedom. Such a mechanism is unable to resolve complex issues of balancing between different anti-discrimination protections (for example religious freedom and equality) as they arise.[61] A comprehensive human rights act will equally protect fundamental democratic rights and freedoms and include a mechanism for balancing competing rights. This approach will best 'accommodate' the perspectives of the religious and the non-religious in a way that 'respects religious belief, while creating a space for robust and open debate about faith-based practices'.[62] Only protecting religious freedom 'tilts the balance one way' which will increase tensions and undermine peaceful coexistence.[63]

However, Nicholas Aroney critiques existing State human rights charters as offering protection that is 'limited and selective' for four reasons.[64] First, they do not adopt the strict limitations which appear in art 18 of the *International Covenant on Civil and Political Rights* ('*ICCPR*').[65] Aroney notes religious freedom may be subject to reasonable limits that are for a legitimate purpose, which is a 'vaguer and lower' threshold than the necessary limits for the particular purposes in the *ICCPR*.[66] Second, the charters indicate that all aspects of freedom of religion are potentially subject to limitation, which contradicts a clear principle of international law that freedom of belief is inviolable and cannot be limited. Third, the charters contain very little protection for the liberty of parents to educate their children in conformity with their convictions as required by art 18(4) of the *ICCPR*. The Australian Capital Territory's *Human Rights Act 2006* merely protects the religious freedom of parents to educate their children in non-government schools (effectively excluding the majority of parents unable to afford the cost of private education from the international law protection), while the other charters (Victoria's

[57] Nicholas Wolterstorff, *Justice: Rights and Wrongs (*Princeton University Press, 2008) 360. For a justification of this claim see Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart, 2023) Part 1: Introduction.
[58] For various perspectives on a charter of rights, see generally Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012).
[59] Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93(9) *Australian Law Journal* 721, 722.
[60] Ibid 731.
[61] Ibid 732.
[62] Ibid.
[63] Ibid.
[64] Aroney, 'Freedom of Religion' (n 55) 715. See also Aroney and Taylor (n 14) 46–8.
[65] *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*').[66] Aroney, 'Freedom of Religion' (n 55) 715.
[66] Aroney, 'Freedom of Religion' (n 55) 715.

and Queensland's) provide no protection at all.[67] Finally, the protections in the state charters are 'at a high level of generality' which fails to provide sufficient protection in the many specific ways law and religion may interact; indeed, 'there is no evidence to suggest that religious freedom has been more adequately protected [by human rights charters]... in fact, at times, religious freedom has received weaker protection in such jurisdictions'.[68] Aroney demonstrates this by comparing the outcomes in a Victorian case where religious freedom was not protected despite the presence of a human rights charter to a similar case in New South Wales where religious freedom was protected without a human rights charter.[69]

In addition, protections for religious freedom in Victoria separate from the *Charter* are generally strong, apart from allowing the possibility that certain religious beliefs could be unlawful (contravening a clear principle of international law) and the fact that the protections are framed as exceptions. The existing protection seems to be due to nothing more than democratic activity and the parliamentary process.[70] The critique of State human rights charters is relevant because a federal charter would likely fail to protect freedom of religion in similar ways. 'Perversely, the charters fail to provide the guarantees required by the *ICCPR*, and at the same time invite an interpretation of them that fundamentally detracts from the protection they purport to afford'.[71] Since the existing charters fail to properly give effect to Australia's international obligations, 'there is a lack of confidence ... that a [national] charter will do much to protect [religious] freedoms'.[72] Zimmermann further notes that bills of rights are unnecessary in a federal system with checks and balances, and may even reduce individual rights (depending on socio-political context) because many nations with bills of rights engage in significant levels of human rights abuse while paradoxically pointing to their entrenched protection of rights to deny such abuse occurs.[73] Constitutional luminaries such as Jeremy Waldron, Jeffrey Goldsworthy, and James Allan also express typical concerns that a charter of rights undermines democracy by providing too much power to unelected and incompetent judges, and simultaneously politicises the judiciary — undermining the separation of powers and the rule of law.[74]

---

[67] Ibid. See *Charter of Human Rights and Responsibility Act 2006* (Vic); *Human Rights Act 2019* (Qld).
[68] Aroney, 'Freedom of Religion' (n 55) 715.
[69] Ibid 716–18. For further analysis, see Deagon, 'Religious Questions Doctrine' (n 46), where I suggest the major determining factor was the extent to which the judges adhered to the golden rule and engaged in imaginative sympathy as part of their judgement process, especially in deferring to the religious parties' articulation of their own beliefs and practices. This indicates deferring to the religious organisation will better protect religious freedom and preserve peaceful coexistence.
[70] Aroney, 'Freedom of Religion' (n 55) 715–16. See also Nicholas Aroney, Joel Harrison and Paul Babie, 'Religious Freedom under the Victorian Charter of Rights' in Colin Campbell and Matthew Groves (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 120.
[71] Aroney and Taylor (n 14) 48.
[72] Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) 132 ('Christian Concerns').
[73] Augusto Zimmermann, 'The Wrongs of a Bill of Rights for Australia: A Rights-Based Appraisal' in Augusto Zimmermann (ed), *A Commitment to Excellence: Essays in Honour of Emeritus Professor Gabriel A. Moens* (Connor Court, 2018) 33–4.
[74] See, eg, Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18; Jeffrey Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001); James Allan, 'Why Australia Does Not Have, and Does Not Need, a National Bill of Rights' (2012) 24 *Journal of Constitutional History* 35.

The point is that the ideological dominance of equality norms in rights discourse may well cause a charter to result in the undermining of religious freedom rather than reconciliation and peaceful coexistence. Parkinson summarises:

> The problem is when absolutist claims about the moral requirements of a charter are used to mask and provide some special authority for the policy positions of people with particular agendas. At the heart of Christian concerns about the development of a charter is that secular liberal interpretations of human rights charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law but by the intellectual fashions of the day.[75]

Parliamentary processes are therefore a more appropriate forum for resolving competing moral claims between religious freedom and equality because this will facilitate nuanced consideration of all perspectives, supporting peaceful coexistence.

Finally, in a similar vein, Harrison critiques the kind of proportionality and balancing analysis characteristic of what is required by human rights instruments on the basis that such processes are structured by a contestable secular narrative which fails to truly understand and engage with the claims of religious parties. Harrison criticises 'monolingual adjudication' which is 'inattentive to the actual arguments of religious groups, or else potentially fails to comprehend the seriousness of what is at stake'.[76] Rather than considering 'the diversity of arguments presented by claimants', they are subsumed into the same 'abstract language' of secular reasons.[77] This means the 'real nature of the community's argument may be lost'.[78] The very religion-based reasons why a tension is experienced by a religious claimant is eliminated at the outset and 'there is something deeply unsatisfying or else anaemic in this framing'.[79] To resolve this Harrison suggests bypassing the courts as much as possible and having a richer debate through the democratic process with enacted changes better reflecting religious perspectives.[80] However, even if more religiously inclusive legislation is passed, it will need to be interpreted by courts, so when judicial interpretation is necessary an approach conducive to peaceful coexistence is to apply the golden rule and an imaginative sympathy which genuinely engages with the views of religious parties and defers to their own understanding of those views rather than imposing a secular perspective.[81]

Even Hobbs and Williams admit that the State human rights Acts 'fall[] short of the standard required under international law' because freedom to believe (as opposed to manifesting belief) is subject to limitation under the relevant Acts, and the limitation provisions themselves are also a 'problem' because they permit 'reasonable' limitations while the international instruments permit only 'necessary' limitations.[82] Despite the enduring criticisms, Hobbs and

[75] Parkinson, 'Christian Concerns' (n 72) 120–1. See also Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.
[76] Joel Harrison, 'Towards Re-thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (2019) 93(9) *Australian Law Journal* 734, 738.
[77] Ibid 738–9.
[78] Ibid 739.
[79] Ibid.
[80] Ibid 742–6.
[81] See Deagon, 'Religious Questions Doctrine' (n 46); Foster, 'Respecting the Dignity of Religious Organisations' (n 46).
[82] Hobbs and Williams (n 59) 728–9.

Williams maintain that at the very least, a human rights charter will have the symbolic effect of demonstrating the value of human rights by explicitly protecting them, and providing a framework for resolving competing rights.[83] Perhaps it is possible to protect the freedom of religious communities with a human rights charter, but all these concerns would need to be addressed and implemented. It seems more likely that separate laws providing positive associational rights would more effectively preserve the freedom of religious communities without undermining equality.

Schools desire 'freedom to conduct their educational functions through a curriculum and in a manner which is consistent with their religious ethos, delivered by and within a community of like-minded others', and freedom to 'make suitable appointments based on the alignment of fundamental beliefs and practices'; this desire is consistent with international law under the ECtHR and the *ICCPR*.[84] Positive associational rights would enable schools to select and preference staff consistent with their religious and institutional ethos, and to enforce generally applicable procedures and rules with regard to student advocacy, conduct, dress, and so forth. Such legislation would ameliorate hostility, reconciling both religious freedom (by enabling religious schools to require employees to believe and act consistently with an ethos) and equality (by removing the targeted sexuality-based religious exemptions). An example of how to achieve this might be by amending the *Fair Work Act 2009* (Cth) to provide employment rights to organisations established for a particular religious purpose or social cause, which would legally affirm the freedom of religious communities to choose or prefer members who adhere to the ethos of the organisation in their beliefs and conduct.[85] In the context of schools, Walsh also notes that a public document requirement (that a school engaging in selecting, preferencing, and regulating members is required to disclose the nature of that conduct and the rationale for it) is likely to play 'a significant role in reducing the harm that can be caused by' such conduct; the school can specifically advise potential employees of 'the school's religious commitments and the relevant expectations that the school has of their staff members'.[86] This will mean individuals who disagree with those commitments and/or expectations may not apply for the position, or if they do, they are aware they may be subject to an adverse employment decision and can even prepare in advance by having back-up employment.[87] In this sense the public document requirement helps to promote peaceful coexistence by supporting the associational freedom of religious communities while mitigating the impact of incidental discriminatory conduct.

CONCLUSION

This framing would address the perception that schools are engaging in poor behaviour by seeking special privileges to discriminate based simply on prejudice. The 'positive rights' framework recognises that schools are creating a community with a distinct ethos which will contribute to the public good and to both equality and freedom, thus facilitating peaceful coexistence. This proposition might well sit awkwardly with those who do not adhere to the doctrines of the particular religious institution involved in a given decision. Nevertheless, if we desire a healthy democracy which coexists peacefully and accommodates difference for the pursuit of mutual and public good, we must allow religious communities the freedom to

[83] Ibid 732–3.
[84] Aroney and Taylor (n 14) 61–2.
[85] Parkinson, 'Future of Religious Freedom' (n 5) 702–3.
[86] Walsh, 'Right to Equality' (n 7) 134–5.
[87] Ibid.

publicly conduct themselves in such a way as to maintain their unique identity on *their* terms so they can contribute to this diversity.

The Position of Religious Schools under International Human Rights Law

Mark Fowler*

This article considers the application of international human rights law to the employment of persons by Australian religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of 'inherent requirements' tests to employees within religious schools appropriately gives effect to the requirements of international law. Part One observes that that law is found in two primary protections: the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians, and the protection against discrimination. Part Two illustrates the domestic implications of these regimes by considering the human rights rationales offered by the governmental proponents of the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021. It concludes that the Equal Opportunity (Religious Exceptions) Amendment Act 2021*(Vic) is an inadequate implementation of relevant international human rights law and that similar legislation in development in other States and the Commonwealth should be scrutinised carefully.*

INTRODUCTION

This article considers the application of international human rights law principles in the context of employment decisions made by religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of an 'inherent requirements' test to employees within religious schools appropriately gives effect to the requirements of international law. The article observes that two primary international law protections are relevant in this context: (1) the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians; and (2) the protection against discrimination. The article illustrates the domestic implications of these protections by considering, as an example, the human rights rationales offered by the State government proponents of the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) ('EOREA Bill'). It concludes that the EOREA Bill failed to conform with important principles of international human rights law and that, more generally, closer scrutiny should be given to proposed legislation which would affect the right of private schools to maintain a religious ethos.

Australian discrimination law is a complex interaction of prohibition and exemption, operating within differing, but interacting, overlays of Commonwealth, State, and Territory law. Until recently, all Australian jurisdictions provided exemptions in variant forms to religious educational institutions in both the areas of employment[1] and the supply of services to

* Adjunct Associate Professor, University of New England School of Law.

[1] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i) (although this is a general exemption not specifically addressed to the circumstances of religious schools, it will also apply to those circumstances); *Anti-Discrimination Act 1991* (Qld) s 25; *Equal Opportunity Act 1984* (SA) s 34(3); *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 2010* (Vic) s 83A; *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1).

students.[2] In the past year alone these exemptions have been the subject of a proliferation of reform proposals.

The Commonwealth Attorney-General has requested the Australian Law Reform Commission ('ALRC') to draft Commonwealth reforms that would 'ensure that' a religious educational institution 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy' while also permitting such institutions to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.'[3] In January of 2023 the ALRC released a Consultation Paper[4] that prompted prominent religious leaders to write an open joint letter to the Commonwealth Attorney-General expressing their 'deep disappointment' with the 'severe limits' proposed therein.[5] As the present article went to press, the ALRC's final recommendations are yet to be delivered.

Developments in the states and territories have continued as well. In May and in July of 2022, respectively, the Law Reform Commission of Western Australia ('LRCWA') and the Queensland Human Rights Commission ('QHRC') issued reports that propose reforms to the exceptions for religious educational institutions currently granted under Western Australia and Queensland law.[6] The ALRC, LRCWA, and QHRC proposals claim to replicate amendments to the *Equal Opportunity Act 2010* (Vic) ('*EOA*') that came into effect on 14 June 2022.[7] As the LRCWA recognised, those amendments 'substantially narrowed' the religious exceptions in Victoria. If enacted, they would have the same effect in Commonwealth, Western Australian, and Queensland law.[8] In November 2022, the Northern Territory became the first Australian jurisdiction to remove the distinct exemption that pertains to religious schools in respect of both staff and students. In that jurisdiction such schools may only have regard to the 'genuine occupational qualification' exception available to all employers when seeking to maintain their religious ethos.[9]

In their 2018 report, the Commonwealth Expert Panel on Religious Freedom ('Expert Panel') emphasised 'the pivotal role of exceptions to discrimination laws in the protection of freedom of religion'.[10] In recommending the retention of existing exceptions, with some minor curtailments, the Expert Panel affirmed the legitimacy of the positions expressed to it by religious schools. These included that many schools 'consider that the freedom to select, and

[2] *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Anti-Discrimination Act 1991* (Qld) s 41(a); *Equal Opportunity Act 1984* (SA) s 35(2b); *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3). This article focusses only on the employment context.

[3] Australian Law Reform Commission, 'New ALRC Inquiry: Religious Educational Institutions and Anti-Discrimination Laws' (Media Release, 4 November 2022) <https://alrc.gov.au/news/new-alrc-inquiry/>.

[4] Australian Law Reform Commission, *Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, 27 January 2023) ('ALRC Paper').

[5] Letter from Michael Stead, Anglican Bishop of South Sydney on behalf of thirty-three signatories to Mark Dreyfus, Commonwealth Attorney-General, 13 February 2023 <https://sydneyanglicans.net/files/2302013_Letter_Faith_Leaders_AG_ALRC_Consultation_Paper.pdf>.

[6] Western Australia Law Reform Commission, *Review of the Equal Opportunity Act 1984* (WA) (Final Report Project 111, August 2022) 16–7, 178–84 ('LRCWA Report'); Queensland Human Rights Commission, *Building Belonging* (Report, July 2022) 467, 575–83 ('QHRC Report').

[7] *Equal Opportunity Act 2010* (Vic) amended by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

[8] LRCWA Report (n 6) 168.

[9] *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i).

[10] *Religious Freedom Review* (Report, 18 May 2018) 104 [1.419] ('*Religious Freedom Review*').

to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs'.[11] The Expert Panel noted that '[a] key theme in these discussions, was the need for staff to model the religious and moral convictions of the community, and to uphold or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is "caught not taught".'[12] The Expert Panel recognised that '[f]or some religious schools … the only way to create a community consistent with the teachings of the faith is to be selective in employment, including with respect to non-teaching staff, who are also important members of the school community.'[13]

As we will see, these propositions lie at the very heart of the recent contention inspired by legislative reforms that affect religious schools. These assertions by religious schools frame the context for the key consideration of this article: are such practices by religious schools in accordance with the relevant international human rights law?

PART I: INTERNATIONAL HUMAN RIGHTS LAW

A. UNITED NATIONS JURISPRUDENCE

The right to establish private schools is protected by international human rights law that Australia has ratified. The starting place for the consideration of the rights of religious schools is the protection of the right to manifest religion contained in art 8 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'):

> 1. 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 private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[14]

[11] Ibid 62 [1.245].
[12] Ibid 56 [1.210].
[13] Ibid 56 [1.212].
[14] *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*'). See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,* GA Res 36/55, Un Doc A/RES/36/55 (18 January 1982, adopted 25 November 1981) art 6 ('*Religious Declaration*'); Human Rights Committee, *Views: Communication No 1249/2004,* 85th sess, UN Doc CCPR/C/85/D/1249/2004 (18 November 2005).

The right to found religious schools is protected under each of the above sub-articles. As the Expert Panel recognised: '[a] key aspect of the right to manifest one's belief in Article 18(1) of the *ICCPR* is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion'.[15] As Taylor further notes, Article 18(4) protects the freedom to establish independent religious schools: 'Private religious schools may be seen as a means of supporting the religious and moral education of children in conformity with parental convictions'.[16] The United Nations Special Rapporteur on Freedom of Religion or Belief has also recognised that 'private denominational schools' are 'one way for parents to ensure' their Article 18(4) rights.[17] In his commentary on the *ICCPR*, Nowak also concludes that '[w]ith respect to the express rule in Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the Third Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'[18] The *United Nations Universal Declaration of Human Rights* ('*UNDHR*'),[19] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[20] and the *Convention on the Rights of the Child* ('*CRC*')[21] also provide relevant protections to children and their parents.

In *Delgado Páez v Colombia*,[22] the United Nations Human Rights Committee ('UNHRC') considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment by his employer due to his advocacy of 'liberation theology'. In finding that the complainant's 'right to profess or to manifest his religion has not been violated' the UNHRC stated 'that Colombia may, without violating [Article 18], allow the Church authorities to decide who may teach religion and in what manner it should be taught.'[23] Similarly, the UNHRC found no breach of Article 19, concerning the right to freedom of expression by the employee. Subsequently in its General Comment on Article 18, the Committee emphasised the foundational importance of Article 18(4) when it recognised that, unlike the general protection to religious manifestation in Article 18(3), 'the liberty of the parents and guardians to ensure religious and moral education cannot be restricted.'[24]

In 2010 former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt concluded that 'private schools constitute a part of the institutionalised diversity within a modern pluralistic society'.[25] In 2013 he emphasised that 'the right of persons and

[15] *Religious Freedom Review* (n 10) 59 [1.225].
[16] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 533.
[17] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/16/53 (15 December 2010) [55].
[18] Manfred Nowak, *UN Covenant on Civil and Political Rights:CCPR Commentary* (N P Engel, 2nd rev ed, 2005) 443.
[19] *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 26(3) ('*UNDHR*').
[20] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 13(3)–(4) ('*ICESCR*').
[21] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (signed and entered into force 2 September 1990) arts 5, 14(2) ('*CRC*'). See also Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 243.
[22] Human Rights Committee, *Views: Communication No. 195/198*, 39th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) ('*Delgado Páez v Colombia'*).
[23] Ibid [5.7].
[24] 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*)*.
[25] Bielefeldt (n 17) [54].

groups of persons to establish religious institutions that function in conformity with their religious self-understanding … is not just an external aspect of marginal significance.' Without 'an appropriate institutional infrastructure … their long-term survival options as a community might be in serious peril'. In respect of their treatment of staff he acknowledged that for many 'questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith.' The means by which they 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[26] While recognising that 'religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace' than secular institutions, he emphasised that 'much depends on the details of each specific case.' For these reasons the Special Rapporteur concluded that '[t]he autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief.'[27] These principles also apply to religious schools, as he noted that limitations on the ability to incorporate private religious schools 'may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions.'[28]

The exercise of control by religious schools over the appointment of staff entails competing rights. Chief among these is the right to equality of staff under Article 26, and the right to maintain a religious school as an effectuation of the rights granted to individuals under Article 18. Other rights that may be enlivened include the right to privacy, the right to family life, and the rights to work and education, where the actions of a religious school would deprive persons of employment opportunities. As the immediate past Special Rapporteur has noted, in such cases 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.[29] However, acknowledging that religious institutions comprise a 'special category' distinct from secular institutions because 'their *raison d'être* is, from the outset, a religious one', successive

[26] Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/68/290 (7 August 2013) [57].
[27] Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/69/261 (5 August 2014) [41].
[28] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/19/60 (22 December 2011) [47]. Ireland is the sole State Party that the Human Rights Committee has called to reform its discrimination law as applies to religious educational institutions: Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21]. That recommendation can be considered to be situation-specific, applying to a country in which genuine alternative employment opportunities for teachers that do not uphold the ethos of religious schools are not available. As O'Toole reports, shortly before the Committee's recommendation 'approximately 96% of primary schools remain under denominational patronage.' Barbara O'Toole '1831–2014: an opportunity to get it right this time? Some thoughts on the current debate on patronage and religious education in Irish primary schools' (2015) 34:1 *Irish Educational Studies* 89, 91. Similarly, the Human Rights Committee did not reiterate the recommendations for similar reform made by the Committee on Economic, Social and Cultural Rights in its 2018 *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021), see Human Rights Committee *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021). Neither the Human Rights Committee nor the Committee on Economic, Social and Cultural Rights have rendered any conclusion in their Periodic Reviews that Australia is non-compliant with the *ICCPR* or the *ICESCR* as a result of the current exemptions for religious educational institutions within Federal law.
[29] Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion and Belief*, UN Doc A/HRC/37/49 (28 February 2018) [47]. See also Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief: Civil and Political Rights, Including the Question of Religious Intolerance,* UN Doc E/CN.4/2006/5 (9 January 2006) 'contentious situations should be evaluated on a case-by-case basis' and 'the competing human rights and public interests put forward in national and international forums need to be borne in mind': at [51]–[52].

Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is the strict standard set by Article 18(3).[30] While regard to 'the details of each specific case'[31] is required in determinations of whether the conduct of religious institutions constitutes a permissible limitation on the rights of others, as we will see, much turns on the precise means adopted within domestic law by which those specific circumstances are incorporated.

