

Religious Freedom and Freedom from Religious Discrimination: Implications for the Religious Discrimination Bill

Ysabel Andrea Abordo*

Alex Deagon**

This article argues that religious freedom and freedom from religious discrimination are distinct but conceptually linked; in particular, freedom from religious discrimination is a sub-category of religious freedom. Their conceptual relationship is grounded in a common foundation of autonomy. However, autonomy in this context is not purely individualistic and includes group aspects. The article draws on this analysis to consider whether the most contentious provisions of the Commonwealth's 2021 Religious Discrimination Bill were appropriate to include as properly implementing principles of freedom from religious discrimination. The article suggests that the 'statement of belief' provision was not appropriate to include because it implemented religious freedom principles more broadly. Conversely, the 'conduct that is not discrimination' provision implemented freedom from religious discrimination principles and therefore was appropriate to include in the Bill.

I. INTRODUCTION

Religious freedom and freedom from religious discrimination are distinct ideas which share some conceptual overlap, but there is little consensus with respect to the precise nature of their relationship.¹ This presents a problem which is illustrated by the now lapsed Religious Discrimination Bill 2021 (Cth) ('RDB'). Critics argued that the RDB exceeded the traditional scope of discrimination legislation by incorporating principles of religious freedom, which resulted in some tensions in key provisions.² The most contentious provisions were the 'statement of belief' provision (cl 12), which would have allowed a person to make a statement of religious belief or about religion which may be offensive, and the 'conduct which is not discrimination' provision (cl 7), which would have allowed religious bodies to engage in conduct which may appear to be discriminatory.³ This article argues that freedom from religious discrimination is a sub-category of religious freedom. In this way they are distinct but conceptually linked. As a consequence, they share a common conceptual foundation of

* LL.B.(Hons) Candidate, Queensland University of Technology (conferral expected in 2023).

** Associate Professor, 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 See, eg, Ronan McCrea, 'Squaring the Circle: Can an Egalitarian and Individualistic Conception of Freedom of Religion or Belief Co-Exist with the Notion of Indirect Discrimination?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 149; Jonathan Fox, *Thou Shalt Have No Other Gods before Me: Why Governments Discriminate against Religious Minorities* (Cambridge University Press, 2020) 20; Ilias Trispiotis, 'Religious Freedom and Religious Antidiscrimination' (2019) 82(5) *Modern Law Review* 864, 864.

² Renae Barker, 'The Freedom of Religion Debate: Where Are We and How Did We Get Here?' (2020) 47(4) *Brief* 27, 29