B. EUROPEAN JURISPRUDENCE

The European Court of Human Rights (ECtHR) provides the most developed body of applied human rights law at an international level. This includes its treatment of the right to maintain private schools. However, important distinctions between the jurisprudence of the ECtHR and that developed under the *ICCPR* should not be overlooked. The UNHRC has specifically eschewed the jurisprudence of the ECtHR in several respects, and in some cases has imposed more stringent protections for religious manifestation.[32] Chief among these distinctions is the UNHRC's eschewal of the margin of appreciation doctrine.[33] As Taylor shows, the UNHRC has also been less willing to adopt the 'progressive' conception of its chief enabling treaty as a 'living instrument' than has the ECtHR.[34]

In domestic reform efforts reliance is also at times placed upon the jurisprudence of the Court of Justice of the European Union applying European Council Directive 2000/78.[35] However, as the United Nations High Commissioner for Human Rights has made clear, that jurisprudence is to be distinguished as 'distinct among international and regional instruments', including on account of its 'limited exceptions' for religious institutions.[36] Aroney and Taylor have recently summarised the key points of the Directive's departure from the relevant human rights law enshrining Australia's obligations.[37] Accordingly, the Directive need not be further considered in this account of those obligations.

1. *Religious Institutional Autonomy*

Returning to the ECtHR, and following the approach of that Court itself, consideration of its jurisprudence concerning religious schools must commence with its framing of the broad

[30] Bielefeldt (n 27) [41] see also [38]; Bielefeldt (n 28) [60]; Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) [59], [66], [74].
[31] Bielefeldt (n 27) [41].
[32] See, eg, Human Rights Committee, *Views*: *Communication No 185/2008,* 106th sess, CCPR/C/106/D/1852/2008 (1 November 2012) ('*Bikramjit Singh v France'*) [8.6]; Cf *Ranjit Singh v France (dec.)* (European Court of Human Rights, Fifth Section, Application No 27561/08, 30 June 2009).
[33] Human Rights Committee, *Views: Communication No 511/92*, 52nd sess, CCPR/C/52/D/511/1992 (8 November 26 October 1994) [7.13], [9.4]; *Bikramjit Singh v France* (n 28).
[34] Taylor (n 16) 19.
[35] See, eg, ALRC Paper (n 4) [53], [55], [60], [66], [103] and [A.47]; *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, as considered in *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018); *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).
[36] Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (United Nations and Equal Rights Trust, 2022) 54.
[37] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42.

philosophical correlation between religious institutional autonomy and plural democratic society. In *Hasan and Chaush v Bulgaria*, the Court stated:

> [T]he believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. … Were the organisational life of the community not protected … all other aspects of the individual's freedom of religion would become vulnerable.[38]

In respect of members' rights, in *Sindicatul "Păstorul Cel Bun" v Romania*, the Grand Chamber of the ECtHR stated that:

> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones … in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.[39]

In that matter the Court stated:

> [R]eligious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient … It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy.[40]

The Court's consideration of the employment practices of faith-based institutions proceeds from these broad principles of democratic liberal political philosophy. A further developed account of this jurisprudence is provided in Part II, where the consistency of reforms within Australian law with that jurisprudence is considered.

2. *Right to Establish Private Religious Institutions*

The provision corresponding to the parental rights protection at Article 18(4) of the *ICCPR* is contained within Article 2 of the First Protocol to the *European Convention on Human Rights* ('*ECHR*'):

[38] *Hasan and Chaush v Bulgaria* [2000] XI Eur Court HR 117, 137-8 [61] ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* [1999] IX Eur Court HR 73. See also Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153.

[39] *Sindicatul "Păstorul Cel Bun" v Romania* [2013] V Eur Court HR 41, 63 [137] (citations omitted) ('*Sindicatul "Păstorul Cel Bun" v Romania*').

[40] Ibid 67–8 [159] (citations omitted).

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[41]

The seminal ECtHR judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark* ('*Kjeldsen*')[42] concerned the right of parents to remove children from sex education. Therein the European Court of Human Rights held that Article 2 'aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention.'[43] The Court considered this right took effect as 'the discharge of a natural duty towards their children — parents being primarily responsible for the "education and teaching" of their children — [whereby] parents may require the State to respect their religious and philosophical convictions.'[44] The Court noted the important role private schools play in ensuring parents may excuse their children from education that does not align with their religious or philosophical convictions:

> [T]he Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools … or to educate them or have them educated at home.[45]

In *Ingrid Jordebo Foundation of Christian Schools v Sweden*,[46] the European Commission on Human Rights further articulated the principles set out in *Kjeldsen* with specific application to the context of independent schools. Therein the Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the *ECHR*] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that … the activity in a private school should be allowed 'within very wide ranges to bear the stamp of different views and values'.[47]

In light of these principles the Commission criticised the Swedish Government, which:

> [S]eem[ed] to regard the right to keep a school as something entirely within 'le fait du Prince' [permissible acts of government]. … The Government seem[ed] to look

[41] *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as supplemented by *Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 20 March 1952, 213 ETS No 009 (entered into force 18 May 1954).
[42] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711 ('*Kjeldsen*').
[43] Ibid [21]. Also affirmed in *Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No 15472/02, 29 June 2007) [84(b)]. See also Rivers (n 21) 245, commenting upon the decision of *Kjeldsen* (n 42).
[44] *Kjeldsen* (n 42) [22].
[45] Ibid [24].
[46] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No 11533/85, 6 March 1987) ('*Ingrid Jordebo*').
[47] *Ingrid Jordebo* (n 46). See also Klaus Beiter, *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).

> at schooling the same way as at military service, where of course no competing 'private regiments' could be tolerated.[48]

In a lengthy analysis, the Commission was critical of the unitary nature of the Swedish schooling system, linking diversity in private schooling to a flourishing democratic State:

> In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country … The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament.[49]

In its conclusion, the Commission held 'the right to start and run a private school' had been breached.[50]

C. SUMMARY OF PART I

In summary, the above rulings, fashioned as extensions of the foundational philosophical conceptions underpinning democratic society, support the offering of strong protections for faith-based schools in respect of their employment decisions. Legislative reforms that fail to afford religious educational associations the ability to maintain their ethos through restrictions on their ability to employ persons who share their beliefs require strict scrutiny to ensure they do not evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament', breaching 'the 'guaranteed … right to think freely'.[51] This is because, as the application of these principles to domestic legislation in Part II considers, such limitations may jeopardise the ability of religious schools to offer students a holistic religious education in accordance with the human right that protects the ability of parents to choose a school consistent with their religious and moral convictions. Under both the *ICCPR* and the *ECHR*, regard must be had to the specific circumstances of each case in balancing the rights of individuals to freedom from discrimination, the rights of religious individuals to form collective institutions, and parental rights. However, the limitations standard applicable to the employment practices of the 'special category'[52] of religious educational institutions remains that under Article 18. As will be seen in Part II, the precise means adopted to incorporate the specific circumstances can have a significant impact on the ability of schools to maintain their unique ethos.

PART II: DOMESTIC APPLICATION

[48] Ibid.
[49] Ibid.
[50] Ibid (citations omitted). Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[51] Ibid. See also *Verein Gemeinsam Lernen v Austria* (European Commission of Human Rights, First Chamber, Application no 23419/94, 6 September 1995).
[52] Bielefeldt, (n 27) [41].

Having outlined the general principles applying to the religious institutional autonomy of Australian private schools under international human rights law, this article now considers the alignment of domestic Australian legislation with that law. The enactment of the EOREA Bill limited the 'exemptions' available to religious institutions and schools found within the *EOA*. The Victorian model is proving to provide somewhat of a template for reform. The ALRC makes the claim that the proposals contained in its January 2023 Consultation Paper are 'generally consistent with amendments to the law … in force in Victoria'.[53] In its May 2022 Final Report, the LRCWA concludes that 'the approach taken in the Victorian Religious Exceptions Act should be adopted.'[54] The Western Australian Attorney-General has confirmed that the Government 'has broadly accepted the recommendations' with reforms 'strengthening equal opportunity protections for LGBTIQA+ staff and students in religious schools' being one of 'several key reforms … expected to be included'.[55] In its response to a review commissioned by the Queensland Attorney-General, in July 2022 the Queensland Human Rights Commission recommended a reform closely aligning with the EOREA Bill.[56] At the time of writing, the Queensland Government is yet to release its response to the Commission's '*Building Belonging*' report.

The following discussion considers the extent to which the Victorian model can be said to be consistent with international human rights law. The Statement of Compatibility ('SoC') provided with the EOREA Bill sets out its key function:

> The Bill promotes the right to equality by amending the religious exceptions in the EO Act to remove the ability for religious bodies and educational institutions to discriminate on the basis of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment, education and the provision of goods and services.[57]

Under s 83A of the amended *EOA* a religious school can only 'discriminate' if an employee has an inconsistent 'religious belief' or engages in an inconsistent religious 'activity'. To the extent that this provision permits religious institutions and religious educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

> [C]onformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[58]

[53] ALRC Paper (n 4) [53], [60].
[54] LRCWA Report (n 6) 182.
[55] John Quigley, 'WA's Anti-discrimination Laws Set for Overhaul (Media Statement, 16 August 2022 <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/08/WAs-anti-discrimination-laws-set-for-overhaul.aspx>.
[56] QHRC Report (n 6).
[57] Victoria, *Parliamentary Debates,* Legislative Assembly, 28 October 2021, 4368 (Natalie Hutchins) ('*Parliamentary Debate* EOREA')
[58] Ibid 4369. See also 4370.

As the SoC outlined: 'This replaces the current blanket exception with an exception that is tailored to the specific position and restricts the discrimination to only those positions where it is necessary.'[59]

These reforms rely on a particular interpretation of international human rights law in two key respects. First, that non-religious activity can be irrelevant to the suitability of an employee of a religious institution under that law. Second, that an 'inherent requirements test' is consistent with that law. It is noteworthy that for both contentions the SoC that accompanied the EOREA Bill failed to provide one citation expressing reliance on the judgements of international human rights bodies for its interpretation. The following discussion considers the accuracy of these claims.

A. The Relevance of an Employee's Inconsistent, but Non-Religious Conduct

The EOREA Bill sparked significant concerns for religious institutions. One of the primary concerns was associated with the legislation's attempt to limit a religious institution's consideration of non-religious conduct that is inconsistent with the teachings of a religious institution when determining the suitability of employees. While the SoC states that it preserves the ability of faith communities to 'exclude individuals who do not share their faith',[60] it also states that it removes

> the ability of religious organisations and schools to discriminate on the basis of sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment. Teachers and other employees at religious organisations and educational institutions should not need to hide their identity in order to avoid risking their livelihoods.[61]

Prima facie, these two statements could appear to be in tension. What guiding principles are we provided with that could reconcile these competing demands? The SoC states the clear intention to allow some ongoing form of discretion to schools when it posits:

> [T]he Bill also limits the right to equality by allowing religious organisations and educational institutions to continue to discriminate against individuals on the basis of a religious belief or activity (a protected attribute under the EO Act) in employment, education and the provision of government-funded goods and services. The purpose of this limitation is to protect the ability of religious organisations and educational institutions to demonstrate their religion or belief as part of a faith community, and exclude individuals who do not share their faith. The formation of religious schools and organisations is an important part of an individual's right to enjoy freedom of religion with other members of their community.[62]

However, again in apparent tension with that statement, in her second reading speech government minister Natalie Hutchins stated:

[59] Ibid 4369. See s 83A(2) *Equal Opportunity Act 2020* (Vic) ('*EOA*').
[60] Ibid 4373.
[61] Ibid 4369.
[62] Ibid 4368–9.

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee only on the basis that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body.[63]

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.[64]

In calling into question the extent to which private conduct of a non-religious nature is relevant to the determination of an employee's suitability, the resulting interaction between non-religious 'activity' and religious 'belief' introduced into the *EOA* has the potential to cause significant uncertainty, both for schools and their employees. Each will now need to consider the extent to which belief can be informed by action that is not inherently religious, but which nonetheless is inconsistent with religious belief. This uncertainty calls into question the ability of the *EOA* to satisfy the requirement that limitations on human rights be 'prescribed by law' under Article 18(3) of the *ICCPR*. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* interprets this requirement as encompassing the dual obligation that '[l]aws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable' and that '[l]egal rules limiting the exercise of human rights shall be clear and accessible to everyone.'[65]

The judgement of the ECtHR in *Obst v Germany*[66] also raises serious questions for the compliance of this aspect of the *EOA* with international human rights law. That matter concerned the director for Europe of the public relations department of the Mormon Church who had engaged in an extramarital affair. No question was raised of any activity or views that would fall within the definition of 'religious belief or activity' under the *EOA*. The private activity of the employee, which would (absent an exemption) fall within the protected attribute of 'lawful sexual activity' under the *EOA*, was not a 'religious activity'. The Court held that the Church was justified in dismissing him, on the ground that to do so was vital for its credibility.[67] The private nature of the conduct was not a decisive factor, as the special nature of the professional requirements imposed on the Applicant was due to the fact that they were established by an employer whose ethos is based on religion or belief.[68] To the extent that the *EOA* requires that a religious institution disregard the same activities of a similarly placed

[63] Ibid 4375.
[64] Ibid.
[65] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984) Annex 4 [16]–[17].
[66] *Obst v Germany* (European Court of Human Rights, Fifth Section, Application No 425/03, 23 September 2010).
[67] Ibid [51].
[68] Ibid.

employee of a religious institution, it is inconsistent with the recognition provided to religious institutional autonomy by the ECtHR.

Fernández Martínez v Spain[69] concerned a Catholic priest and scripture teacher in public schools who, in the context of a campaign against Catholic teaching on clergy celibacy, disclosed to the media that he was married. The decision provides a further illustration of the Court's recognition that, in the case of religious institutions, private conduct may impact upon the ability of an employee to perform their professional activities:

> In the present case the interaction between private life *stricto sensu* and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be 'outstanding in true doctrine, the witness of Christian life, and teaching ability', thus establishing a direct link between the person's conduct in private life and his or her professional activities.[70]

In the context of religious schools, it is of particular interest that the Court considered that the concerns of the Church in ensuring alignment between its representatives' private lives and its teachings 'were all the more important as the applicant had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion.'[71]

Travaš v Croatia also raises significant concerns as to the compliance of the *EOA* with international human rights principles.[72] That matter concerned a religious teacher at a state school who divorced and remarried, in contravention of Catholic canon law. However, unlike *Fernández Martínez v Spain* where the applicant had voluntarily disclosed the inconsistency in his private life to the media, in *Travaš v Croatia* the applicant teacher's private conduct was not publicly disclosed. The Court noted that the question of the public awareness of the actions of the teacher was not relevant:

> [T]he question is rather whether a particular religious doctrine could be taught by a person whose conduct and way of life were seen by the Church at issue as being at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers.[73]

In answering that question in the negative, the Court concluded 'it does not appear that the decision to withdraw his canonical mandate, justified by the interest of the Church to preserve the credibility of its teachings, was in itself excessive'.[74] In reaching that conclusion the Court reasoned:

> [I]n order for a religion to remain credible, the requirement of a heightened duty of loyalty may relate also to questions of the way of life of religious teachers. Lifestyle may be a particularly important issue when the nature of an applicant's professional

[69] *Fernández Martínez v Spain* (2014) II Eur Court of HR 449 (extracts).
[70] Ibid [111].
[71] Ibid [142].
[72] *Travaš v Croatia* (European Court of Human Rights, Application no 75581/13, 4 October 2016) [97]-[98]. See also *Fernández Martínez v Spain* (n 59) [137], in the context of teachers of religious doctrine.
[73] *Travaš v Croatia* (n 72) [97].
[74] Ibid [107].

> activity results from an ethos founded in the religious doctrine aimed at governing the private life and personal beliefs of its followers, as was the case with the applicant's position of teacher of Catholic religious education and the precepts of the Catholic religion. In observing the requirement of heightened duty of loyalty aimed at preserving the Church's credibility, it would therefore be a delicate task to make a clear distinction between the applicant's personal conduct and the requirements related to his professional activity.[75]

Finally, attention is drawn to *Siebenhaar v Germany,*[76] a decision concerning the German Protestant Church's dismissal of a member of a religious community called the 'Universal Church/Brotherhood of Humanity' from employment as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'.[77] In that matter the Court upheld the determination of the domestic court that

> the applicant did not have the right to belong to or participate in an organization whose objectives were in conflict with the mission of the Protestant Church, which could require its employees to abstain from activities that put in doubt their loyalty to it and to adopt both professional *and private conduct* that conforms to these requirements.[78]

The crucial point arising from the preceding cases is that the ECtHR has emphasized that the credibility of religious institutions whose moral code governs private conduct requires that such institutions be entitled to discipline employees whose conduct does not conform to that moral code, regardless of whether that conduct is inherently religious or publicly known.

If private non-religious activity is not determinative under the newly-amended Victorian regime, even the prominent position occupied by a Church public relations director would not justify disciplinary action, if the conduct complained of was in the employee's personal life (as in *Obst v Germany*) and where the protagonist continued to affirm the beliefs of the religious institution notwithstanding their conduct. Practically speaking, the Anglican Church could not act where a bishop was discovered to have a porn addition, the Catholic Church could not act where a bishop was discovered to be covertly married, and an Islamic institution could not act where an imam was discovered to be in an extra-marital affair (whether heterosexual or otherwise), so long as each of those protagonists were repentant. In this respect, the relevant amended provisions of the *EOA* are not compatible with international human rights law.

B. INHERENT REQUIREMENTS TEST

The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test for certain roles.[79] In her second reading speech Natalie Hutchins explicated the distinctions that this aspect of the EOREA Bill seeks to draw:

---

[75] Ibid [98].
[76] *Siebenhaar v Germany* (European Court of Human Rights, Fifth Section, Application No 18136/02, 3 February 2011).
[77] Ibid.
[78] Ibid [44] [tr author] (emphasis added).
[79] Section 83A *EOA.*

> In most religious schools it would be an inherent requirement of a religious education position that employees must closely conform to the doctrines, beliefs or principles of the school's religion. On the other hand, a support position, such as a gardener or maintenance worker, is unlikely to have religious conformity as an inherent requirement of their role.[80]

The test is intended to protect persons from being 'discriminated against for reasons that have nothing to do with their work duties'.[81] Similar statements have been made by the LRCWA.[82] The QHRC has recommended the adoption of a 'genuine occupational requirements test', with the complementing clarification that '[t]he Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution'.[83] For the purposes of Queensland law 'there is no relevant distinction between the two tests of 'genuine occupational requirements' and 'inherent requirements'.[84] The ALRC's Consultation Paper claims that the imposition of a 'genuine requirement'[85] test (later described as a 'genuine occupational qualification'[86] and a 'genuine occupational requirement' test[87]) or 'inherent requirements'[88] test on religious educational institutions is consistent with Australia's international obligations.[89]

That the Victorian provision introduces significant uncertainty both for schools and employees is accentuated by the following selection of examples provided within the SoC:

> [A] teacher changes their religious beliefs and becomes accepting of marriage equality. They now hold an inconsistent religious belief. The teacher continues to promote the religious views of the school on [traditional] marriage to students but also tells students that there are those in the broader community that hold different views. Depending on the circumstances, it *may not* be reasonable and proportionate to dismiss a teacher who is willing to convey the religious views of the school, even if they differ from their own.[90]

and

> [A] religious school may state that it is an inherent requirement of all teaching positions that conformity with the religion of the school is required because all teachers carry pastoral care duties. However, it may be that for various reasons, the

[80] *Parliamentary Debate* EOREA (n 57) 4374.
[81] Ibid.
[82] LRCWA Report (n 6) 182.
[83] QHRC Report (n 6) 583.
[84] *Toganivalu v Brown and Department of Corrective Services* [2006] QADT 13. See also *Chivers v Queensland* [2014] QCA 141; 244 IR 102 [40]. For the position outside of Queensland see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [11.2.32]–[11.2.33], where an argument is also made for a subtle distinction between an 'inherent requirement' and a 'genuine occupational qualification'. However, as they say, regard to the 'character of the work', is common to both tests.
[85] ALRC Paper (n 4) 22.
[86] Ibid [66], [A.36].
[87] Ibid [93], [97].
[88] Ibid [96].
[89] Ibid [51].
[90] Ibid 4375 (emphasis added).

> school hires several teachers who are unable to meet this inherent requirement. This would suggest that religious conformity may not be an actual inherent requirement of the teaching roles.[91]

The latter example illustrates a key effect of the 'inherent requirements' test. If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions.[92] Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of an equivalent teacher as evidence for their subsequent unlawful dismissal. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. With the passage of time, the maintenance of the school's ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). This risk is particularly pronounced for those schools experiencing difficulty in recruiting suitably-qualified persons who hold the relevant faith.[93] Such an outcome would risk frustrating the operations of those schools who seek, as recorded by the Expert Panel, to inculcate an institutional ethos by applying a *preference* for staff that share their faith across the employee cohort wherever possible, operating on the notion that faith is 'caught not taught'.[94]

Further, through their vague and imprecise application, inherent requirements tests risk running afoul of the requirement that limitations on religious exercise be 'prescribed by law', which incorporates the obligation that they be sufficiently clear to enable application. Given these effects, serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law. Again, the SoC is notably scant on detail. As noted above, the Special Rapporteur has commented that under the *ICCPR* 'much depends on the details of each specific case'.[95] Similarly, although not ratified by Australia, the ECtHR jurisprudence recognizes that, amongst a range of factors, 'the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned'.[96] However, as the following analysis demonstrates, both of these recognitions do not equate to an assertion that the adoption of an 'inherent requirements' test will assure compliance with the applicable human rights law. Indeed, if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance. This is because, as Aroney and Taylor have summarised:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational

[91] Ibid 4375.
[92] Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.
[93] Greg Walsh, 'The Right to Equality and Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 123-4.
[94] *Religious Freedom Review* (n 10) 56 [1.210]
[95] Bielefeldt (n 27) [41].
[96] *Fernández Martínez v Spain* (n 69) [130]. See also *Obst v Germany* (n 66) [48]-[51]; *Schüth v Germany* [2010] V Eur Court HR 397, 427 [69].

> requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[97]

In contrast, in their review of decisions of the ECtHR, Hilkemeijer and Maguire claim that:

> Since the right to manifest religion expressly protects the right to teach religion, the ECtHR has held that religious organisations may expect a high level of loyalty from persons employed to teach religion. However, employees of religious organisations such as administrators, teachers of non-religious subjects, gardeners and bus drivers, are less likely to owe a heightened duty of loyalty that extends to living their private lives in accordance with religious precepts.[98]

However, as the following analysis shows, the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.

Siebenhaar v Germany[99] directly refutes the assertion that a determinative 'inherent requirements' test that only looks to the functions performed by the particular role in question, the 'work duties' to use the terminology employed by the Victorian Minister,[100] will satisfy the requirements of international human rights law. The matter concerned the dismissal of a person employed as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'[101] run by the German Protestant Church. Critically, the Court recorded that the terms of the contract of employment provided:

> Service in the church and in the diakonia is determined by the mission to proclaim the gospel in word and deed. The employees and the employer put their professional skills at the service of this objective and *form a community of service regardless of their position or of their professional functions* ...[102]

The dismissal related to behaviour outside of work hours, namely Ms Siebenhaar's membership of, and proselytisation for, the Universal Church/Brotherhood of Humanity. The Court restated its jurisprudence that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them'.[103] From that jurisprudence flowed the Court's affirmation of the Church's own conception of the conduct or beliefs of its employees that would detrimentally impact on its ability to 'form a community of service *regardless of their position or professional functions*'.[104] That jurisprudence is consistent with the frequently adopted approach that courts should apprehend the genuineness, or sincerity, of the religious beliefs in question.[105] The Court saw fit to have

[97] Aroney and Taylor (n 37) 58.
[98] Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination Against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93(9) *Australian Law Journal* 752, 758.
[99] *Siebenhaar v Germany* (n 76).
[100] *Parliamentary Debate* EOREA (n 57) 4374.
[101] *Siebenhaar v Germany* (n 76).
[102] Ibid [9] [tr author] (emphasis added).
[103] Ibid. See also *Hasan and Chaush v Bulgaria* (n 31) 137–8 [62], 140–1 [78].
[104] *Siebenhaar v Germany* (n 76) [9] [tr author] (emphasis added).
[105] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom*

regard to the self-conception of the Protestant Church as to the impact Ms Siebenhaar's private conduct and belief would have on the ethos of the relevant childcare centres. In affirming that the actions taken on the basis of the employment contract (and its clarification that the Church's assessment could be made 'regardless of their position or professional functions'),[106] the Court expressly disavowed an 'inherent requirements' test as a determinative feature of the law concerning religious institutional autonomy. It is also of particular note that the Court specifically referenced both the administrative and managerial duties engaged in by Ms Siebenhaar when acknowledging the Church's concern for the impact on the credibility of the Protestant Church 'in the eyes of the public and the parents of the children'. Regardless of her ability to perform these functions, the credibility issue also arose because of the perceived 'risk of influence' Ms Siebenhaar might pose, notwithstanding the young age of the children. The Court's regard for a religious institution's own assessment of what will impact upon the maintenance of its ethos, and its engagement with the wider public, is in opposition to an 'inherent requirements' style test that would have regard to the particular 'work duties'[107] assigned to a role without regard to the wider institutional context in which the employee is placed, as is proposed by the SoC. Instead, the Court acknowledged that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos [lit. 'ethic'] is founded on religion or beliefs'.[108]

In *Rommelfanger v Germany,*[109] the ECtHR found no violation in respect of a Catholic hospital's discipline of staff that had publicly criticized the Catholic Church's position on abortion. The judgement provides a further example of the Court giving credence to the self-conception of a religious institution concerning the fitness of a person to fulfill the responsibilities of their employment and the impact of their extra-work activities on the religious ethos of an institution. Therein the ECtHR held:

> If, as in the present case, the employer is an organisation based on certain convictions and value judgments *which it considers as essential* for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of the employment *as well as the importance of the issue* for the employer.[110]

The applicant in question was a physician whose employment contract provided that his conduct would

> be governed by … the duties which flow from charity (Caritas) as an essential expression of Christian life. The employees are required to perform their services in loyalty and to show a behaviour *inside and outside their professional functions*

in Contemporary Australia (Shepherd Street Press, 2021); Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175.

[106] *Siebenhaar v Germany* (n 76) [9] [tr author].

[107] *Parliamentary Debate* EOREA (n 57) 4374.

[108] *Siebenhaar v Germany* (n 76) [46] [tr author].

[109] Human Rights Commission, Application No 12242/86, 6 September 1989.

[110] Ibid (emphasis added).

> which, as a whole, corresponds to the responsibility which they have accepted. It is presupposed that in performing their professional duties they will be guided by Christian principles.[111]

Again, the decision defies the proposition that an inherent requirement test that looks only to the 'work duties'[112] of the role is determinative. Finally, as noted above, in the decision of *Fernández Martínez v Spain,*[113] concerning a Catholic priest and scripture teacher, the Court recognized that 'the requirements for this kind of specific employment were *not only technical skills*, but also the ability to be "outstanding in true doctrine, the witness of Christian life, and teaching ability"'.[114]

C. SUMMARY OF PART II

In applying the broad philosophical principles outlined in Part II, rather than the 'inherent requirements' or 'genuine occupational qualifications' tests, the ECtHR has focused on a range of factors, including whether a 'heightened degree of loyalty' exists;[115] the impact of the impugned conduct or belief on the ethos of the religious institution;[116] 'the proximity between the applicant's activity and the Church's proclamatory mission';[117] whether procedural fairness according to the rules of the religious institution has been afforded;[118] whether the relevant documents sufficiently clarified the expectations of the employer;[119] whether the applicant had knowingly placed themselves in a position of conflict;[120] whether the domestic courts had conducted 'a detailed assessment of all the competing interests and provided sufficient reasoning when dismissing the applicant's complaints';[121] and the availability of alternative employment,[122] all to be exercised with the understanding that the Court is not to engage in an exercise of assessing the legitimacy of the asserted beliefs of the institution, or the means by which they are expressed.[123] In particular, as noted above, the ECtHR's jurisprudence recognizes that personal conduct engaged in within the 'private life' of an employee can impact upon the ethos of a religious institution.[124]

The foregoing authorities establish that the 'real and substantial' risk to religious autonomy test[125] does not preclude a religious community from considering that the private life and beliefs of employees may give rise to a legitimate concern that its religious ethos would be undermined. Further, as *Travaš v Croatia* demonstrates, while the public nature of acts undertaken in the private life of an employee may be relevant, the importance of fidelity to teachings means that for some religious institutions, inconsistent acts need not be public, having regard to the conception of the religious institution employer. As the Court stated in

---

[111] Ibid (emphasis added).
[112] *Parliamentary Debate* EOREA (n 57) 4374.
[113] *Fernández Martínez v Spain* (n 69).
[114] Ibid [111] (emphasis added).
[115] *Travaš v Croatia* (n 72); *Obst v Germany* (n 66) [51]; *Schüth v Germany* (n 96).
[116] *Siebenhaar v Germany* (n 76).
[117] *Schüth v Germany* (n 96); *Fernández Martínez v Spain* (n 69) [139].
[118] *Schüth v Germany* (n 96).
[119] *Travaš v Croatia* (n 72) [93]; *Siebenhaar v Germany* (n 76).
[120] *Fernández Martínez v Spain* (n 69) [144]-[145]; *Siebenhaar v Germany* (n 76).
[121] *Travaš v Croatia* (n 72) [69] summarising *Schüth v Germany* (n 96).
[122] *Schüth v Germany* (n 96); *Fernández Martínez v Spain* (n 69).
[123] *Hasan and Chaush v Bulgaria* (n 38).
[124] *Siebenhaar v Germany* (n 76).
[125] *Sindicatul "Păstorul Cel Bun" v Romania* (n 39); *Fernández Martínez v Spain* (n 69) [131].

Obst v Germany 'the absence of media coverage … cannot be decisive … the special nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer whose ethos is based on religion or belief'.[126] Further, as *Siebenhaar v Germany* demonstrates, even where an employee is engaged in managerial tasks and the education provided is directed to small children the Court is willing to recognize that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos is founded on religion or beliefs' and that the detrimental impact of the employee's beliefs on the credibility of the institution 'in the eyes of the public and the parents' may be a sufficient factor.[127] Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to undertake 'any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them'.[128] As Aroney and Taylor summarise, an 'inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the *ECHR* as interpreted by the ECtHR.'[129] As the Special Rapporteur acknowledges in interpreting the jurisprudence of the *ICCPR*, the means by which religious bodies 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[130]

CONCLUSION

This article has set out the primary international human rights law that pertains to religious schools. The right to found and maintain private schools is protected by the international human rights law that Australia has ratified, primarily found in Article 18 of the *ICCPR*. It has also considered the developed application of that right, as enunciated within the jurisprudence of bodies exercising jurisdiction under the *European Convention on Human Rights.* In the light of the foundational principles of democratic political philosophy articulated particularly by the latter, it has argued that close scrutiny of any legislative proposals that may impact upon the ability of private education associations to maintain their distinct religious ethos is required. It has considered how restrictions on the ability of a private faith-based school to ensure that those persons appointed as its representatives also share its faith can impact upon its ability to maintain a unique religious identity, and thus breach the right to establish private religious schools. It has demonstrated the domestic application of these principles by consideration of the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021 which has framed the recent recommendations for reform provided by the Australian Law Reform Commission, the Law Reform Commission of Western Australia, and the Queensland Human Rights Commission. That now enacted Bill has served as an important illustration of how domestic legislation may fail to adequately acquit the obligations of international human rights law.

[126] *Obst v Germany* (n 66) [51] [tr author].
[127] *Siebenhaar v Germany* (n 76) [46] [tr author].
[128] Ibid. See also *Hasan and Chaush v Bulgaria* (n 38) 137–8 [62], 141–2 [78].
[129] Aroney and Taylor (n 38).
[130] Bielefeldt (n 27) [57].

Legislating Gender Prejudice: Religion and the Overturning of *Roe v Wade*

Rena A. MacLeod*

This paper explores the intersection of religion, gender identity, and gender prejudice within the American context of religious conservatism and the overturning of Roe v Wade. *Discussion considers the overturning as a dangerous move that negates the rights and religious liberties of women, with adverse implications also for the rainbow community. Notably, this legislative context depicts the power of conservative Christian ideology to sustain hierarchical gender norms anchored in a binary consciousness, which privileges and empowers men (typically white, elite, heterosexual men), while diminishing and disempowering women and gender-diverse persons as non-normative and subsidiary. Discussion further conveys that this male-centred/androcentric ideology continues the oppressive legacy of male-dominant, fundamentalist biblical interpretation — a mode of interpretation heavily criticised within contemporary mainstream biblical scholarship as flawed and grievous in its promotion of gender prejudice. Accordingly, the overturning of* Roe v Wade *is relevant to the Australian context, for the same androcentricity and legacy of biblically-justified gender prejudice underpins all Western cultures. That is, manifold people, knowingly or reflexively, religious or otherwise, adhere to this biased interpretation and prejudicial gender consciousness through entrenched psychosocial Western norms. Not least, much scholarship has stressed that the issue of gender bias deeply pervades the structures of Australia's justice system. Ultimately, this paper emphasises that understanding androcentricity and the legacy of injurious androcentric biblical interpretation is necessary to the tasks of negotiating religious freedom for all persons and cultivating non-sexist social and legal structures that uphold the rights of multiple gender identities and subjectivities.*

INTRODUCTION

> 'The hard-won rights for women and girls that many of us now take for granted could be snatched away at any moment.' – Margaret Atwood

Margaret Atwood, author of *The Handmaid's Tale* (1985), spoke these words to a Canadian audience in a speech titled *We Hang by a Thread*.[1] In this address, Atwood emphasised the vulnerability of women's rights 'even in the so-called advanced West' because 'culturally, those rights are very shallowly embedded … they haven't been around that long, historically, and they are not fervently believed in by everyone in the culture'.[2] Delivered in 2016 during the midst of the presidential campaign that resulted in the election of Donald Trump (who would soon significantly influence the conservative Christian makeup of the U.S. Supreme Court that overturned *Roe v Wade*), Atwood's address was evidently a prophetic one. Her warning that 'it wouldn't take that much to roll back recent legal entitlements for women' has

* Associate Lecturer, Central Queensland University.

[1] Margaret Atwood, 'We Hang by a Thread' in *Burning Questions: Essays and Occasional Pieces, 2004-2021* (Penguin Random House, 2022) 313.

[2] Ibid.

turned out to be soberingly valid.[3] This same warning had been promulgated via Atwood's aforementioned dystopic novel that tells of contemporary America falling subject to a patriarchal, biblically-anchored regime which stymies the religious freedoms of others and justifies controlling women and their fertility in accordance with sexist religious ideology. Those who donned the uniform of Atwood's subjugated handmaids to protest Trump and the revoking of *Roe v Wade* remind us of that warning.[4]

This paper considers, from a gender and biblical scholar's perspective, the intersection of religious freedom, gender identity, and gender prejudice within the American context of religious conservatism and the overturning of *Roe v Wade*. Discussion considers the latter as a dangerous move that negates the rights and religious liberties of women in America and beyond. Noted too, is the ruling's adverse implications for the rainbow community. Via analysis through the conceptual lens of androcentricity,[5] the following exploration highlights how this legal shift epitomises the power of conservative Christian ideology to sustain hierarchical gender norms which value and privilege men while diminishing women and gender-diverse persons as non-normative and subsidiary. Discussion in this paper further argues that this androcentric/male-centred ideology continues the oppressive legacy of male-dominant, fundamentalist biblical interpretation — a mode of interpretation heavily criticised within contemporary mainstream biblical scholarship[6] as flawed and grievous in its promotion of bigotry and gender prejudice.

Accordingly, the overturning of *Roe v Wade* is explicated as worryingly relevant to the Australian context and that of other Western nations, for the same legacy of androcentric, biblically-justified gender prejudice underpins all Western cultures. In other words, manifold peoples, male or female, knowingly or reflexively, religious or otherwise, adhere to traditional biased interpretations and prejudicial gender consciousness as entrenched psychosocial Western norms. Notably, much scholarship has stressed that the issue of gender bias deeply pervades Australia's social and justice structures. Ultimately, this paper accentuates the idea that understanding androcentricity, and the legacy of injurious androcentric biblical interpretation, is necessary to the tasks of negotiating religious freedom for all persons and cultivating non-sexist social and legal structures that uphold the rights of multiple gender identities. In pursuit of this objective, the following first discusses the overturning of *Roe v Wade*, including the issue of abortion and the judicial influence of the conservative Christian right. Discussion then addresses androcentricity and its intersection with Christianity's legacy of harmful androcentric biblical interpretation. Finally, wider implications of this legacy and the overturning of *Roe v Wade* are discussed in relation to the Australian social and legal context.

---

[3] Ibid 314.

[4] Nick Bonyhady, 'What is Roe v Wade, and What Happens if it is Overturned?' *Sydney Morning Herald* (online, 3 May 2022) <https://www.smh.com.au/world/north-america/what-was-roe-v-wade-and-why-is-everyone-talking-about-it-now-20201009-p563jp.html>.

[5] The Greek term 'androcentricity' denotes a 'male-centred' worldview. See, eg, Jane Pilcher and Imelda Whelehan, *Key Concepts in Gender Studies* (SAGE, 2017) 5.

[6] Here I refer to the extensive body of specialised academic scholars that read biblical material in their original language and employ a myriad of contemporary analytical tools and theory in order to comprehend aspects such as the linguistic and structural features of texts, the formative and redaction stages behind texts, and their historical setting(s) and interrelated meaning(s). Mainstream scholarship further encompasses analysis that extends these interpretive frames via lenses informed, for example, by psychoanalysis, gender theory, feminism/womanism, post-colonialism, and liberation theology. Appreciating that texts are multifaceted, mainstream biblical scholarship encompasses a multiplicity of interpretations that are generated through close study of biblical material in accordance with well-grounded, cogent methodologies. See, eg, John H Hayes and Carl R Holladay, *Biblical Exegesis: A Beginner's Handbook* (Westminster John Knox Press, 3rd ed, 2007).

CHRISTIAN CONSERVATIVISM AND THE OVERTURNING OF *ROE V WADE*

Roe v Wade[7] refers to the 1973 Supreme Court ruling, by a 7-2 determination, that the right to an abortion is protected by the implied right to privacy in the United States Constitution. This ruling placed the right to an abortion within the same protective frames as a person's entitlement to liberty and privacy regarding decisions pertaining to contraception, marriage, and intimate sexual conduct.[8] The ruling further included a trimester framework and a 'strict scrutiny' standard. Accordingly, women had the right to an abortion prior to foetus viability,[9] understood then as transpiring at the third trimester (28 weeks).[10] After this time and providing the woman's own life and health were not endangered, States could then legally prohibit abortions in the interest of protecting prenatal life. The 'strict scrutiny' standard meant that any challenges to the ruling would be subject to the highest level of judicial review.[11]

This ruling on the fundamental right to an abortion prior to viability was again upheld in the landmark 1992 case, *Planned Parenthood v Casey*.[12] However, two diluting alterations were made. The trimester framework was overturned and replaced with viability analysis.[13] This enabled States to restrict abortions prior to the third trimester, given medical proofs of earlier viability at the 23/24-week mark. The 'strict scrutiny' specification was also replaced with the 'undue burden' standard. States could now regulate abortion, providing it did not subject those seeking an abortion of a non-viable foetus to undue interference and obstacles.[14] In other words, legal obstructions to women seeking abortions of pre-viable foetuses were unconstitutional; however, States acquired increased capacity to restrict abortions of post-viable foetuses, on condition the laws did not impede abortions in ways that were injurious to a woman's life or health.[15]

Roe v Wade was fully overturned on 24 June 2022 in the case of *Dobbs v Jackson Women's Health Organization* ('*Dobbs*').[16] In 2018, the Jackson Women's Health Organisation had successfully sued the Mississippi Department of Health in relation to a newly passed State law, the *Gestational Age Act*.[17] This act banned most abortions after 15 weeks, except where necessary to save the woman's life and in cases of severe foetal abnormality.[18] The act provided

---

[7] 410 US 113 (1973). Norma McCorvey, known by the legal pseudonym 'Jane Roe' filed a suit against Henry Wade, the District Attorney of Dallas County, Texas. Wanting to terminate her third pregnancy due to her impoverished situation, she alleged the Texas law that prohibited abortion unless the mother's life was at risk was unconstitutional. See, eg, Sakshi Soni, 'Roe v Wade Case and the Abortion Laws in US' (2021) 4(6) *International Journal of Law Management and Humanities* 287.

[8] *Roe v Wade*, (n 7) 152–3.

[9] That is, the capacity for a human foetus to survive outside the womb.

[10] *Roe v Wade* (n 7) 164–5.

[11] Ibid 169.

[12] *Planned Parenthood v Casey*, 505 US 833 (1992). The plaintiffs argued that the *Pennsylvania Abortion Control Act of 1982*, 18 Pa Cons Stat §§3203-20 (1990) comprised five provisions that were unconstitutional under *Roe v Wade*, including stipulations of a waiting period, notifying a spouse, and parental consent for minors.

[13] 'Planned Parenthood of Southeastern Pennsylvania v Casey' *Legal Information Institute* (Web Page, June 2022) <https://www.law.cornell.edu/wex/planned_parenthood_of_southeastern_pennsylvania_v_casey_(1992)>.

[14] *Planned Parenthood v Casey* (n 12) 837, 933.

[15] Alta Charo, 'Undue Burden of Abortion' (1992) 340(8810) *Lancet* 44.

[16] *Dobbs v Jackson Women's Health Organization*, 597 US (2022) ('*Dobbs*').

[17] *Gestational Age Act 2018*, Miss Gen Laws ch 393 (2018). Miss Code Ann § 41-41-191.

[18] Jeffrey Hannan, 'Dobbs v Jackson Women's Health Organization and the Likely End of the *Roe v Wade* Era' (2022) 17 *Duke Journal of Constitutional Law and Public Policy* 281, 282–3. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1214&context=djclpp_sidebar>.

no exceptions for rape and incest.[19] The District Court of Southern Mississippi ruled that the State had no justifiable interest in banning abortions prior to viability and, by injunction, prohibited any enforcement of the act.[20] In 2019, the Court placed another injunction on the State, preventing the enactment of a new law banning abortions upon detection of a foetus' heartbeat — typically within the 6 to 12 week gestation phase.[21] Via appeal to the Supreme Court, the State of Mississippi petitioned for a reconsideration of the benchmarks of viability in light of medical advances.[22]

In *Dobbs*, the Supreme Court held, 5-4,[23] that abortion was not a protected right under the Constitution. According to the majority opinion, abortion was neither referenced in the Constitution nor a substantive right deeply rooted in the nation's history or tradition.[24] The Supreme Court's ruling effectively provides individual States full power to regulate abortion.[25] With the 'undue burden' test also replaced with the weaker 'rational basis' standard, the legality of banning abortions is now tied to determinations that States have a rational basis to do so.[26] Consequently, some States have taken measures to protect and expand abortion access. However, close to a third of the States — especially those in the Midwest and 'Bible Belt' regions — have already severely restricted or prohibited abortions, including abortions after six weeks (before many know they are pregnant) and even in relation to pregnancies arising in cases of rape or incest.[27]

The overturning of *Roe v Wade* has given rise to a deep vein of criticism concerning the influence of conservative Christian beliefs on American jurisprudence. Trump, in conjunction with courting conservative Christian voters, had expressed his determination to configure a 'pro-life' Supreme Court.[28] With the appointment of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett (following the death of Ruth Bader Ginsberg), he did just that. These three, together with Justices Samuel Alito and Clarence Thomas, voted to overturn *Roe v Wade*. Much news media has pointed to the Catholic background and enduring conservative

[19] Ibid; Jenny Gathright, 'Mississippi Governor Signs Nation's Toughest Abortion Ban Into Law' *NPR News* (online, 19 March 2018) <https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law>.

[20] Grinberg, Emanuella, 'Judge Notes "Sad Irony" of Men Deciding Abortion Rights as he Strikes Mississippi's Abortion Law' *CNN* (online, 21 November 2018) <https://edition.cnn.com/2018/11/20/health/mississippi-abortion-ban-15-weeks-ruling/index.html>.

[21] Hannan (n 18) 283.

[22] Lynn Fitch (A-G Miss) 'Petition for a Writ of Certiorari' *Dobbs v Jackson Women's Health Organization* 19-1392, 15 June 2020 <https://www.supremecourt.gov/DocketPDF/19/19-1392/145658/20200615170733513_FINAL Petition.pdf>.

[23] The court decided, in a 6-3 ruling, to uphold the Mississippi law, banning abortion after 15 weeks. Justice John Roberts sided with this majority, though he disputed the total overturning of *Roe v Wade*. See Lawrence Hurley and Andrew Chung, 'U.S. Supreme Court Overturns Roe v Wade, Ends Constitutional Right to Abortion' *Reuters* (online, 28 June 2022) <https://www.reuters.com/world/us/us-supreme-court-overturns-abortion-rights-landmark-2022-06-24/>.

[24] *Dobbs* (n 16).

[25] Ibid.

[26] Ibid; Linda McClain and Nicole Huberfeld, 'Roe Overturned: What You Need to Know about the Supreme Court Abortion Decision' *The Conversation* (online, 25 June 2022) <https://theconversation.com/roe-overturned-what-you-need-to-know-about-the-supreme-court-abortion-decision-184692>.

[27] Priya Krishnakumar and Veronica Stracqualursi, 'See Where Abortion Access is Banned — And Where It's Still in Limbo' *CNN News* (online, 31 August 2022) <https://edition.cnn.com/2022/08/31/us/abortion-access-restrictions-bans-us/index.html>; Associated Press, 'Abortion Ruling Prompts Variety of Reactions From States' *Associated Press* (online), 22 July 2022 <https://apnews.com/article/supreme-court-abortion-ruling-states-a767801145ad01617100e57410a0a21d>.

[28] Brit McCandless Farmer, 'Trump in 2016: "The Judges will be Pro-life"' *CBS News* (online, 23 September 2020) <https://www.cbsnews.com/news/donald-trump-2016-pro-life-judges-60-minutes-2020-09-23/>.

Catholic/Christian affiliations of these Justices. As Associated Press News notes, for example, 'the justices in the *Dobbs* majority aren't simply cradle Catholics. Several have ties to intellectual and social currents within Catholicism that, for all their differences, share a doctrinal conservatism and strong opposition to abortion'.[29] The revoking of *Roe v Wade* has hence been interpreted by many as religious bias distorting the legal fabric of America. Encapsulating this perspective, Professor Martin Gold of Columbia Law School asserts: 'The current Court is giving our law a clearly conservative Christian direction… The Supreme Court majority is well aware that like-minded conservative Christian forces will prevail in many states'.[30]

The revoking of *Roe v Wade* has indeed been heralded as a major victory for the conservative Christian right on an issue that has been central to America's 'culture wars' for decades. Alongside Trump's boasting for accomplishing the new ruling, conservative Christian leaders have applauded the decision as a much-needed correction of an earlier iniquitous mistake in judgment.[31] For other Christian leaders, however, and persons from other faith traditions, the overturning of *Roe v Wade* represents not only a violation of the separation of church and state, but the privileging of the religious freedoms of some against the religious freedoms of others.[32] These oppositional voices are supported by data that reveals a considerable portion of the American populace who identify as Christian and other faith traditions support safe and unhindered access to abortion.[33]

Together with condemnations from 'pro-choice', feminist, and Democratic Party sectors, major health and medical associations have also deplored the ruling. As history has shown and global data continues to confirm, impeding access to safe abortions does not decrease terminations; on the contrary, it escalates the occurrence of dangerous procedures. Medecins Sans Frontieres notes 'unsafe abortion remains one of the leading causes of maternal mortality globally'; consequently, 'safe abortion care is essential health care'.[34] Further recognised health risks associated with restricted access to safe abortions comprise psychological and financial harms incurred through bearing and raising unwished for children.[35] The overturning of *Roe v Wade* has been deemed to bear heaviest upon poorer women who lack the financial means to travel interstate for abortion care,[36] and especially black women, who already face disproportionately high risks of maternal mortality in the country with 'the highest maternal mortality rate in the developed world'.[37] Concerns accordingly also emphasise that impeding and criminalising abortion will subject countless women to inhumane, inescapable forced pregnancy.[38]

---

[29] Peter Smith, 'Anti-Roe Justices a Part of Catholicism's Conservative Wing' *Associated Press* (online, 1 July 2022) <https://apnews.com/article/abortion-supreme-court-catholic-ee063f7803eb354b4784289ce67037b4>.
[30] Martin E Gold, 'The Demise of Roe v Wade Undermines Freedom of Religion' *American Constitution Society: Expert Forum* (Webpage, 30 August 2022) <https://www.acslaw.org/expertforum/the-demise-of-roe-v-wade-undermines-freedom-of-religion/>.
[31] David Crary, 'Faith Leaders React with Joy, Anger to Roe's Reversal', *PBS News* (online, 24 June 2022) <https://www.pbs.org/newshour/politics/faith-leaders-react-with-joy-anger-to-roes-reversal>.
[32] Ibid.
[33] Ibid; Gold (n 30).
[34] Katrina Penney, 'Reducing Access to Abortion Puts Lives in Danger' *Medecins Sans Frontieres* (Webpage, 4 July 2022) <https://msf.org.au/article/statements-opinion/reducing-access-abortion-puts-lives-danger>.
[35] Terry McGovern, 'Overturning Roe v Wade Has Had an Immediate Chilling Effect on Reproductive Healthcare' (2022) 377 *British Medical Journal* 1622, 1622.
[36] Ibid.
[37] Ibid.
[38] Ibid.

Abortion is, no doubt, a highly complex and gendered issue. In other global contexts, we must not forget, open access to and forced abortions have resulted in an inordinate termination of female life due to the higher valuing of male children.[39] In the current American context, however, restricting access to abortion raises profound concerns in relation to the capacity of females to live with equitable liberty and autonomy to self-govern their lives. In the West, the issue commonly pivots on understandings of when human life with rights begins and consequently supersedes the rights of the bearer to decide not to carry the foetus to term. Within Catholic frameworks, human life with rights begins at conception and is considered a sacred gift from God.[40] Furthermore, procreation is regarded as the true intended end of the sexual act as discerned via Natural Law, which in turn derives from and in accordance with Divine Law and God's will for humanity.[41] 'Pro-life' stances draw further reinforcement from the biblical commandment 'Thou Shalt not Kill'[42] Accordingly, abortion at any stage is regarded as the intentional killing of innocent human life and thus inherently evil — even in contexts of rape and incest where the unborn foetus is considered a victim of the crime too.[43]

Unquestionably, in a world wrought by so much violence, there is value to be found in viewpoints that seek to protect and esteem the preciousness of all human life. Yet, as renowned Catholic theologian and feminist scholar Rosemary Radford Ruether has long articulated, the conservative Christian 'pro-life' stance falls well short in its concern for women and the complexity of the issue of abortion as it pertains to women's gendered lives and experiences. Ruether emphasises, as do manifold other gender scholars, that the inequitable position of women in society means they typically have reduced capacity to control the conditions within which they have sex and become pregnant.[44] Aside from the literature and data that attests to girls' and women's excessive experience of men's sexual violence,[45] recent scholarship also illuminates the prevalence and nuances of sexual coercion that impact the everyday lives of women.[46] Furthermore, when it comes to making decisions to terminate a pregnancy, the rhetoric of 'choice' is misleading in its insinuation that women have unbridled autonomy. Such decisions commonly abound with complexity as women weigh their personal circumstances and the projected quality of life of both child and mother in contexts where motherhood all too frequently aligns with single parenthood, underemployment, financial insecurity, and poverty.[47]

---

[39] Ayana Gray, 'Sex-Selective Abortion, Female Infanticide, and their Lasting Effects in China and India' (2020) 21(1) *Concord Review* 1, 1-26 <https://www.sfponline.org/uploads/302/TheConcordReview_V20_ISS4.pdf - page=6>.

[40] Pontifical Council of Justice and Peace, *Compendium of the Social Doctrine of the Church* (Burns & Oates, 2005) # 155, 228; Chris Alcock, Sam Farmar, and Hilary Andersson, 'Panorama: America's Abortion War' *EduTV*, 31 August 2019 <https://search-informit-org.ezproxy.usq.edu.au/doi/10.3316/edutv.3604555>.

[41] Pontifical Council of Justice and Peace (n 40).

[42] 'Book of Exodus' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 20 verse 13 ('Exodus').

[43] Diane N Irving, 'Abortion: Correct Application of Natural Law Theory' (2000) 67(1) *Linacre Quarterly* 45.

[44] Rosemary Radford Ruether, 'A Consistent Life Ethic? Supporting Life After Birth' (2011) *Conscience* 46-47 <https://www.catholicsforchoice.org/wp-content/uploads/2014/01/Specialrosemaryedition2011.pdf>; Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Beacon, 1985) 122–4; Germaine Greer, *On Rape* (Melbourne University Press, 2018).

[45] World Health Organisation, *Violence Against Women Prevalence Estimates, 2018*, *WHO* (Webpage, 9 March 2021) <https://www.who.int/publications/i/item/9789240022256>.

[46] Greer (n 44).

[47] Rosemary Radford Ruether, 'Women, Sexuality, Ecology, and the Church' (2011) *Conscience* 11 <https://www.catholicsforchoice.org/wp-content/uploads/2014/01/Specialrosemaryedition2011.pdf>.

As other scholars have also noted, the conservative Christian anti-abortion stance is fundamentally intertwined with the deep-seated belief that women's primary vocation and purpose is motherhood.[48] This belief underpins the perspective that, morally, women should put themselves second, relinquishing their bodily integrity and autonomy in the service of prenatal life. It is this belief in women's foremost role as mothers that underlies the sentiment that even in contexts of incest and rape, pregnancies should be carried to term. Such a position evidently does not sincerely care about the flourishing of women. Rather, as the following section will discuss, it reflects entrenched sexist ideology which is anchored in the hierarchical gender norms of androcentric societies and, in the West, the oppressive legacy of male dominant Christianity and fundamentalist biblical interpretation.

PROBLEMATISING ANDROCENTRICITY IN THE CHRISTIANISED WEST

Androcentricity refers to a historically and globally pervasive worldview which places males and male experience at the centre of meaning-making and reflects men's power to name the world.[49] While androcentric cultures are vastly different in their outward expressions they nevertheless share common core features. At a fundamental level, androcentric societies emphasise the biological differences between males and females through attributing polarised/binarised gender constructions of masculinity and femininity. In other words, men and masculinity are associated with more highly-esteemed qualities in contrast to those associated with women and femininity.[50] As history and the great variety of male dominant cultures shows, girls and women are heavily socialised to notions that they are the weaker, dependent, sensitive sex and thus naturally aligned to the private, serving, child-rearing domain. Men, conversely, have enjoyed greater access to power and privilege in accordance with beliefs that they are the stronger, independent, rational sex and therefore innately disposed to the public, leadership, and household-headship domain.[51] Put another way, as men have named their subjectivity and the characteristics of dominant masculinity, women have been objectified and determined in contradistinction. As Simone de Beauvoir notably stated '"woman" is not a subject in her own right, but occupies the place as the alterity to man.' [52]

Androcentric societies are consequently structured upon a hierarchical gender consciousness that normalises and institutionalises men's superiority and empowerment.[53] More specifically, this is a consciousness that privileges and empowers the ruling class of men; in the West, elite, white, heterosexual men. In correlation, androcentricity's binarised consciousness underpins intersectional prejudices that value white people over brown and black, able-bodied persons over those with disabilities, the wealthy over the poor, and heterosexuality over LGBTQ expressions.[54] Though androcentricity intimates *universal* human experience, in actuality it

[48] Ibid; Daly (n 44) 3.
[49] Pilcher and Whelehan (n 5) 5.
[50] Daly (n 44) 15.
[51] Ibid. Allan G Johnson, *The Gender Knot: Unraveling Our Patriarchal Legacy* (Temple University Press, 3rd ed, 2014) 80; Ann Rosalind Jones, 'Writing the Body: Toward an Understanding of "L'Ecriture Feminine"' (1981) 7(2) *Feminist Studies* 252; Anne M Clifford, *Introducing Feminist Theology* (Orbis Books, 2001) 16–21.
[52] Simone de Beauvoir, *The Second Sex* (Vintage Books, 2011) 6.
[53] Johnson (n 51) 10–12.
[54] Ibid 109. R.W. Connell, *Gender* (Cambridge: Polity, 2003) ('Though men in general benefit from the inequalities of the gender order, they do not benefit equally': at 6). Paul Kivel, *Men's Work: How to Stop the Violence that Tears Our Lives Apart* (Hazelden, 1992) where Paul Kivel notes further 'in many situations men of colour are treated much worse than white women, but better than women of colour': at 168. Sandra Bartky emphasises, however, the shared commonality of women's particular subjugation: 'women of all kinds and colors have endured not only the overt, but also the disguised and covert attacks of a misogynist society'. Sandra Lee

positions *some* men and male experiences as normative for humanity. Correspondingly, androcentricity rebuffs the diversity of human experiences as it diminishes and disempowers women, some men, and gender-diverse persons who are deemed non-normative and subsidiary. The historical and global institutional outworking of culturally dominant androcentricity is evident in the vast political, legal, economic, and religious structures that reflect male-centeredness, identification, dominance, and control.[55]

Certainly, gains have been made in some quarters towards gender equality. Yet one has only to look at recent scandals and controversies to see political landscapes fraught with sexism.[56] One has only to read reports on gender gaps and violence[57] to see how institutionalised androcentricity continues to derail gender equity and markedly afflict the lives of women. Androcentricity is evidently a worldview sustained by those persons, including women,[58] who have uncritically embodied this hierarchical consciousness and push back against those who would challenge it. In sum, the entrenched normative structures of androcentricity continue to fortify the diminishment of women and other marginalised groups. Women especially continue to be subject to male-dominant behaviours and social forces that detrimentally impact their capacity to make choices and live freely. As the following will further explore, Western androcentricity has been profoundly engrained through the androcentrism of Christianity and its history of male-dominant biblical interpretation and dissemination. The connection between androcentric biblical interpretation and the judgments of androcentric Christian Supreme Court Justices is not difficult to draw.

ANDROCENTRIC CHRISTIANITY AND BIBLICAL INTERPRETATION

Though the contemporary West has inclined towards secularism and a separation between church and state, Western society is nevertheless swathed in a psychosocial fabric spun by the extensive history of Eurocentric Christianity and the Bible's influence on religion, art, literature, philosophy, education, politics, law, and normative cultural customs. When it comes to the Bible, no other text has impacted Western civilisation more; furthermore, biblical characters, imagery, and expressions continue to pervade our modern-day landscape.[59] This ancient text is deeply intertwined with the noble and ignoble experiences of the Christianised West. Undoubtedly biblical matter has positively impacted society through inspiring

Bartky, 'Introduction' in *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge, 1990) 9.

[55] Johnson (n 51) 5–18.

[56] Georgia Hitch, 'Review Finds 1 in 3 Staff in Federal Parliament Experience Sexual Harassment' *ABC News* (online, 30 November 2021) <https://www.abc.net.au/news/2021-11-30/sexual-haassment-report-parliament-brittany-higgins/100660894>; Kate A Ratliff, Liz Redford, and Colin T Smith, 'Engendering Support: Hostile Sexism Predicts Voting for Donald Trump Over Hillary Clinton in the 2016 US Presidential Election' (2019) 22(4) *Group Processes and Intergroup Relations* 578–93.

[57] 'Global Gender Gap Report 2021', *World Economic Forum* (Report, 30 March 2021) <https://www3.weforum.org/docs/WEF_GGGR_2021.pdf>; Mona Lena Krook, 'Violence Against Women in Politics' (2017) 28(1) *Journal of Democracy* 74–88.

[58] For Hélène Cixous, women's enculturation into androcentricity means 'Men have committed the greatest crime against women. Insidiously, violently, they have led them to hate women, to be their own enemies, to mobilise their immense strength against themselves'. Hélène Cixous, 'The Laugh of the Medusa' (1976) 1(4) *Signs* 878–9 <https://artandobjecthood.files.wordpress.com/2012/06/cixous_the_laugh_of_the_medusa.pdf>.

[59] See, eg, Mark I Pinsky, *The Gospel According to the Simpsons* (Westminster John Knox, 2007); Julia Fiore, 'Decoding Depictions of Eve in Art and Pop Culture' *CNN* (Webpage, 13 July 2019) <https://www.artsy.net/article/artsy-editorial-long-demonized-art-eve-pop-culture-icon>; Rebecca Denova, '50 Biblical Phrases, Idioms & Metaphors' *World History Encyclopedia* (Webpage, 16 February 2022) <https://www.worldhistory.org/article/1941/50-biblical-phrases-idioms--metaphors/>.

honourable values of altruism and social justice. Yet its verses have also been mobilised to justify the racist and sexist oppression of others. These prejudicial manifestations signify the influence of two dominant, interconnected interpretive facets. Namely, biblical interpretation and dissemination have been historically performed and governed by men — who have tended to interpret the Bible selectively and literally, in ways that advantaged them.

Inherent to Christianity's institutionalisation into a male-dominant religion in the early centuries of the Common Era, men became the authoritative voices on biblical interpretation and theology. Thus commenced the institutionalising of interpretive praxis that inclined to overlook biblical texts more favourable towards women, in preference of others that substantiated men's authority and superiority over women as divinely intended.[60] Put another way, this is an interpretive history that has downplayed biblical content that promotes genuine equitable relationships between men and women[61] in favour of exploiting androcentric biblical material that conveys the male-dominant social norms of the ancient Near East. Modern mainstream biblical scholarship agrees that the Bible is significantly androcentric in character. There is little doubt that the Bible was written by, about, and for men, given biblical material overwhelmingly reflects male viewpoints, interests, concerns, biases, experiences, agendas, and authority.[62] Men are typically represented as heads of households with civic power, while women are routinely depicted within the private domain and subject to laws and customs that place their bodies, sexuality, and fertility under the regulation and proprietorship of fathers and husbands.[63] The subaltern position of women in the Bible is undeniably evident in the fact that most of them are unnamed even if they are key to the narrative.[64] Consequently, readers do not have to search for long to find texts depicting men's power and superiority over women.

Historically, the literal and biased interpretations of the Adam and Eve narratives of Genesis[65] have been especially influential in cementing the belief that women are inherently inferior to men.[66] Predominant readings of these texts have determined that God created man first and man named the world. Woman was created second, *from* man and *for* man as man's supporting helper. Hence, God intended man to be foremost with ascendency over women.[67] Further vindication for women's subordinate position has come from vilifying interpretations of Eve as the one who instigated man's downfall and brought evil into the world. Men's interpretation of Eve as a corrupted and corrupting figure manifested the deep-seated conviction that all women are corrupt by nature.[68] Accordingly, women are rightly subjugated by men and deserving of discipline and punishment since they are weak-willed and liable to be deceitful

[60] Elizabeth Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse* (Crossroad Publishing, 1993) 18; Daly (n 44) 13, 18.
[61] See 'Book of Genesis' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 1 verse 27, for example, which proposes males and females are equal as both are created in the image of God ("Genesis'). See also, 'Book of Galatians' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 3 verse 28: 'There is neither Jew nor Greek, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus'.
[62] Eryl Davies, *The Dissenting Reader: Feminist Approaches to the Hebrew Bible* (Ashgate, 2003) 1–15.
[63] Judith Plaskow, *Standing Again at Sinai: Judaism from a Feminist Perspective* (HarperCollins, 1991) 1–4.
[64] Meyers notes that of the 1,426 named characters in the Hebrew Bible, only 111 are women. Carol Meyers, 'Everyday Life: Women in the Period of the Hebrew Bible' in Carol A Newsom and Sharon H Ringe (eds), *The Women's Bible Commentary* (Westminster John Knox, 2nd ed, 1998) 251–2.
[65] Genesis (n 61) ch 2 verse 3.
[66] Daly (n 44) 44-68.
[67] For a classic feminist alternative reading see Phyllis Trible, *Eve and Adam: Genesis 2-3 Reread* (Women's Ordination Conference, 1983).
[68] Daly (n 44) 45–6.

and sinful.[69] As a counterpart to this biased interpretation of Eve, Mary (the mother of Jesus) has been historically construed and depicted as the ideal example of womanhood by virtue of her submissiveness, obedience, virginity, and motherhood.[70] Other biblical passages exploited for their male-dominant expressions include those that emphasise male ownership of women,[71] those that instruct women to be silent,[72] to submit to their husbands,[73] and to accept motherhood as women's primary role and path to redemption.[74]

As the annals of history show, this bigoted view of women, relayed by notable male church leaders, has been a normative constant throughout male-dominant Christianity and thus the West ever since.[75]

> 'And do you not know that you are (each) an Eve?... You are the devil's gateway... you are the first deserter of the divine law… On account of your desert… even the Son of God had to die' – Tertullian (155-240)[76]
>
> 'I do not see, therefore, in what other way the woman was made to be the helper of the man if procreation is eliminated' – Augustine of Hippo (354-430)[77]
>
> 'Woman is defective and misbegotten…woman is naturally subject to man, because in man the discretion of reason predominates' – Thomas Aquinas (1225-1274)[78]
>
> 'women… should remain at home, sit still, keep house, and bear and bring up children' – Martin Luther (1483-1546)[79]

---

[69] Rosemary Radford Ruether, 'The Western Religious Tradition and Violence Against Women in the Home' in Joanne Carlson Brown and Carole R Bohn (eds), *Christianity, Patriarchy and Abuse: A Feminist Critique* (Pilgrim Press, 1989) 31–41.

[70] Rosemary Radford Ruether, *Sexism and God-Talk: Towards a Feminist Theology* (SCM Press, 1983) 152.

[71] Exodus (n 42) ch 21 verses 4, 7–9; 'Book of Leviticus' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 21 verse 9; 'Book of Numbers' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 30 verses 3–16; 'Book of Deuteronomy' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 22 verses 20–8; 'Book of 1 Peter' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 3 verses 1–7 ('1 Peter').

[72] 'Book of 1 Timothy' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 2 verses 8–15 ('1 Timothy'); 'Book of 1 Corinthians' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 14 verses 33–5.

[73] 'Book of Ephesians' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 5 verses 22–33; 1 Peter (n 71) ch 3 verses 1–7; 'Book of Colossians' in *Holy Bible: New International Version* (Bible Society in Australia, 2007) ch 3 verses 18–19.

[74] 1 Timothy' (n 72) ch 2 verse 15.

[75] For extended discussion on this topic and its interrelationship with women's experience of domestic violence, see Linda L Ammons, 'What's God Got to Do with It: Church and State Collaboration in the Subordination of Women and Domestic Violence' (1999) 51(5) *Rutgers Law Review* 1207–88.

[76] Tertullian, *On the Apparel of Women*. Book 1. Chapter 1: Introduction. Modesty in Apparel Becoming to Women, In Memory of the Introduction of Sin into the World Through a Woman. <https://www.newadvent.org/fathers/0402.htm>.

[77] St. Augustine, "The Literal Meaning of Genesis," Translated by John Hammond Taylor. *Ancient Christian Writers*, vol 2 (Newman Press, 1982) 77.

[78] Thomas Aquinas, *Summa Theologiae*, Question 92 'The Production of the Woman' <https://www.newadvent.org/summa/1092.htm>.

[79] Martin Luther, *The Table Talk of Martin Luther* (William Hazlitt, trans. & ed.) (Bell and Daldy, 1872) 299 <https://ia800909.us.archive.org/6/items/tabletalkofmarti00luth/tabletalkofmarti00luth.pdf>.

> '[While ministerial priesthood] is entrusted only to men…[women] reveal the gift of their womanhood by placing themselves at the service of others in their everyday lives. For in giving themselves to others each day women fulfil their deepest vocation' – Pope John Paul II (1920-2005)[80]

In short, the history of men's dissemination of select and literally interpreted biblical material has 'projected a malignant image of the male-female relationship and of the "nature" of women'.[81] The Western psyche remains deeply affected by this time-honoured, normalised consciousness that diminishes women and their agency and development of personhood through socialising them to roles of domesticity, servitude, and motherhood.[82] Not least, a significant portion of the Western population who identify as Christian still believe binarised gender roles to be the divine will of God.

As a corollary, they believe heterosexual relationships are also God's will; thus, non-binary/non-heterosexual persons are supposed wicked perversions.[83] Such conservative Christians continue to believe that these precepts are communicated through the literal and sacred words of the Bible, deemed to be supremely authoritative and without error because they are God-given.[84] Accordingly, this ideology comprises a particular inflexibility because it provides those who subscribe to it with absolute 'Truths' and righteous justifications of the highest divine order. Yet, drawing absolute certainties from the literal words of the Bible is a tenuous exercise indeed, for it does not at all sit in accord with the multiplicity, complexity, and dynamic qualities of the biblical literature itself.

Mainstream biblical scholarship has shown that, as a collection of ancient texts, the Bible is rife with the enigmas, ambiguities, and obscurities intrinsic to any ancient library. The biblical collection comprises highly diverse texts, each with their own unique history of evolution from ancient oral traditions to written form via various editing phases over several centuries. Furthermore, no actual original manuscripts of any biblical writings are in known existence. Rather scribal copies have survived, copies made much later than the original and duplicated from earlier copies.[85] While thousands of these manuscripts exist from antiquity — sometimes as complete books, or as portions or tiny fragments thereof — no two of any comparable manuscript is identical.[86] Other interpretation issues arise in relation to the limitations of any language to fully capture the meaning of another.[87] Thus substantial differences appear in the Greek and Latin translations made in antiquity.[88] Similarly, translations vary considerably between the numerous English versions of the Bible we have today, disparities which point to differing ideologies and agendas at work behind the translations.[89] Interpretation and translation issues are additionally compounded by the explicitly figurative quality of some texts, as well as the generally succinct nature of biblical expression that manifests extensive

[80] John Paul II, 'Letter of Pope John Paul II to Women' in *John Paul II* (Letter, 29 June 1995) [12] <https://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii_let_29061995_women.html>.
[81] Daly (n 44) 45.
[82] Ibid.
[83] John Shelby Spong, *Rescuing the Bible from Fundamentalism* (Harper, 1991) 5–8.
[84] Ibid.
[85] Hayes and Holladay (n 6). The authors note: 'Since there is a chronological gap between what was written originally by a biblical author (or what was compiled by an editor) and the earliest surviving copy, it is probably an illusion to assume that we can ever recover with certainty the original wording of a biblical text': at 37.
[86] Ibid.
[87] Spong (n 83) 78.
[88] Hayes and Holladay (n 6) 37–8.
[89] Ibid 35–6.

gaps, silences, and inconsistencies.[90] The Jewish traditions of Midrash, Mishnah, and other Talmudic literature have accordingly exemplified that the 'white spaces' around the written words require 'reading' too.[91] Still more interpretive difficulties include the challenges of comprehending an ancient world vastly complex and different from our own — a world replete with prescientific understandings of the cosmos and customs once acceptable in the ancient Near East that are ethically objectionable to our modern day sensibilities, such as polygamy, animal and child sacrifice, and capital punishment by stoning.

Such immense complexities as the diversity and intricate evolution of biblical texts, manifold interpretation and translation issues, and the scale of historical cultural specificity, render literal readings of the Bible as the definitive word of God incongruous. This is not at all to deny that the Bible has sacred weight. It is the remarkable theological literature of an ancient people that tells of their movement away from polytheistic beliefs and violent sacrificial systems towards a monotheistic sense of encounter with a relational, benevolent, and loving God. It is a body of literature that gives voice to a special concern for the poor and disenfranchised — children, widows, strangers, and outcasts — and relays an exploration of ethics, wisdom, and spirituality against a backdrop of human entanglement in distorted desires, enmity, and violence. But, given the aforementioned complexities, the Bible as an ancient artefact contravenes narrow, literal, exploitative readings of selective contents. A wrong is done when biblical texts are superficially rendered to align with wants for absolute truths and made to serve prejudicial justifications for the disenfranchisement of others. Great harm is enacted when androcentric biblical material is uncritically appropriated to serve androcentric Christianised ideologies that endeavour to disempower and delimit the lives of women.

After the overturning of *Roe v Wade*, we can now see the ongoing entrenchment of androcentric Christianity and biblical interpretation in the political and legal fabric of America. This is not an ideology truly oriented to stemming abortion, for it does not seek to transform the fundamental gendered social structures that leave women vulnerable to unwanted pregnancies, inequitable accountability for the consequences of intercourse, and precarious futures should they carry pregnancies to term. Rather, this is a context that illustrates the power of the conservative Christian right to reinscribe traditional hierarchical gender norms that align women with domesticity, servitude, and motherhood. The overturning of *Roe v Wade* ultimately means the legal entrenchment of androcentric, conservative Christian gender prejudice—a burden which will fall heaviest upon women in ways meant to control aspects of their fertility, agency, and autonomy by restricting safe and legal access to abortion. Moreover, these judicial moves detrimentally impact the capacity of women to exercise their religious freedom to make decisions in accordance with their own consciousness, conscience, spirituality, and faith ideologies. Not least, the ruling ominously signifies the same prejudicial ideology, powerfully in play, that rebukes the identities, experiences, and lifestyles of the rainbow community.

---

[90] As an example of inconsistencies, although one of the 10 commandments divinely forbids taking another's life [Exodus (n 42) ch 20 verse 13], other texts divinely sanction slaughter (see the Book of Joshua ch 10 verses 1–43; the Book of Judges ch 1 verses 4–5). As W Gunther Plaut explains: 'Where we are prone to say 'either, or,' the Bible may say 'both' and let the unresolved tension between the two stand without further comment'. W Gunther Plaut, 'On Reading this Commentary' in W Gunther Plaut (ed), *The Torah: A Modern Commentary* (Union of American Hebrew Congregations, 1981) xxvi-ii.

[91] Midrash literature employs a free, creative, and often highly imaginative method of biblical interpretation. Mishnah and Talmudic literature include explanations and elaborations to supplement the written words. See Bernard J Bamberger, 'The Torah and the Jewish People' in W Gunther Plaut (ed), *The Torah: A Modern Commentary* (Union of American Hebrew Congregations, 1981) xxx-xxxi.

WIDER IMPLICATIONS

The overturning of *Roe v Wade* has no direct impact upon Australia and Australian law, where abortion is legal in all States and Territories (albeit with varying restrictions[92] and issues of accessibility[93]). Nevertheless, there is a dangerous implicit impact insofar as the revoking of *Roe v Wade* reaffirms the deep vein of Christianised androcentricity that runs throughout all Western nations' histories and social structures. As Mary Daly states, we cannot underestimate the enduring effects of the Christian tradition's destructive image of women on the modern psyche.[94] We may not take it seriously, and it may be disguised or residual in manner, but the malignant image of women borne through the history of men's biased biblical interpretation 'undergirds destructive patterns in the fabric of our culture'.[95] Accordingly, we are prompted to consider that enduring Christianised androcentricity remains entangled in women's Australian experiences of inequality. That is, deep-seated beliefs that men are naturally/rightly/divinely created as superior to women remain interwoven with issues of wage gaps,[96] the denigration of women leaders,[97] the scourge of women's experience of intimate partner violence,[98] cultural attitudes that blame women for causing men's violence,[99] and barriers that prevent women from accessing unbiased justice.[100] In short, the task of liberating Western consciousness from centuries-long, biblically-justified gender prejudice that devalues and oppresses women and non-binary persons remains considerable.[101]

---

[92] Department of Health and Aged Care, Australian Government, 'Can I Have an Abortion in Australia?' *Healthdirect* (Blog Post, 18 August 2022) <https://www.healthdirect.gov.au/blog/can-i-have-an-abortion-in-australia>.

[93] 'Women's Health Week: Breaking Down the Barriers to Abortion Access in Australia' (7 September 2022) *Monash Lens* <https://lens.monash.edu/@medicine-health/2022/09/07/1385061/womens-health-week-breaking-down-the-barriers-to-abortion-access-in-australia>.

[94] Daly (n 44) 44-45.

[95] Ibid.

[96] Australia Bureau of Statistics, *Gender Indicators* (Catalogue No 4125.0, May 2022).

[97] Malcolm Farr, 'No More "JuLiar": PM's Office 'Demands Respect', *news.com.au* (online, 12 March 2013) <https://www.news.com.au/national/no-more-juliar-pms-office-demands-respect/news-story/dcb1e6a55b1f1a36be6ee50ad9b25031>; Katharine Murphy and Daniel Hurst, '"We Will Not Be Silent": Prominent Women Press Morrison Government for Violence and Harassment Reform', *Guardian* (online, 6 March 2022) <https://www.theguardian.com/australia-news/2022/mar/06/we-will-not-be-silent-prominent-women-press-morrison-government-for-violence-and-harassment-reform>.

[98] Australian Institute of Health and Welfare, 'Australia's Welfare 2015,' (*Australia's Welfare Series* No 12, Catalogue No AUS 189,2015) 341 <https://www.aihw.gov.au/getmedia/692fd1d4-0e81-41da-82af-be623a4e00ae/18960-aw15.pdf.aspx?inline=true>; Naomi Priest ,et al, 'A "Dark Side" of Religion?: Associations Between Religious Involvement, Identity and Domestic Violence Determinants' (2021) *Women's Health Weekly* 72 <https://osf.io/preprints/socarxiv/9hf6d/>.

[99] Council of Australian Governments, *COAG Advisory Panel on Reducing Violence Against Women and Their Children Final Report* (Final Report, 2016) <https://familiesaustralia.org.au/wp-content/uploads/2016/11/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>.

[100] Julia Quilter, Luke McNamara and Melissa Porter, 'The Most Persistent Rape Myth? A Qualitative Study of "Delay" in Complaint in Victorian Rape Trials' (2022) *Current Issues in Criminal Justice* 1; Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases', *Trends and Issues in Crime and Criminal Justice* (Paper No 344, Australian Government Institute of Criminology, August 2007) <https://www.aic.gov.au/sites/default/files/2020-05/tandi344.pdf>.

[101] Francisco Perales and Gary Bouma, 'Religion, Religiosity and Patriarchal Gender Beliefs: Understanding the Australian Experience' (2019) 55(2) *Journal of Sociology* 323–41.

CONCLUSION

The overturning of *Roe v Wade*, then, raises significant points for Australia as it navigates its own political and judicial pathways of protecting human rights and religious freedoms in a climate of increased American media influence and the global rise of the Christian right. There seems an urgent need to understand more fully the impact of androcentricity, and the legacy of androcentric Christianity and biblical interpretation, that has fortified in the West a hierarchical gender consciousness. The overturning of *Roe v Wade* illuminates a crucial truth: biblical literacy is a major, if under-recognised, issue of our times. Accordingly, inroads to challenging uncritical, unethical biblical scholarship appear necessary to the ongoing evolution of Western consciousness away from injurious gender norms. The ruling further illustrates the dilemma whereby protecting religious freedoms is often interconnected with protecting male-dominant traditions and their right to discriminate based on flawed biblical interpretation and theology. Ultimately, the overturning of *Roe v Wade* serves as a clarion call for Australia to be vigilant in ensuring that protections for religious freedom do not dilute progress toward the development of non-sexist and non-binarist social and legal structures.

Conversion Practices Legislation in Victoria – A Potential Crisis for Church Authority?

Rhett Martin*

The Victorian Change or Suppression (Conversion) Practices Prohibition Act 2021 *(Vic) prohibits change and suppression practices that alter or fundamentally change someone's sexual orientation or gender identity. Whilst the intent of the* Act *is worthy, the devil is very much in the detail, especially in how the* Act *includes religious and psychiatric practices and services in its potential ambit. The other contentious issue is the range of powers provided to the Victorian Equal Opportunity and Human Rights Commission, which some argue potentially blur the lines on separation of powers between the judiciary and the legislature. This paper argues some amendments to the Act may be required in order to address these issues.*

INTRODUCTION

This paper examines the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) ('*Act*') and asks the question whether it represents a problem for the exercise of church authority over its members. Whilst the discussion in this paper is exclusively concerned with Victoria's new prohibition against conversion therapy, it is worth noting Queensland and the ACT have their own version of legislation banning conversion therapy.[1] The object of the ACT legislation is to recognise and prevent harm caused by sexuality and gender identity conversion practices.[2] The 2020 amendment to the Queensland *Public Health Act 2005* prohibits a health practitioner from performing conversion practices.[3] The prohibition does not apply to religious or spiritual practices that do not involve the provision of a health service. The interstate examples are sufficiently different to not group them together with the discussion of Victoria's *Act*. Accordingly, the commentary in this article is limited to Victorian law and cannot be taken as a general reference to all prohibitions on conversion therapy.

BRIEF HISTORY OF CONVERSION THERAPY

The history of conversion therapy is one that primarily relates to religious and spiritual leaders and teachers.[4] Conversion therapy, as currently understood, can be traced back to late nineteenth-century Europe where it then spread to the United States.[5] The medical fraternity in the United States at the time generally viewed homosexuality as a medical problem and

* Senior Lecturer, University of Southern Queensland.

[1] *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT); *Public Health Act 2005* (Qld) ch 5B, as inserted by *Health Legislation Amendment Act 2020* (Qld) s 28.

[2] *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) s 6.

[3] *Public Health Act 2005* (Qld) s 213H; *Health Ombudsman Act 2013* (Qld) s 8.

[4] Christy Mallory, Taylor N T Brown and Keith J Conron, 'Conversion Therapy and LGBT Youth', *Williams Institute* (Web Page, January 2018) <https/williamsinstitute.law.ucla.edu/wpcontent/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>.

[5] Tommy Dickinson, *Curing Queers: Mental Nurses and Their Patients, 1935–74* (Manchester University Press, 2015).

therefore aimed to 'cure' individuals.[6] The 'cure' could include such extreme practices as bladder washing, rectal massage, testicle implants, and castration. Such 'treatments' were eventually discarded when it became clear they did not work.[7] Whilst physical intervention was still practiced, the emphasis changed to conversion through mental health treatment.[8] Psychotherapy in the early twentieth century could range from talk therapy to electric shock treatment all the way to extremes like lobotomies (the latter representing an example of physical interventions still practiced into the mid-twentieth century). By the 1960s, however, behavioural therapy became more mainstream.[9]

Behavioural therapy focused on aversion training, including 'inducing nausea or paralysis in response to homoerotic imagery' or 'instructing patients to snap' themselves 'with a rubber band' every time they were aroused by such images.[10] Other treatments included trying 'to improve the patient's dating skills with members of the opposite sex', male assertiveness training, the teaching of 'stereotypically masculine and feminine behaviours', and reconditioning orgasmic responses through the use of hypnosis.[11] Gradually, the position in the United States changed, especially amongst medical and psychiatry associations, towards the rejection of conversion therapy on the basis that it harmed patients and was largely ineffective.[12] The changes happening at a therapeutic level began to be taken up by United States legislatures, with California becoming the first state to prohibit mental health practitioners offering conversion therapy to minors.[13] This has been replicated in seventeen other United States state legislatures.[14]

Recently the United Kingdom and Wales announced plans to ban conversion therapy targeting LGBTI people.[15] A member of Cabinet, Michelle Donelan, was reported as saying the Bill is designed to 'protect everyone' including 'those targeted on the basis of their sexuality, or being transgender'.[16] The developments in the United States and recently in the United Kingdom highlight that Australia, at least at a State and Territory level, is responding to calls for a ban on conversion practices. These developments, however, do not resolve the debate brought by some who argue that the bans should not outlaw conversations with clinicians or therapists helping people with sexual orientation and gender identity issues. The issue is very much about the 'devil is in the detail'. How clear is the legislation in these various jurisdictions about the position of medical therapists and religious leaders who advise and help people with sexuality

[6] J. Seth Anderson, 'Why We Still Haven't Banished Conversion Therapy in 2018', *Washington Post* (online August 5 2018) <https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/>.
[7] Ibid.
[8] Ibid.
[9] American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Task Force Report, 2009) 22 <https://www.apa.org/pilgbt/resources/therapeutic-response.pdf>.
[10] Tiffany C. Graham, 'Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts' (2019) 52(4) *Creighton Law Review* 419, 422.
[11] Ibid.
[12] Ibid 423.
[13] Cal Bus & Prof Code § 865-865.2 (West 2019).
[14] Including Colorado, Connecticut, Washington DC, Illinois, Massachusetts, Nevada, New Jersey, New York, New Mexico, Oregon, and Vermont.
[15] Sachin Ravikumar, 'Britain Vows New Law to Ban Conversion Therapy for LGBT People', *Reuters* (online 17 January 2023) <https://www.reuters.com/world/uk/britain-promises-new-law-ban-conversion-therapy-targeting-lgbt-people-2023-01-17/>.
[16] Ibid.

and gender issues? To help answer that question, the next section considers Victoria's conversion legislation.

THE VICTORIA ACT

The intent of the *Act* is to ban change or suppression practices ('practices') that seek to alter or fundamentally change someone's sexual orientation or gender identity. These practices are sometimes referred to colloquially as 'gay conversion' or 'conversion therapy', although these names do not necessarily reflect an accurate description of what change the practices seek to achieve. Such practices can include teaching, counselling, spiritual and pastoral care, and psychological or medical interventions designed to alter a perceived negative sexual orientation. A common premise inherent in these practices is that there is something wrong or broken in people who exhibit diverse gender identities or sexualities. These practices are not supported by medical research, and there is little support to the idea that sexual orientation or gender identity can be changed or suppressed.[17] The literature supports the view that conversion practices are correlated with poor well-being outcomes, thereby providing support to arguments for expanding health (including mental health) services to affirm the religious and non-religious identities of LGBTQIA+ youth.[18] The foregoing inferentially supports bans on conversion practices, which is the intent of the *Act*.

The *Act* states that a prohibited change or suppression practice can occur despite the recipient's consent.[19] A 'practice' is defined as conduct directed to the purpose of changing or suppressing the sexual orientation or gender identity of a person or inducing a person to change or suppress their sexual orientation or gender identity. A 'practice' includes psychiatry or psychotherapy consultation treatment or therapy,[20] but important for present purposes it also includes the carrying out of a religious practice, including (but not limited to) a prayer, a deliverance, or an exorcism.[21] All offences under the *Act* must be proved under the criminal standard of beyond reasonable doubt.[22]

Section 5 also defines what is *not* a change or suppression practice, and this extends to anything supportive of or affirming a person's gender identity or sexual orientation (which includes, but is not limited to, assisting a person who is undergoing gender transition). Another exclusion is treatment provided by a health service provider which, in their reasonable professional judgment, is supportive of a person's gender identity or sexual orientation or is necessary or otherwise needed to comply with the provider's legal professional obligations.[23] Whilst these exemptions provide some level of defence for psychiatrists and religious practitioners, they depend on a positive affirmation of a person's gender identity or sexual orientation and do not expressly provide any exemption for religious practitioners.

Section 9 of the *Act* contains a general prohibition against change or suppression practices. An individual or organisation may be reported under the Civil Response Scheme set up by the *Act*

[17] See, eg, Katie Heiden-Rootes, Christi R. McGregor and Joanne Salas, 'The Effects of Gender Identity Change Efforts on Black, Latinx, and White Transgender and Gender Non-binary Adults: Implications for Ethical Clinical Practice' (2022) 48 *Journal of Marital Family Therapy* 927, 927–44.
[18] Tiffany Jones et al, 'Religious Conversion Practices and LGBTQA + Youth,' (2022) 19 *Sexual Research and Social Policy* 1155, 1155–64.
[19] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) ss 5(1)(a)–(b) ('*Act*').
[20] Ibid s 5(3)(b).
[21] Ibid s 5(3)(b).
[22] Ibid ss 5, 15.
[23] Ibid ss 5(2)(a)–(b).

or charged with a criminal offence under the *Act*. Under s 10 of the *Act*, it is unlawful for a person to intentionally engage in a change or suppression practice towards another person that negligently causes serious injury. A breach of s 10 by a body corporate incurs a maximum fine of 10,000 penalty units.[24] Section 11 of the *Act* makes it an offence for a person to intentionally engage in a change or suppression practice with another person that negligently causes injury. Breach of s 11 carries a maximum fine of 3000 units.[25] An individual is guilty of an offence under s 12 of the *Act* if they take another person from Victoria with the intention to direct change practices at that person outside of Victoria and are negligent as to whether the change or suppression practice will cause injury.[26] Section 13 states it is unlawful for individuals to publish, display, or authorise the display of their intent to engage in a change or suppression practice (other than for the purposes of warning of the harm caused by such practices).[27]

Practices that cause credible injury can be investigated by the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), but only if they are serious, systemic, or persisting. Otherwise, the VEOHRC is limited to offering education and voluntary facilitation services or referring the matter to another agency if it considers a law or professional obligation has been breached.

CONCERNS OVER OPERATION OF THE ACT

The *Act* has been the subject of heavy criticism by a number of religious commentators, some stating that 'the most antireligious laws in the Western world [are] now in force in the State of Victoria'.[28] The focus of criticism relates to powers in the *Act* which allow scrutiny of churches, organisations, and individuals who believe in and teach orthodox Biblical doctrines of sexuality and gender. In particular, the criticism relates to fears that the practical effect of the *Act* is to ban spiritual or therapeutic help for those experiencing unwanted same-sex attraction or gender identity confusion. As the ban is backed by fines and possible jail time for offenders, many are concerned that religious ministers and health practitioners working in good faith to help a troubled person could run afoul of the law. The VEOHRC, for example, has power to investigate churches, religious organisations, religious schools, and individuals for alleged breaches of the law. According to critics of the *Act*, traditional religious beliefs are now squarely at risk given what they view as the vaguely defined practices prohibited by the law. Further, these critics view the definitions of 'sexual orientation' and 'gender identity' as too broad in that they could very well encompass a wide variety of speech, teaching, and conduct that may have only an indirect relevance to sexual orientation or gender identity. The powers given to the VEOHRC over investigation, re-education, and censure, critics argue, risks unwarranted persecution of anyone teaching Christian sexual ethics. Because the VEOHRC has wide discretionary power to accept a report from anyone and instigate an investigation, critics argue there is a real danger of persecution. Thus, pastors, parents, teachers, counsellors, and anyone else engaged in professional or private interaction with people concerned about their sexual and gender identity are seen as being potentially at risk.

A variety of religious groups in Victoria have expressed their views on the Bill or the *Act*. This section canvasses some of those views.

[24] This equates to a maximum fine of $1,090,440.
[25] This equates to a maximum fine of $545,220.
[26] This incurs 1200 penalty units equating to $218,088.
[27] This incurs 200 penalty unit trying equating to $36,348.
[28] John Steenhof, 'Anti-religious Victorian Conversion Therapy Law is Now in Force. Christians Beware', *Human Rights Law Alliance* (Blog Post, 18 February 2022) <https://www.hrla.org.au/vic-conth>.

The Baptist Union of Victoria ('BUV') stated that the Bill that was before the Victorian Parliament to introduce this *Act* placed Christians in a vulnerable position and challenged fundamental aspects of their faith. Of particular concern in its view was a perceived intent of the Bill to outlaw the view that homosexuality is sinful.[29] The BUV argued the Bill should only ban conversion practices directed in childhood or to a person with impaired capacity but not to an adult who has consented to the practice. Further, it argued that the Bill should permit communication of religious beliefs through religious counselling, pastoral care, and prayer for people over 16 (provided this occurs through informed consent).

The Catholic Archbishop of Melbourne, Peter Comensoli, was reported as being opposed to the Bill and was reported as arguing that it 'targets prayer and that it prevents people of faith from sharing their beliefs in an open and honest and faithful way'.[30] A news article by John Sandeman presented further arguments attributed to the Archbishop where he further argued that the Bill transgresses the rights of parents and children to speak plainly and honestly with one another about beliefs and sexuality. The Archbishop was quoted as arguing that, in practical terms, the Bill denied adults the right to seek guidance and pastoral support when addressing matters of personal concern which should not be intruded upon by the state.

Sandeman's article also canvassed opinions from the Presbyterian Church of Victoria. The Church argued that the Bill would make ordinary Christian practice 'illegal under the pretence of banning those hateful, forced, and violent conversion therapies which have already been illegal for decades …'[31] The Australian Christian Lobby also strongly opposed the Bill, arguing its effect made prayer a potential criminal offence and that the government has no business in deciding what people can pray for or how they pray.[32] Similarly, Neil Chambers, a Council member of the Gospel Coalition Australia, argued the Bill conflates issues regarding gender identity and sexual orientation within the definition of change or suppression practices, criticised the extent of its reach into private and voluntary conversations, and decried the potential criminalisation of therapy.[33] In addition, it was presented that in conflating sexual orientation and gender identity, the Bill potentially creates a scenario that the only correct stance is insistence of a young person affirming a change to the desired gender rather than exploring all of their options. To preclude consideration of other treatments of gender dysphoria, it was argued, goes against scientific evidence and has the potential to do harm, a view supported by the National Association of Practising Psychiatrists.[34]

---

[29] Daniel Bullock et al, 'Change or Suppression (Conversion) Practices Prohibition Bill 2020', *Baptist Union of Victoria* (Letter, 8 December 2020) <https://www.buv.com.au/wp-content/uploads/2021/01/Change-or-Suppression-Conversion-Practices-Prohibition-Bill-2020-Email-081220.pdf>.

[30] John Sandeman, 'Catholics and Presbyterians Say No, Other Church Voices Muted on Vic Conversion Practices Bill,' *Eternity* (Web Page, 10 December 2020) <https://www.eternitynews.com.au/australia/catholics-and-presbyterians-say-no-other-church-voices-muted-on-vic-conversion-practices-bill/>.

[31] Ibid.

[32] Ibid.

[33] Neil Chambers, 'Urgent Concerns over Victoria's Change or Suppression Bill', *The Gospel Coalition Australia* (Web Page, 1 February 2021) <https://au.thegospelcoalition.org/article/urgent-concerns-over-victorias-change-or-suppression-bill/>.

[34] Phillip Morris and Patrick Parkinson, 'Change or Suppression (Conversion) Practices Prohibition Bill 2010', *National Association of Practising Psychiatrists* (Public Letter, 7 January 2021) <https://bpc.org.au/mt-content/uploads/2021/01/letter_to_attorney_vic_jan_7th_conversion_practices_bill.pdf> quoted by Neil Chambers, 'Urgent Concerns over Victoria's Change or Suppression Bill', *The Gospel Coalition Australia* (Web Page, 1 February 2021) <https://au.thegospelcoalition.org/article/urgent-concerns-over-victorias-change-or-suppression-bill/>.

Opposition to the current form of the *Act* is not limited to Christian churches in Victoria. The *Act* is described by a Muslim commentator as 'criminalising nasiha (advice) to same-sex attracted ('SSA') Muslims to abstain from sex with the same gender, or counselling to abide by traditional gender norms'.[35] The concern expressed was that parents will be stigmatised as committing 'family violence' if they advise gender dysphoric children to adhere to Islamic norms or take gender dysphoric children for advice to a sheik. This position was supported in an article by Dr Rateb Jneid, President of the Australian Federation of Islamic Councils, who stated: 'I pledge to work with other faith groups to mount a legal challenge to this repressive and oppressive law. We will immediately establish a legal fighting fund to protect religious freedoms, families and children in Australia.'[36] Dr Jneid was also reported as saying the *Act* 'criminalises speech, advice and parental protection'. The views of Dr Jneid and the Islamic Council of Victoria were that the Bill was 'poorly written and vague and could capture parental discussions with their children'. The issue from an Islamic perspective appears to relate to at least two concerns. The first is that the Bill potentially stigmatises some teachings from the Quran, and secondly, it has been introduced without appropriate education for parents who may be unsure how they can speak to their children on issues such as gender dysphoria without getting in trouble with the law.

The chairperson of the Sikh Interfaith Council of Victoria, Mr Jasbir Singh Suropada, was reported as stating:

> [W]ith this new Bill, parents might feel a bit more disempowered because they don't know how to go about doing it (what is or what is not allowed in talking to their children). So I think more education is required for parents and communities, and faith communities, to promote…what this Bill actually means in layman's terms.[37]

In opposition to the foregoing views, the Uniting Network, which is the Uniting Church's LGBTIQ+ network, urged its members to lobby in support of the Bill, arguing it would make an important difference in the lives of its LGBTIQ + members. This view is also supported by those that argue a plain reading of the *Act* and its Statement of Compatibility with the Victorian *Charter of Human Rights and Responsibilities*[38] places most fears to one side. In particular, they argue the intent of the *Act* is to balance the protection of religious freedom with the protection of the rights of LGBTIQ+ people. In doing this it does not ban prayer, preaching, or pastoral support about gender and sexuality in general. However, it does prevent these spiritual practices being misused if they seek to change or suppress a person's sexuality or gender identity, and as a result, cause harm. Further, they state that while it may have the practical effect of placing limits on religious practices in some quarters, this only occurs in circumstances that would seriously burden an individual's right to equality under Australian law or international human rights law (such as the *International Covenant on Civil and Political Rights*).

---

[35] Daud Batchelor, 'Oppressive Law Banning "Conversion" Prohibits Religious Healing Practices,' (Opinion, 25 February 2021) <https://www.amust.com.au/2021/02/oppressive-law-banning-conversion-prohibits-religious-healing-practices/>.
[36] Ibid.
[37] Rashida Yosufzai, '"Unintended Consequences": Faith Groups, Psychiatrists say Victoria's New Gay Conversion Ban Laws are Too Vague', *SBS News* (online, 5 February 2021) <https://www.sbs.com.au/news/article/unintended-consequences-faith-groups-psychiatrists-say-victorias-new-gay-conversion-ban-laws-are-too-vague/z9jcq51jx.>.
[38] *Act* (n 19) s 1(a).

These opposing views mean that a forensic examination of the *Act* is necessary to interpret its provisions and discuss its practical impact free of a political or religious overlay that may or may not be justified. The next section examines key provisions of the *Act* under general principles of statutory interpretation, with a focus on legislative intent as a touchstone to resolve ambiguity.

INTERPRETATION OF THE ACT

Are the critics' fears about the reach of the *Act* realistic? It is possible to identify certain risk scenarios that may be subject to unnecessary scrutiny under the *Act*. For example: (1) a church member who discusses unwanted same-sex attraction with a pastor of the church; (2) a counsellor for a religious counselling service making a presentation on how to live in accordance with biblical sexual ethics; (3) a person who is same-sex attracted being advised by a Catholic priest to remain celibate outside of marriage; and (4) parents of a child struggling with gender identity who refuse or wish to delay that child's wish to undergo hormone therapy treatment. In response to these identified risk scenarios, the VEOHRC has stated that the normal religious activities engaged by people of faith will not be impacted.[39] Even in the face of this reassurance, the concern is that religious communities will engage in self-censorship or even cease preaching and teaching the full breadth of their beliefs for fear of attracting criminal prosecution or investigation by the VEOHRC.

Another concern with the *Act* is the potential for a breach of the law where someone is trying to change or suppress a person's sexual orientation or gender identity even where that person seeks help or asks for assistance to achieve this objective. It is permissible under the *Act* to assist a person who is undergoing gender transition, or who is considering undergoing gender transition, and it is permissible to assist a person to express their gender identity or provide facilitation to a person's coping skills, social support, or identity exploration and development in this context. However, it is arguably illegal to convey the view that, despite all their best efforts, a person cannot actually change their sex. Further it may not be permissible to run a peer-to-peer support group designed to coach a person who is exploring their gender identity to accept the sex they were assigned at birth or help someone accept their biological reality. According to a strict reading of the *Act*, even parents are not allowed to speak with their own child about the reality of their gender at birth if their child is expressing any form of gender confusion.

The stated purpose of the *Act* is to denounce and prohibit change or suppression practices.[40] The extension into 'denouncing' is not a common scenario for legislation. A subsidiary purpose is to establish a Civil Response Scheme within the VEOHRC to 'promote' understanding of the prohibition on practices and to investigate reports of serious or systemic conversion practices.[41]

From a legal point of view, the powers given to the VEOHRC raise concern over the separation of powers. The VEOHRC has wide investigatory powers and may seek agreement on compliance or an undertaking, take enforceable actions, or issue a compliance notice. The risk area arises from s 24 of the *Act* providing that a person affected by a prohibited practice, or any

[39] 'For People of Faith, Professionals, and Other Communities', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <https://www.humanrights.vic.gov.au/change-or-suppression-practices/for-professionals-institutions-and-communities/>.
[40] *Act* (n 19) s 1.
[41] Ibid s 1(b).

other person, may make a report to the VEOHRC. This creates a risk that a disaffected person may make a complaint to the VEOHRC resulting in an investigation and possible issuing of a compliance notice or arrangement regarding an undertaking. Whilst prosecution will only occur from referral to the police, the compliance arrangement or undertaking could act as a precursor to police prosecution, and potentially blur the lines between enforcing compliance and prosecution. The worst case scenario is the VEOHRC becoming a 'Star Chamber' that works in parallel to the courts. Whilst it is acknowledged this risk is taking an extreme worst case risk scenario, it is submitted it cannot be excluded entirely. If the powers of the VEOHRC are to remain in their current form, then at the very least, clarification on due process rights to those accused and procedures surrounding the enforcement of compliance is required. Until this is done it is legitimate to raise issues about the separation of powers under the *Act*.

The VEOHRC may investigate any matter arising under the *Act* as it considers fit.[42] In conducting an investigation, the VEOHRC is bound by the principles of natural justice 'unless otherwise expressly provided in this Division'.[43] This added requirement seems to preclude application of natural justice in some circumstances, without clarifying when that may arise. When this is taken in conjunction with wide powers to compel the provision of information and the production of documents when deemed necessary for an investigation[44] and to compel attendance before the VEOHRC,[45] it is possible to conclude that the VEOHRC has a wide-ranging investigatory power that may potentially be outside the parameters of natural justice. This view is reinforced by the law allowing the VEOHRC to issue a compliance notice after investigation.[46] Whilst the primary purpose is clear in the prohibition against suppression practices, the subsidiary purpose of a Civil Response Scheme potentially risks targeted 'witch hunts' instigated by people reporting the actions of others for conduct that does not genuinely warrant reporting. To be successful and fair, the VEOHRC must manage this process efficiently, but also reasonably, whilst considering diverse opinions from churches and other groups.

The objects of the *Act*, dealt with under a separate section, restate the purpose to eliminate, as far as possible, the occurrence of practices in Victoria.[47] Further, the objects include promoting and protecting rights set out in the Victorian *Charter of Human Rights and Responsibilities Act (2006)*.[48] This means that the requirements of the Charter in the context of individual rights regarding sexual orientation or gender identity must be upheld at all times. The objects section also states it is the intention of Parliament to 'denounce and give statutory recognition to serious harm caused by … [such] practices'.[49] It further seeks 'to affirm' that these practices 'are deceptive and harmful both to the person subject to the change or suppression practice and to the community as a whole'.[50] It is clear therefore that the object of the Act includes a very definitive statement about these practices being wholly inappropriate and wrong. This view has been criticised as being inflexible and not taking account all of the circumstances which may arise, especially, in regards to medical intervention in diverse case scenarios.

---

[42] Ibid ss 34–35.
[43] Ibid s 51(2).
[44] Ibid s 36.
[45] Ibid s 37.
[46] Ibid ss 42, 45.
[47] Ibid s 1.
[48] Ibid s (3)(1)(b). See 'About the Charter', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter/>.
[49] Act (n 19) s 3(2)(a).
[50] Ibid s 3(2)(d).

The definition of 'change or suppression practice' includes 'a practice … directed towards a person … with or without a person's consent, on the basis of the person's sexual orientation or gender identity, for the purpose of changing … sexual orientation or gender identity …'.[51] Conduct of a health service provider that is, in the health service provider's reasonable professional judgement, necessary to provide a health service or comply with a legal professional obligation provider, is not a prohibited practice. Whilst practice includes 'carrying out a religious practice, including but not limited to, a prayer-based practice, deliverance practice or an exorcism',[52] the general exception to the prohibition against suppression practices includes 'assisting a person who is considering undergoing gender transition or providing acceptance support or understanding of a person'.[53] Concerns of various churches about prayer-based practice are allayed to some extent by the fact it would only be a prohibited practice if it seeks to deny a person from expressing their sexual orientation or gender identity. In other words, the focus is on the individual freedom of a person to express their sexual orientation or gender identity and to prohibit any activity that is designed to inhibit that being given expression.

The *Act* creates an offence if a person intentionally engages in a practice toward another person and the practice causes serious injury to the other person and is negligent thereto as to whether it will cause serious injury to the other person.[54] This section expressly refers to intentionally engaging in a practice which causes serious injury and being negligent as to whether the practice will cause serious injury. This posits an express intention with a negligent disregard of the outcome of the practice. The addition of the negligence requirement seems unnecessary given that the offence will only arise if the intentional act gives rise to serious injury, thereby requiring a causal connection between the intentional act and the outcome of serious injury, which is not, in itself, dependent on a negligent attitude to the outcome.

The *Act* creates corporate liability, presumably requiring the guilty mind being established by the intention of the body corporate's board of directors.[55] If an officer of the body corporate engages in conduct that constitutes an offence, then the body corporate must be taken to have also engaged in conduct constituting the offence, thus creating a vicarious liability in the body corporate. This has the potential to widen considerably executive officer responsibility and arguably creates an added level of compliance that must be dealt with within the corporate governance paradigm.

Does the *Act* go too far in relation to prohibiting legitimate activities in Victoria? Arguably, the concerns of religious groups over the potential criminalisation of some prayer practices are unfounded when considered only in the context of breaching the ban on suppression practices. However, the devil is in the detail as to what constitutes a prohibited practice when prayer is undertaken.

A potentially greater risk arises in respect to the treatment provided by mental health professionals for those experiencing gender incongruence issues. Such treatment may give rise to a patient not engaging in sex reassignment surgery. Such an outcome may not fall within the exceptions allowed for under the definition of prohibited practices in s 5 of the *Act*. The

[51] *Act* (n 19) ss 5(1)(a)–(b)(i).
[52] Ibid s 5(3)(b).
[53] Ibid ss 5(2)(ii), (iv).
[54] Ibid s 10.
[55] Ibid s 15(1)(c).

concerns of some health professionals, including psychiatrists,[56] support the idea that an individual's understanding of their own gender may fluctuate in different times and situations. These professionals argue that there is evidence to support the value and importance of therapeutic counselling for adolescents identifying as transgender, and that this type of psychotherapeutic counselling will be discouraged by threats to practitioners of criminal prosecution in the *Act*. The concern is that young, troubled people will be prevented from receiving health care and will instead embark upon irreversible medical transitions that they may regret later. Further, there is a fear that the *Act* criminalises the practice of psychiatry and psychotherapy under s 5(3), which includes psychiatry or psychotherapy consultation treatment or therapy when conducted as a prohibited change or suppression practice. A defence is permitted under s 5(2) which states that a practice is not a prohibited practice if the conduct of the health service provider is, in the health service provider's reasonable professional judgement, a necessary service.[57]

The National Association of Practising Psychiatrists ('NAPP') argues this provision is of dubious benefit as a defence because it leaves considerable room for argument about whether a particular treatment approach was or was not 'reasonably necessary.' The NAPP argues that a defence should be an absolute defence that the treatment approach is, in the mental health professional's reasonable professional judgement, clinically appropriate. The NAPP states that '[t]here is no medical justification for Parliament to stipulate that a therapeutic program supporting a person to transition is lawful, while an intervention which aims to help the patient explore other explanations for their gender identity concerns risks a jail term'.[58]

The position advanced by the NAPP provides an arguable case that the *Act*, in its current form, risks criminalising some psychotherapeutic practices. Whilst a similar argument could be raised in respect to prayer-based practices, it is arguable such a risk is less for religious practitioners as compared to medical health practitioners, although neither can be dismissed out of hand. A religious practitioner is only at risk if a prayer-based or other identified religious practice is directed at changing or suppressing the sexual orientation or gender identity of a person. In contrast, a medical practitioner may be presenting a range of potential options to a patient as part of their professional and ethical obligations to discuss all relevant available treatments and options to a patient, and as a result, may potentially be in technical breach of the *Act* when presenting such options.

CONCLUSION

Despite the foregoing there is still concern from many religious groups that the wide definition of prohibited practices in s 5 of the *Act* will place at risk a pastor or youth group leader expressing biblical teaching about same-sex activity even if participation in the conversation was voluntary by all parties involved. Similarly, another concern is that simply praying with someone to be strengthened to 'resist temptation and live a chaste and godly life' could incur legal consequences.

The other major risk in the *Act* relates to what is seen as the conflation of gender identity and sexual orientation in the *Act*. Including gender identity in the *Act* and implicitly stating that the only acceptable course is to affirm gender transition is potentially at odds with recent case law

[56] Morris and Parkinson (n 34).
[57] *Act* (n 19) s 5(2)(b)(i).
[58] Morris and Parkinson (n 34).

in England. The English High Court judgement *Bell v Tavistock*[59] described gender reassignment treatment as 'experimental.' The Court stated:

> We express that view for these reasons. First, clinical interventions involve significant, long-term and, in part, potentially irreversible long-term physical, and psychological consequences for young persons, going as it does to the very heart of an individual's identity. Secondly, at present, it is right to call the treatment experimental or innovative in the sense that there are currently limited studies/evidence of the efficacy or long-term effects of the treatment.[60]

According to this view, to preclude looking at other treatments for gender dysphoria and insist that one course only should be pursued may go beyond current scientific evidence and even, despite the best of intentions of adults, be potentially harmful to young persons.

Given this scientific uncertainty, the *Act's* interpretive difficulties, and the plausible risk scenarios discussed above, the opinion of the present author is that the *Act* should be amended to address these concerns.

[59] *Bell v Tavistock* [2020] EWHC 3274.
[60] Ibid [152].

Statements of Belief as Political Communication

Timothy Nugent*

There is increased interest in legislation that shields some forms of expression not only from the legislature but also from sanctions by powerful private institutions such as social media companies, professional associations, and employers. The Religious Discrimination Bill 2022 (Cth), if passed, would have prohibited 'qualifying bodies' from implementing conduct rules that restrict 'statements of belief' in their effects. Other provisions of the Bill implicitly provided some protection for 'religious speech' within the broader ambit of 'religious belief or activity'. Using the Religious Discrimination Bill as an example, this paper examines laws that restrict private censure of speech with respect to the implied freedom of political communication. It is argued that laws that limit private censorship of political speech may place a burden upon political communication if they are not constructed in a manner that is 'viewpoint neutral'. Such laws can thus only be valid if the criteria of 'compatibility' and 'proportionality' are met (as established in Lange *and its progeny). The power imbalance between individuals and large private institutions may warrant limits on private censorship. However, such limits are best framed so as not to discriminate between viewpoints. Laws that protect the expression of particular ideas, such as those based in religious doctrine, must demonstrate a legitimate reason for differential treatment compared to other foundational beliefs.*

INTRODUCTION

The Religious Discrimination Bill 2022 (Cth) ('Bill') was the focus of a rigorous debate for three years before being shelved by the incoming Labor Government in 2022. The Bill was presented as a measure to address a lacuna in federal discrimination law.[1] In introducing the Bill, the former Prime Minister Scott Morrison encouraged comparisons with the *Sex Discrimination Act 1984* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth). The message of these comparisons was clear: the legislation should be understood simply as providing those who hold religious beliefs with the same protections that are afforded in relation to other attributes. If it were so straightforward, the Bill might have had a smoother political path. However, the Bill, taken together with legislation introduced alongside it,[2] proposed measures not found in other discrimination legislation.[3] The Bill's supporters considered these adaptations necessary to provide comprehensive protection for belief. Its detractors claimed

* Sessional Academic, University of Southern Queensland.

[1] Commonwealth, *Hansard*, House of Representatives, 25 November 2021, 10811 (Scott Morrison, Prime Minister).

[2] Religious Discrimination (Consequential Amendments) Bill 2022.

[3] See, eg, Renae Barker, Submission to Attorney Generals Department, Parliament of Australia, *Religious Discrimination Bills: Second Exposure Drafts Consultation* (29 January 2020). '[T]he Bill has attempted to respond to potential conflicts and hypothetical cases via specific clauses with no equivalent in other Federal Discrimination laws': at 3.

the Bill would create special privileges for religious individuals and bodies[4] or even forge a 'right to be a bigot'.[5]

This paper addresses one of these controversial measures — the protection for 'statements of belief'. While the Bill itself is unlikely to be revived in the same form, this provision was an early example of a 'private censorship' law, and so represents an opportunity to consider the implications of the implied freedom of political communication to this growing area of legislative interest.[6]

STATEMENTS OF BELIEF

Statements of belief had a particular legal function in the Religious Discrimination Bill 2022. The Bill was crafted to provide people with a qualified right to make statements that accord with the beliefs they consider to accord with their religion or that relate to the fact that they do not hold a religious belief.

Clause 5 of the Bill defined 'statement of belief' as follows:

> (a) the statement:
>
> (i) is of a religious belief held by a person; and
> (ii) is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and
> (iii) is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
>
> (b) the statement:
>
> (i) is of a belief held by a person who does not hold a religious belief; and
> (ii) is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and
> (iii) is of a belief that the person genuinely considers to relate to the fact of not holding a religious belief.

Under the Bill, those who make statements of belief would have been granted two substantial protections.[7] First, such statements would be exempted from State and Federal discrimination law including, inter alia, the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth). Secondly, 'qualifying bodies', such as professional and trade associations,

[4] Bruce Baer Arnold, Wendy Bonython and Richard Matthews, Submission to Attorney Generals Department, Parliament of Australia, *Religious Discrimination Bills: Second Exposure Drafts Consultation* (3 March 2020).
[5] Luke Beck, Submission to Attorney Generals Department, Parliament of Australia, *Religious Discrimination Bills: Second Exposure Drafts Consultation* (3 March 2020) 7-9. The terminology was in reference to Senator Brandis' arguments for the repeal of s 18C of the *Racial Discrimination Act*: Commonwealth, *Hansard,* Senate, (24 March 2014) 1797 [14:12] - [14:16] (George Brandis, Attorney-General).
[6] Other examples of this form of 'private censorship' legislation proposed in common law jurisdictions include: Social Media (Protecting Australians from Censorship) Bill 2022 (Cth)*;*Texas House Bill No 20 2021 (Texas); Transparency in Technology Act, SB 7072 2021 (Florida).
[7] Commonwealth, *Hansard*, House of Representatives, 9 February 2022, 279 (Paul Fletcher) ('Third Reading Bill') The third reading of the Bill provided exceptions where such statements are 'malicious' and do not '…threaten, intimidate, harass of vilify…' or promote a serious offence under cl 35(1)(b): at cls 12(2) (a)–(c) Religious Discrimination Bill 2022 (Cth).

would be prohibited from imposing conduct rules which limit statements of belief outside of a professional practice context. The initial exposure draft of the legislation went further to provide similar limitations on the employee codes of conduct of organisations with a turnover of more than $50 million.[8] However, in response to criticism, these further provisions were cut from the Bill when it was introduced in Parliament. In the third reading draft, statements of belief do not have special protection in an employment context.[9]

Despite these changes, the third reading draft of the Bill would still provide greater protection for religious believers than non-believers. This is partly due to differential textual treatment. Statements of non-believers are tested to the standard of 'a belief that the person genuinely considers to *relate to* the fact of not holding a religious belief' which is narrower than the standard for believers, 'a belief that the person genuinely considers to be *in accordance* with the doctrines, tenets, beliefs or teachings of that religion'.[10] However, even if the language were harmonised, the provision would not achieve equity because people arrange their identity and morality around what they believe, not around the concepts they reject. For example, pro-choice beliefs are more usually based upon feminism or liberalism than on a considered rejection of Catholic doctrine per se.

The author submits that there is a potential argument that this difference in the treatment of religious and secular positions may have created a distortion in Australian political communication that invites scrutiny under the implied freedom of political communication.

ARE STATEMENTS OF BELIEF POLITICAL COMMUNICATION?

Statements of belief, as defined by the Bill, could cover a very broad range of subject matter ranging from the minutiae of spiritual practice and ritual to broad sweeping statements on what should be prohibited in society. In principle, the Bill was designed to cover both political and apolitical statements. However, adverse action against a person is far more likely to be in response to controversy. Internal disagreement about the idiosyncrasies of worship within a particular faith will rarely attract widespread public attention. In our contemporary secular society, major controversy about religious matters is usually provoked where religious beliefs intersect with broader societal issues or with the rights or legitimacy of communities outside of a faith tradition.

There are prominent examples of controversy at the intersection of religion and politics. Consider the matter of Andrew Thorburn, who resigned from an appointment as Essendon Chief Executive Officer following revelations of his managerial involvement with 'City on the Hill', a church known for sermons on political matters from a highly conservative viewpoint.[11] Or, the dismissal of Israel Folau, whose Twitter posts challenged the morality of homosexuality, and were a catalyst for both the Ruddock Report[12] and later the drafting of the

[8] Religious Discrimination Bill (Second Exposure Draft) 2019 cl 8 (3)(b). Clause 32(6)(b) included caveat for cases where failure to limit statements of belief would result in unjustifiable financial hardship to the employer.
[9] Third Reading Bill (n 7). However some statements may presumably be protected under the ordinary criteria for indirect discrimination: at cl 14.
[10] Beck (n 5) 17 (emphasis added).
[11] Anna Patty and Lachlan Abbot, 'Thorburn Church Pastor Regrets "Sloppy Analogy": Legal Options Against Essendon Grow', *Sydney Morning Herald* (online, 2 October 2022).
[12] Expert Panel, *Religious Freedom Review* (Report, 18 May 2018). This is commonly known as the 'Ruddock Report'.

Bill itself. The protection for statements of belief in the Bill has even been described as the 'Folau clause'.[13]

Commentary on issues such as access to abortion, euthanasia, same-sex marriage, and responses to religious extremism often blends religion and politics with no clear separation between the two. As McNamara notes in his commentary on a 2006 religious vilification case 'the contemporary political climate ties religion and politics together inescapably …'[14]
Even where religious statements do not expressly refer to politics, positions on morality have a political dimension because persons of faith rely on them in forming an opinion of legislation or executive action. Thus, at least a portion (and arguably a preponderance) of controversial statements of belief comprise political communication.

THE NATURE OF THE IMPLIED FREEDOM

To the extent that statements of belief are a form of political communication, their regulation must be consistent with the implied freedom of political communication, a 'qualified limitation on legislative power to ensure that the people of the Commonwealth may exercise a "free and informed choice as electors".'[15]

In the 1990s, the High Court established a constitutional freedom of political communication as an implication of the Australian Constitution.[16] The Court took notice that the Constitution anticipates a system of representative and responsible government.[17] Such a system, it stands to reason, can only function where there is free and open communication about political matters. Consequently, according to the Court, the Constitution must contain at least some degree of implicit protection for communication about political matters. As articulated by the Court, the implied freedom is also not absolute: the government is entitled to encroach upon political speech by legitimate and proportional legislation. Further, the implied freedom must not be construed as an individual right. Rather, it protects political communication 'as a whole'[18] by limiting legislative and executive power.[19]

The High Court has refined three questions to determine whether a provision is invalid:

1. Does the law effectively burden the freedom in its terms, operation or effect?

[13] See, eg, Michael Koziol, 'Liberal MPs want "Folau's Law" Removed from Religious Discrimination Bill', *Sydney Morning Herald* (online, 25 July 2021); Tom McIlroy, 'What Happens if the Religious Freedom Bill Passes' *Australian Financial Review* (online, 8 February 2022). The label is chiefly in regard to the limitation on employee codes of conduct in the exposure draft.
[14] Lawrence McNamara, '*Catch the Fire Ministries v Islamic Council of Victoria*: Religious Vilification Laws in the Victorian Court of Appeal' (2008) *SSRN* 12.
[15] *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
[16] *Nationwide News v Wills* (1992) 177 CLR 1.
[17] Relying on ss 7 and 25 as well as the structure of the Constitution itself.
[18] *Comcare v Banerji* (2019) 267 CLR 373, 396 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 1344.
[19] *McCloy v NSW* (n 15) 202-3, [29]–[30] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 360 [90] (Kiefel CJ, Bell and Keane JJ), 407 [258] (Nettle J), 503 [559] (Edelman J).

2. Are the purposes of the law legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
3. Is the law reasonably appropriate and adapted to advance that legitimate object?[20]

A majority of the High Court has further endorsed proportionality analysis as the preferred approach to question three.[21] Proportionality analysis addresses the 'reasonably appropriate and adapted' criterion by reference to three inquiries. It asks whether the impugned provision is:

1. *suitable*— as having a rational connection to the purpose of the provision;
2. *necessary*— in the sense there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
3. *adequate in its balance*— a criterion requiring a value judgement, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[22]

DOES PROTECTION FOR STATEMENTS OF BELIEF IMPART A BURDEN ON POLITICAL COMMUNICATION?

If 'statements of belief' are political, it may seem counterintuitive to propose that a law that protects their speakers *burdens* political communication. Nevertheless, this conclusion bears consideration for two reasons.

The first and most straightforward reason is that the protection of statements of belief for individuals operates as a restriction upon the rights of qualifying bodies to express their own positions. For many professions, qualifying bodies perform roles outside of facilitating or authorizing professionals. They may be involved in advertising, advocacy on behalf of their members, or commentary on policy or law that is relevant to their role in society. Some forms of accreditation are accepted to indicate that a person possesses expertise, and thus tend to support their arguments. The censure of a member communicates the position of the qualifying body, and without it, a single member could undermine the position of the qualifying body as a whole. Granted, it is a relevant consideration that there are other ways for organizations to communicate beyond censuring non-conforming members.[23] However, this fact is not necessarily ruinous to the argument that statements of belief legislation pose a burden on organisations, as it may be plausibly argued that a political message exercised through action may be more credible and impactful than words alone.[24]

The second reason is that rendering protection selectively for religious statements creates an imbalance in the marketplace for political ideas upon which our democracy depends. As noted above, Australia is distinct in that constitutional free speech is expressed not as an individual

[20] *Clubb v Edwards* [2019] HCA 11, [5] (Kiefel CJ, Bell and Keane JJ) .
[21] *McCloy v New South Wales* (n 15). For a discussion of the growth of proportionality analysis see Anthony Gray, 'Proportionality in Australian Constitutional Law: Next Stop Section 116?' (2022) 1 *Australian Journal of Law & Religion* 116-17.
[22] *McCloy v New South Wales* (n 15) (emphasis in original) (citation omitted).
[23] See, eg, *Clubb v Edwards* (n 20) [251] (Nettle J).
[24] *Brown v Tasmania* (n 19) 367 [117] (Kiefel CJ, Bell and Keane JJ).

right but as a protection on Australian political communication as a whole. Public debate is fundamental to effective political communication. In *Re Alberta Legislation* (1938), two members of the Supreme Court of Canada commented on the nature of the parliament anticipated by the *British North America Act 1867* (Imp):

> [Parliaments] derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.[25]

A public debate is best approached by advocates on even ground in the hope that the merit of ideas will be decisive. An unjustified advantage to one side or detriment to the other distorts this process. The High Court has usually been tasked with ruling upon the validity of laws which have disadvantaged some people or perspectives in the debate. However, there is no authority for the proposition that laws that distort political communication by conferring a advantage to a favoured class or political position cannot also attract the scrutiny of the implied freedom. What matters is that the integrity of political communication as a whole is maintained, not whether individual 'rights' have been infringed upon.

In *Australian Capital Television*,[26] a majority of the High Court rejected a scheme that advantaged a select minority of speakers (such as incumbent political candidates) and disadvantaged others. Mason CJ and McHugh J each found the discriminatory nature of the scheme highly salient. Chief Justice Mason stated that the 'discriminatory effect'[27] of provisions that favoured incumbent electoral candidates in the provision of free time was 'the principle reason for the invalidity of the regulatory scheme'.[28]

Similarly, Justice McHugh commented:

> [S]ome members of the electorate will be able to get their ideas, policies, arguments and comments before radio and television audiences, [but] it does not follow that those wishing to put the opposite point of view will necessarily be able to do so.[29]

Thus from the outset, it has been acknowledged that laws that discriminate between ideas or viewpoints warrant particular scrutiny when compared with content-neutral limits on modes of communication.[30]

The question of whether provisions impose a 'discriminatory burden' or are 'viewpoint neutral'[31] continues to be a relevant heuristic in the reasoning of the Court. In *Brown v Tasmania,* Gageler J explains:

> Because it is a factor which bears on the degree of risk that political communications unhelpful or inconvenient or uninteresting to a current majority

[25] *Re: Alberta Legislation* (1938) 2 DLR 81, 107 (Duff CJC and Davis J) quoted with approval in *Nationwide News v Wills* (1992) 177 CLR 1 [19]: Deane and Toohey JJ [20] and Mason CJ [19].
[26] *Australian Capital Television v The Commonwealth of Australia* (1992) 177 CLR 106.
[27] Ibid [56-58] (Mason CJ).
[28] Ibid.
[29] Ibid [32] (McHugh J).
[30] Ibid [143] (Mason CJ).
[31] *Clubb v Edwards* (n 20) [123] (Keifel CJ, Bell and Keane JJ).

> might be unduly impeded, the extent to which the legal operation or practical effect of a law might be capable of being seen to be discriminatory — against communications, against political communications, or against political communications expressing particular political viewpoints — bears correspondingly on where within that spectrum the level of scrutiny appropriate to be brought to bear on that law is located.[32]

In *Unions NSW v New South Wales,* a lower spending cap for third-party electoral campaigns imposed by s 29(10) of the *Electoral Funding Act 2018* (NSW) was found to be invalid, with a majority citing the discriminatory nature of the legislation in privileging the communication of electoral candidates.[33] And while the majority in *McCloy* upheld provisions singling out the donations of property developers in the *Electoral Funding, Expenditures and Disclosures Act 1981* (NSW), Nettle J delivered a strong dissent that underlined the gravity of *discriminatory* burdens:

> [A]n impugned law which restricts the ability of some sections of the electorate to engage in a significant aspect of the political process while leaving others free to do so as they choose mandates an inequality of political power which strikes at the heart of the system.[34]

In other matters, viewpoint neutrality has been prominent in submissions. In *Clubb v Edwards*,[35] much of the appellants' argument was framed around the position that a 'law that burdens one side of a political debate, and thereby necessarily prefers the other, tends to distort the flow of political communication.' [36] However the Court found that there was no discrimination against anti-abortion perspectives in the impugned legislation — the limitation on protest within safe access zones applied to those on all sides of the controversy, and thus was 'viewpoint and subject matter neutral'.[37]

The Religious Discrimination Bill would have privileged religious viewpoints over secular viewpoints by selectively protecting statements of belief. Is the importance of 'viewpoint neutrality' great enough to attract the scrutiny of the implied freedom even where no individual's speech is restricted? The idea is likely to encounter some resistance. In *Brown v Tasmania,* Kiefel CJ, Bell and Keane JJ emphasised that 'a law effecting a discriminatory burden is [not] for that reason alone invalid …'[38]

Nevertheless, it bears contemplation. The importance of government neutrality toward the regulation of private speech is mature in American First Amendment jurisprudence, which accepts a strong presumption that public institutions cannot regulate speech on the basis of its content or viewpoint.[39] This is so even where regulation conveys a selective benefit, rather than

[32] *Brown v Tasmania* (n 19) 390 [202] (Gageler J).
[33] *Unions NSW v New South Wales* (2019) 264 CLR 595, 614 [40] (Kiefel CJ, Bell and Keane JJ), 661 [180] (Edelman J), 628 [84] (Gageler J dissenting on this point).
[34] *McCloy* (n 15) 273-7 [271] (Nettle J dissenting).
[35] *Clubb v Edwards* (n 20).
[36] Ibid (Keifel CJ, Bell and Keane JJ) [54].
[37] Ibid [123], [54] (Keifel CJ, Bell and Keane JJ), [296] (Nettle J), [364] (Gordon J).
[38] *Brown v Tasmania* (n 19) 361 [92] (Keifel CJ, Bell and Keane JJ).
[39] See *Police Department of Chicago v Mosley*, 408 US 92, 96 (1972); *Boos v Barry*, 485 US 312 (1988); *Congregation Lubavitch v City of Cincinnati*, 923 F 2d 458 (6th Cir, 1991).

a restriction upon speakers. In *Rosenberger v University of Virginia*,[40] for example, the petitioner sought $5,800 from a University of Virginia subsidy scheme to publish a periodical that presented a Christian perspective on university life. University policy was not to subsidise material which promoted religious views. A 5:4 majority of the Supreme Court held that the policies of the public university comprised viewpoint discrimination in violation of the First Amendment. If a public university promotes speech it must do so in a manner that promotes all forms without discrimination.[41]

A comparable broadening of 'viewpoint neutrality' in Australia would not appear to offend any established principle. Further, it would be consistent with the purpose of the implied freedom as a means to ensure electors can exercise a free and informed choice. If legislation creates a partisan imbalance in our political discourse, does it matter whether it uses a shield or a sword to do so?

Finally, public policy favors embracing viewpoint neutrality. Human beliefs are informed by a broad range of philosophies. Many people, including the devout, place great value on ideologies, spiritualities, and sciences that do not accord with organised religion.[42] Treating statements grounded in faith on an even basis with those grounded in natural science or secular ideology maintains the integrity of public discourse.[43] There is much that can be gained by the sharing of ideas on equal footing, as Pope John Paul II noted: 'science can purify religion from error and superstition; religion can purify science from idolatry and false absolutes.'[44]

LEGITIMACY AND PROPORTIONALITY

It has been argued here that a selective protection for religious statements may constitute a burden upon political communication. It must be acknowledged that this is necessary but not sufficient to demonstrate constitutional invalidity. If a burden is demonstrated, the validity of law will turn on whether its purposes are 'compatible with the maintenance of the constitutionally prescribed system of representative government'[45] and whether it is 'reasonably appropriate and adapted to advance that legitimate object'.[46]

The balancing exercise of proportionality ('structured' or otherwise) includes a value judgement on the part of the decision maker. There is little benefit in attempting to make a definitive prediction of what the members of the Court would decide if protection for 'statements of belief' were tested.

---

[40] 515 US 819 (1995) ('*Rosenberger*'). See also *Lamb's Chapel v Center Moriches Union Free School District* 508 US 384 (1993).
[41] *Rosenberger* (n 41).
[42] See, eg, Jeremy Patrick, '"A La Carte" Spirituality and the Future of Freedom of Religion' in Paul T Babie, Neville G. Rochow, and Brett G. Scharffs (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Elgar, 2020) 58-91.
[43] See also, Katy Barnett, Submission to Attorney Generals Department, Parliament of Australia, *Religious Discrimination Bills: Second Exposure Drafts Consultation* (2020) ('The Israel Folau Situation': at 1).
[44] Pope John Paul II, 'Letter of his Holiness John Paul II to Reverend George V Coyne SJ Director of the Vatican Observatory', *John Paul II* (Letters, 1 June 1988) <https://www.vatican.va/content/john-paul-ii/en.html>. See also Pope Francis, 'Video Message of the Holy Father to Mark International Meeting "Science for Peace"', *Holy See* (Video Message, 2 July 2021) <https://www.vatican.va/content/francesco/en/messages/pont-messages/2021/documents/20210702-videomessaggio-scienza-pace.html>.
[45] *Clubb v Edwards* (n 20) [5] (Kiefel CJ, Bell and Keane JJ).
[46] Ibid.

However, it is reasonable to suggest the Bill may be compared with a hypothetical drafting of the provision which equally protects both secular and religious beliefs to see if the latter comprises an 'obvious and compelling alternative.'[47] This approach would draw upon the ongoing debate on whether differential treatment of religious institutions is warranted in contemporary society.[48] Full detail of this debate cannot be done justice here. However, arguments that would be available to the Commonwealth include the recognised importance of religious belief, as evidenced by its inclusion within the Australian Constitution[49] and international treaties that Australia has ratified[50] along with an argument that citizenship is grounded in both the rational and the transcendental.[51]

CONCLUSION

The protection for statements of belief in the Religious Discrimination Bill aims to strike a balance between the rights of persons to express religious beliefs and the rights of qualifying bodies to sanction their members for misconduct. In a liberal society, there is merit in a law that limits powerful private entities from sanctioning individuals for statements about matters which are fundamental to their identity, morality, and values. Religious beliefs frequently meet this description, but this description is not necessarily particular to religious beliefs. Most people form sincere and deeply held positions not only on religious considerations, but also on the basis of guides such as secular morality, science, and political ideology. Our democratic political discourse is best protected where our tools for understanding the world are placed on equal footing, and the implied freedom of political communication could be applied to maintain such balance. Although the 2022 version of the Religious Discrimination Bill and its protection for statements of belief has effectively lapsed, the controversy over the private organizational regulation of individual speech is just beginning.

[47] *Unions NSW v NSW* (n 33) 616 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[48] See, eg, Brian Leiter, *Why Tolerate Religion* (2013, Princeton University Press); Micheal W McConnell, 'Religion and its Relation to Limited Government' (2013) 33 *Harvard Journal of Law and Public Policy* 943; Anthony Ellis, 'What is Special About Religion?' (2006) 25 *Law and Philosophy* 219.
[49] Australian Constitution s 116; Commonwealth of Australia Constitution Act 1900 (Imp) (preamble).
[50] See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art 18; *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Arts 2 & 13; *International Covenant to Eliminate all forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) Art 5(d)(vii).
[51] See, eg, Alex Deagon 'The Name of God in a Constitution: Meaning, Democracy and Political Solidarity' (2019) 8(3) *Oxford Journal of Law and Religion* 473.

Book Review

Law and Religion in the Commonwealth: The Evolution of Case Law

Law and Religion in the Commonwealth: The Evolution of Case Law. Edited by Renae Barker, Paul T. Babie, and Neil Foster. Hart, 2022. Pp. 352. ISBN: 9781509950140.

Review by Barry W. Bussey*

In recent years, the study of law and religion has 'exploded' in attracting more students.[1] With the growing academic interest, there is a concurrent demand for more literature on the subject — not to simply fill the space but to provide competent material that expands our knowledge and appreciation for this growing field. Barker, Babie, and Foster's *Law and Religion in the Commonwealth: The Evolution of Case Law* provides a much-needed contribution to law and religion studies. The editors assembled material from a wide spectrum of Commonwealth of Nations' law and religion experts (nineteen in all). An eclectic array of topics is covered, along with analyses of cases and trends that are sure to meet the needs of both student and instructor.

This book reminds us that religion continues to have a significant impact on the English common law, statutory interpretation, and constitutional law. Such influence on the law is, in many ways, the result of the extent of the religiosity of the people of the Commonwealth and their political and judicial representatives. The ebb and flow of religious influence upon the law observed by the legal scholar needs a structure of analysis to better understand the phenomena. The papers included in this collection assist in the building of that analytical architecture.

The book begins with a discussion on the nature of religion because how religion is defined determines its practical influence on the law. Throughout the Commonwealth there are various state privileges granted to religious entities and individuals. The definition of 'religion' has a gatekeeper function: it will determine who will get the privilege and who will not. For example, whether an organisation receives tax advantages, as was the subject in the Australian High Court case *Church of the New Faith v Commissioner of Pay-roll Tax (Vic),*[2] may very well depend on whether the organisation meets the legal definition of a religion. As Renae Barker notes, although the case does not have a clear ratio decidendi, it does provide a 'theological essay' that gives some guidance to courts in understanding religion.[3] The justices variously provide a 'functional' definition for the individual, a 'substantive' definition that identifies the essence of religion, and an 'analogical' definition with indicia to determine whether something is a religion, such as: ideas

* President, First Freedoms Foundation (Canada) and Lawyer, Bussey Ainsworth.

[1] John Witte, 'The Interdisciplinary Growth of Law and Religion' in Frank Cranmer et al (eds), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge University Press, 2016) 247, 247–261.

[2] (1983) 154 CLR 120.

[3] Renae Baker, 'Church of the New Faith v Commissioner of Pay-roll Tax: Defining Religion for the World?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 9.

and practices involving the supernatural, beliefs about man's nature and place in the universe, codes of conduct, identifiable organisational structures, and, finally, the subjective understanding of the adherents as being part of a religion.

Religion's complexity will vary from one jurisdiction to another as the *Titular Roman Catholic Archbishop of Kuala Lumpur v Home Minister*[4] case reveals. Joshua Neoh makes the compelling argument that secular courts should not adjudicate theological disputes.[5] Determining who may use a holy name of the deity, for example, is one subject that a court ought to leave to the theologians, but, alas, the court decided to take sides in the dispute. Similarly, other contributions in the book establish that for years religion has been the subject of litigation involving everything from claims of undue influence,[6] to contract law and justiciability,[7] to the legitimate functions of an established church,[8] and even to essentially political disagreements.[9]

Religion finds itself addressing postmodern concepts such as same-sex relationships and the increased expectation among some that religious freedom is not to be used as a 'license to discriminate'. Yet, with each new reformulation of human interaction there remains the concern that citizens who abide by traditional understandings must still be free to practice their religious beliefs without state reprisal. These 'culture war' issues[10] and more are addressed by competent scholars and legal practitioners in this work.

---

[4] [2014] 4 MLJ 765.

[5] See Joshua Neoh, '*Titular Roman Catholic Archbishop of Kuala Lumpur v Home Minister*: What is the Name of God?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 33.

[6] See Craig Allen, 'Allcard v Skinner: Religious Influence and Undue Influence' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 311.

[7] See Kathryn Chan, '*Lakeside Colony of Hutterian Brethren v Hofer*: Jurisdiction, Justiciability and Religious Law' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 211.

[8] See Mark Hill, '*Aston Cantlow v Wallbank*: Defining the Public and Private Functions of the Established Church of England' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 137.

[9] See Dian AH Shah, '*Iki Putra Mubarrak v Kerajaan Negeri Selangor and Others*: Re-defining Religious Federalism in Malaysia?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 125; Sawinder Singh, '*M Siddiq (D) Thr Lrs v Mahant Suresh Das and Others*: Inconsistencies in the Law and Politics of Indian History in the Ayodhya Case' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 167; Umar Rashid, '*Benazir Bhutto v Federation of Pakistan*: Using Islamic Principles to Expand Judicial Powers' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 189.

[10] See Ian Leigh, '*Lee v Ashers Baking Company*: Crumbs of Comfort in the Culture Wars' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 65; Michelle Flynn, '*Her Majesty's Attorney-General v Akhter and Others*: The Need for Legislative Reform of the *Marriage Act 1949*' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 247; Neil Foster, '*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*: Balancing Discrimination Rights with the Religious Freedom of Organisations' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 265; Preeti Nalavadi, '*Indian Young Lawyers Association v State of Kerala* and *Shayara Bano v Union of India*: Understanding Religious Freedom and Women's Rights in the Twenty-First Century Using the Lenses of Sabarimala and Shayara Bano' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 293 ; Iain T. Benson, '*Minister of Home Affairs and*

What one discovers from digesting this work is that the intersection of law and religion is not static. It is part and parcel of the community from which it originates. Therefore, the complexities caused by the interwoven interests of political, social, and religious environments can create strange results. For example, Sawinder Singh observes that in the Indian case *M Siddiq (D) Thr Lrs v. Mahant Suresh Das and Others*, justice may not have been done but political peace was maintained when the Court acquiesced to Hindu nationalists against Muslim claims to a historic mosque.[11] Religious freedom, it seems, is unavoidably pragmatic.[12]

This is a volume that can be accessed by reading it systematically from cover to cover to appreciate the depth of scholarship presented. Or, it may be approached by a 'surgical strike' to harvest a chapter that addresses one's particular focus of the moment. Either way, the volume provides the student, scholar, and legal practitioner an invaluable analysis of law and religion's contentious concerns in the modern context.

Normally, reviews offer some critical assessment of shortfalls to consider. However, it is my assessment that when a work accomplishes the task that its creators set out to do, then it is a success. The editors' stated goal was to highlight 'many of the unique challenges faced by communities in working through disputes centred on religion as well as common challenges faced by many, if not all of those nations which comprise [the Commonwealth].'[13] That has been accomplished in *Law and Religion in the Commonwealth*. The cases raised in this work are, of course, but a drop in the vast ocean of knowledge and experience that awaits the law and religion scholar. Nevertheless, such a concise, erudite, and well-argued collection of scholarly commentary on key cases in the Commonwealth is worth the purchase.

Another v Fourier and Another: A Jurisprudence of Engagement' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 227.

[11] Singh (n 9).

[12] See Richard Moon, '*R v Big M Drug Mart*: The Unavoidable Pragmatism of Religious Freedom' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 81; Luke Beck, '*Attorney-General (Victoria) ex rel Black v Commonwealth*: The High Court's Attempt to Make the Establishment Clause of the Australian Constitution Mean Very Little' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 149; Russell Sandberg, '*Eweida v UK*: Cross Words and the Reformulation of Religious Freedom' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 49; Azit O Amoloye-Adebayo and Muhammad Kamaldeen Imam-Tamim, '*Shalla v State*: Is Blasphemy a Religious or Criminal Offence in Nigeria under Islamic Law?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 95; Paul T Babie, '*Adelaide Company of Jehovah's Witnesses v Commonwealth*: Balancing Free Exercise and Public Order' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 105.

[13] Renae Barker, Paul Babie and Neil Foster, 'Introduction' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart, 2022) 1, 1.

Book Review

The Transgender Issue: An Argument for Justice

The Transgender Issue: An Argument for Justice. By Shon Faye. Penguin Random House UK, 2021. Pp. 292. ISBN: 978-0-241-42314-1.

Review by Jeremy Patrick*

A substantial amount of the discussion about religious freedom in Australian politics over the past few years has occurred in the context of the supposed 'culture war' clash of religious freedom versus transgender rights. As same-sex marriage has faded into the background, the question of how religious schools should respond to transgender students and staff has come to the fore of legal, political, and media controversy. However, it can be valuable to step back from the details of a specific controversy by viewing it through a broader lens. Shon Faye's *The Transgender Issue: An Argument for Justice*[1] is a powerful articulation of the issues facing transgender people today. Faye, a British trans woman, provides a highly-readable account of how trans liberation should be seen as part and parcel of the broader struggle against oppression in its various incarnations.

The major theme of Faye's book is that the 'moral panic' about trans people is a distraction from the very real struggles they face. Pundits and politicians obsess endlessly over toilets and elite sporting competitions, says Faye, while ignoring family violence and rejection, poverty and homelessness, school bullying and workplace harassment, and a host of other issues that directly and substantially affect trans people at levels far exceeding that of the general population. Faye positions trans people as one of many marginalised groups that need to work together to overcome capitalist and patriarchal oppression. Class, race, and an understanding of intersectionality is key to this analysis. Elites may be keen to discuss pronouns in e-mail signatures, but for many trans people, safety and shelter are far more pressing concerns.

As Faye explains,

> The experience of being trans is shaped by social class. While there are middle-class trans people, the vast majority are working class — just as the vast majority of the total population is working class. Trans workers are often employed in lower paid and more precarious jobs, with a high risk of discrimination and bullying in the workplace. As a result, trans political struggle is part of a wider class struggle. Despite this, trans politics is commonly misrepresented as coddled, bourgeois, and anti-working class.[2]

To support the theme, chapters are devoted to trans healthcare (physical and mental), discriminatory legislation, the sex work industry, and more. One chapter is devoted to the place of trans rights within the LGBTIQA+ movement generally, while another discusses the subset of the feminist movement which holds essentialist biological views of sex and gender (the J.K. Rowlings of the world). Religion is a topic rarely discussed in the book, but the

* Senior Lecturer, University of Southern Queensland.
[1] Shon Faye, *The Transgender Issue: An Argument for Justice* (Penguin Random House UK, 2021).
[2] Ibid 119.

perhaps surprising alliance between religious conservatives and secular anti-trans feminist campaigners is covered over several pages.

Some aspects of the book may limit its appeal to readers of this journal. The work is clearly one of advocacy, not journalism or scholarship. It is written for a mainstream audience, not an academic one, and the intersection of law and religion is only touched on. Most of the examples and statistics are from the United Kingdom, leaving an Australian reader unsure of whether or to what degree the situation is similar here. Class-based analyses are less predominant in the academy than they used to be, so some may find the core thesis unpersuasive.

But despite these limitations, *The Transgender Issue* is certainly worth reading. Transgender people are not going anywhere and the religious, political, and legal controversies about their place in society seem likely to persist throughout the decade. Advocates for any position can benefit from a healthy dose of compassion and understanding. Whatever 'side' of these issues someone is on, obtaining a better, more well-rounded picture of the struggles transgender people face will be worthwhile.

Cherry Picking Human Rights

Nicholas Aroney*

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 freedom of thought, conscience, and religion[6] 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

* Professor of Constitutional Law, University of Queensland.

[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.

What Does Gender Identity Mean in the *Sex Discrimination Act 1984*?

Patrick Byrne*

The original objective of the *Sex Discrimination Act 1984* (Cth) ('*SDA*') was to eliminate, as far as possible, discrimination against biological women. It aimed 'to give effect to certain provisions of the [United Nations] *Convention on the Elimination of All Forms of Discrimination Against Women* and to provisions of other relevant international instruments'.[1] Especially in the workplace, the biological characteristics of women had given rise to adverse discrimination: women might be fired for becoming pregnant or breastfeeding; or might not be hired at all for some jobs because of stereotypical assumptions about women's physical strength and endurance. To underscore the biological differences that singled out women for discrimination, the *SDA* incorporated definitions of man and woman that said:

> *woman* means a member of the female sex irrespective of age;
>
> *man* means a member of the male sex irrespective of age.[2]

In 2013, amendments to the *SDA* also gave protected attribute status to gender identity and sexual orientation. To underscore this broadening of the *SDA* to cover gender identity, the amendments repealed the biological definition of 'man' and 'woman' from the Act.[3] The amendment defined gender identity as

> the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.[4]

The Bill's Explanatory Memorandum made it clear that the intention of the Bill was to

> ensure that 'man' and 'woman' are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the *SDA*.[5]

These changes create serious problems from both a legal and a religious perspective.

---

* President, National Civic Council.

[1] *Sex Discrimination Act 1984* (Cth) Act No. 4 of 1984 as Registered 21 March 2012, C2012C00313, Section 3 (a). <https://SDA.legislation.gov.au/Details/C2012C00313> ('*SDA*').

[2] Ibid s 4.

[3] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1items 8, 14, amending *SDA* s 4(1).

[4] *SDA* s 4(1), as inserted by *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1 item 6.

[5] Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) para 18.

The *SDA* now states that sex is 'designated' at birth, just as parents choose and designate (assign) a newborn's name, or as a person is chosen for a position. The *SDA* thus treats identification of sex at birth as a subjective choice, and therefore fluid, rather than an objective, observable, immutable, biological reality. This puts the government's 'thumb on the scale' of a major contested issue in modern theology, philosophy, and politics.

Further, the definition of 'gender identity' creates a variety of interpretive ambiguities. For example, what does 'gender-related appearance' mean — should a woman who wears a suit be considered as having the gender identity of a man? What do 'gender-related mannerisms' mean — if a boy throws a ball underarm rather than overarm, does he have the gender identity of a girl? The term 'gender-related characteristics' is also vague. If 'gender-related characteristics' refer to typical socio-cultural characteristics attributed to the person's biological birth sex, then does not 'gender-related characteristics' really mean characteristics based on biological sex?

While 'sex' and 'gender' are not defined in federal law, they have commonplace, self-evident definitions. Biological science defines sex as 'physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy'[6] that distinguish biological males from biological females by their reproductive function, regardless of whether reproductive functions are impaired or not being used for reproduction.[7] Commonly, gender has referred to either of the two sexes (male and female) with reference to social and cultural differences rather than biological differences. At the same time, these social and cultural differences are characteristics that point back to inherent biological sex differences.

This is the crux of the legal problem: the *SDA* definition of 'gender identity' functionally relies on a person being biologically male or female in the first place. The *SDA* states 'gender identity' can be determined 'with or without regard to the person's … sex at birth'. However, all descriptors for gender identity[8] without regard to a person's sex are, in fact, dependent on the reality of binary biological sex.[9]

These ambiguities lead to a conundrum. The *SDA* says that biological sex is the ground for adverse discrimination against women, not female social characteristics. However, the *SDA* also says that gender identity is defined by social characteristics, which create wide grounds for conflict with, and adverse discrimination against, biological women when biological males adopt female social characteristics to identify as female.

Because the *SDA* embodies the notion that gender identify is fluid and one can have an unlimited number of identities according to how a person feels at any given point in time, it

---

[6] Lawrence S. Mayer & Paul R. McHugh, 'Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences', (2016) 50 *The New Atlantis* 10, 87.
[7] Ibid. 89, 91.
[8] The gamut of gender identities are described by Friedemann Pfäfflin, 'Medical/Psychological Views', in Jens M. Sharpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2015) 19. See also Department of the Attorney-General, Parliament of Australia, *Australian Government Guidelines on the Recognition of Sex and Gender* (1 July 2013).
[9] For example, 'non-binary' (genderless, pangender, gender queer, etc.) is defined against binary, two opposites, biological male and female. There can be no non-binary without there first being binary. Those who 'escape sex and gender categories' who are 'genderless' or of 'unspecified sex', are also dependent on the reality of binary biological sex, or else there would be no gender/sex to escape from. The concept of being at a point on a spectrum from 100 per cent male to 100 per cent female is dependent on the biological reality of male and female at opposite ends of the spectrum, begging the question: if we are all on this spectrum, is everyone transgender? The question, although hyperbolic, establishes the conceptual point.

ultimately leads to radical subjectivity and concomitant uncertainty. And this uncertainty doubtless creates injustices when people are charged with failing to comply with the *SDA* — especially when their core beliefs about the essential biological nature of sex are rejected by the law. To solve these problems, the *SDA* should return to the common-sense, biological notions of 'man', 'woman', and 'sex'.

Special Topic Forum: Religious Freedom, Sexuality, and Gender Identity

The Politics of Indonesia's New Criminal Code

Robert W. Hefner*

Since its founders declared their country's independence in August 1945, Indonesia's legal system has relied on a criminal code crafted in the second decade of the twentieth century by the country's former Dutch rulers. With their justifiably proud history of national struggle, Indonesian leaders since the 1950s have called for the crafting of a criminal code more reflective of Indonesian values and legacies. Efforts at legal reform were repeatedly put on hold, however, a casualty of political-infighting from 1955-1965 and the relative indifference of national politicians during all but the last years of the authoritarian 'New Order' regime (1966-1998).

With Indonesia's return to electoral democracy after 1998-1999, many in the legal and human-rights community again called for criminal code reform. After extensive legislative deliberation, a preliminary draft was initially released for public discussion in 2016.[1] However, this draft was withdrawn in the face of some of the most extensive student demonstrations of the post-Suharto era. Calling for greater input from religious, human rights, and civil society organizations, the legislative committee went back to work.[2] With much celebratory fanfare, a final draft of the revised Criminal Code was ratified on 6 December 2022 and promulgated on 2 January 2023.[3] The law, *Kitab Undang-Undang Hukum Pidana* ('KUHP') will take effect on 2 January 2026.[4] During this transition period, the provision provides for education and consultation on the development of regulations and guidelines around the articles in the KUHP. The government and society have three years to review and amend its provisions before the code comes into effect.

In the weeks since the final draft's release, what the government and the code's supporters had celebrated as a much needed 'decolonialization' of Indonesia's legal system has turned into what critics have described as one of the most serious challenges to democracy since the fall of President Suharto in May 1998.[5] The full text of the KUHP contains some 624 articles. Most are not in the least controversial but reflect the careful work of the small army of lawyers, judges, legislators, religious leaders, and civil society activists who were drawn into consultations on the code over the past six years. Notwithstanding the seriousness of these efforts, several of the new criminal

* Professor of Anthropology and International Relations, Boston University.

[1] See generally, Hal Tilemann, 'Indonesia's Long Wait for Its Own Criminal Code' *Indonesia at Melbourne* (Web Page, 10 November 2016) <https://indonesiaatmelbourne.unimelb.edu.au/indonesias-long-wait-for-its-own-criminal-code/>.

[2] The drafts of the Criminal Code Law for consultation over this period are identified as versions of *Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana* ('RUU KUHP') and the final draft as *Revisi Kitab Undang-Undang Hukum Pidana* ('RKUHP').

[3] Undang-Undang Republik Indonesia Nomor 1 Thahun 2023 Tentang Kitab Undang-Undang Hukum Pidan [Law No 1 2023 on Criminal Code] (Indonesia) <https://peraturan.bpk.go.id/Home/Details/234935/uu-no-1-tahun-2023> ('KUHP').

[4] Ibid art 623.

[5] See generally Sana Jaffrey and Eve Warburton, 'Indonesia's New Criminal Code Turns Representatives into Rulers', *New Mandala* (Discussion Paper, 9 December 2022) <https://www.newmandala.org/representatives-into-rulers/>.

code's articles remain controversial. They have caught the eye not just of in-country advocates of democracy and legal reform, but of human rights agencies and news media around the world.

Three sets of issues have received the most consistently critical attention. The first has to do with articles dealing with sex and cohabitation outside of marriage.[6] Customary law (*adat*) in some but not all regions in Indonesia stipulates that both premarital intimacy and adulterous sex may occasion punitive measures by village authorities.[7] In this and other respects, sexuality in Indonesia has never been regarded as an entirely private matter between consenting adults. Inspired in part by unsuccessful efforts several years ago by the Islamist Prosperous Justice Party ('PKS') to provide a greater role for the State in the regulation of sexualities, the new criminal code adopts an even more deliberately non-liberal approach to sexuality. Among other things, the articles stipulate that sexual relations outside the confines of marriage are jailable offenses subject to one year's imprisonment. Importantly, however, prosecution of illicit sexualities is only supposed to be initiated where a spouse, parent, or child files a complaint with state authorities.

Although LGBTQ sexualities are not singled out for criminal prosecution, sexuality activists have observed that the draft code's identification of heterosexual marriage as the sole locus of non-criminal sexual intimacy puts all varieties of same-sex sexuality in legal limbo. This is an area of legal uncertainty that may well be clarified in public discussion over the next three years. However, in light of what the gay-rights activist Dede Oetomo has described as the 'LGBT panic' that has swept Indonesia since the 2010s,[8] supporters of sexual liberalization worry that the draft code's criminalization of extramarital sex may be extended to include same-sex intimacies. Another fear is that, by drawing attention to sexual matters heretofore handled in a quiet or off-stage manner, the draft legislation may encourage acts of vigilantism to suppress and punish non-conforming sexualities, as has occurred in recent years in the province of Aceh in Sumatra.

The second array of issues that have generated controversy are articles 218, 219,[9] 220,[10] and 240,[11] which make defamation of the president, vice-president, and Indonesian political institutions subject to up to three years of imprisonment. In a similar spirit, Article 188 stipulates that anyone promoting Marxism-Leninism and/or opposition to the country's national ideology, the *Pancasila* ('five principles') is subject to a fine or up to five years in prison. In addition to human rights activists,[12] the country's well-respected association of journalists has spoken out against these articles, rightly noting that they put in peril the robust freedoms enjoyed by Indonesia's press since 1998-1999. Whereas the draft criminal code's articles dealing with extra-marital sexualities may well enjoy a significant measure of public support, many in the Indonesian public regard the protections of national politicians as an unjustified concession to establishment elites. Pressure may yet grow for these articles to be revised.

---

[6] See, eg, TUHP (n 3) articles 411, 412 for sex outside of marriage and cohabitation between unmarried partners.
[7] I have witnessed many such incidents over the course of my years of research in rural Java.
[8] See Tim Mann, 'Dede Oetomo on the LGBT Panic', *Indonesia at Melbourne* (Blog, 17 March 2016) <https://indonesiaatmelbourne.unimelb.edu.au/interview-dede-oetomo-on-the-lgbt-panic/>.
[9] TUHP (n 3) arts 218 and 219, publicly attacking the honour or dignity of the president.
[10] Prosecutions by complaint in writing from the president or vice president.
[11] Public verbal or written insults against government or state institutions.
[12] See 'Indonesia: New Criminal Code Disastrous for Rights', *Human Rights Watch* (Web Page, 8 December 2022) <https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights>.

The third and final set of issues on which the new criminal code touches are among the most legally complex. These are articles dealing with the defamation (*penodaan*) of recognized religions, matters referred to in international reporting as Indonesia's 'blasphemy' laws. The new criminal code does not revoke the existing blasphemy law.[13] In keeping with the spirit of that earlier legislation, articles 300 and 302 of the new code forbid actors from promoting interpretations of a religion in a manner that 'deviates from the tenets' of Indonesia's six state-recognized religions (Islam, Protestant Christianity, Catholicism, Hinduism, Buddhism, and Confucianism). Article 302 of the new criminal code makes it a crime (subject to a maximum of four years' imprisonment) to attempt to convert someone already professing one of these religions. The new criminal code also retains Indonesia's legal prescription against atheism; the nation requires all its citizens to affiliate with a state-recognized religion.[14]

Notwithstanding what many human rights activists regard as a serious threat to rights of conscience, in one regard articles 300-305 of the new criminal code amount to a small but significant expansion of religious freedom. Whereas previous presidential edicts and national legislation have extended state-recognition only to six 'religions' (*agama*), the new criminal code extends those same protections to the long-marginalized practitioners of 'spiritual beliefs' (*kepercayaan*). The latter is a variety of religiosity associated both with local indigenous religions and with the country's varied mystical associations. Although in 2016 Indonesia's Constitutional Court surprised many observers by instructing the government to extend civil protections to spirituality groups, the new draft criminal code makes this inclusive recognition of *kepercayaan* even more explicit.[15] This portion of the new criminal code represents a significant step toward a more inclusive practice of religious recognition, albeit within a thoroughly non-secular legal framework.

All three of these legal matters – extra-marital sexualities, defamation of national politicians and institutions, and state-recognition of religion and beliefs – are certain to be the subject of extensive public debate over the next three years. What is clear at this point is that the contests will generate intensified rivalries and mobilizations among Indonesia's three primary political currents: democracy activists, Islamist conservatives, and *Pancasila* nationalists of a broadly democratic but socially conservative variety. To judge by their broad support among mainstream Muslim organizations, articles dealing with sexuality may well not be among those subject to the greatest pressures for revision. But public discussion may yet soften some of the draft code's articles dealing with acts of defamation against political officials or national institutions. These arguably are among the new criminal code's articles most antithetical to post-Suharto Indonesia's significant but unfinished democratic achievement.

[13] Regulation No 1/PNPS/1965, introduced by President Sukarno now in art 156a of KUPH.

[14] I am grateful to Dr. Zainal Abidin Bagir of Gadjah Mada University for his personal communication on these details of the criminal code in January 2023.

[15] See Samsul Maarif, et al, 'Merangkul Penghayat Kepercayaan Melalui Advokasi Inklusi Sosial: Belajar dari Pengalaman Pendampingan', *Centre for Religious and Cross Cultural Studies* (Web Site, July 2019) < Merangkul_Penghayat_Kepercayaan_melalui.pdf>.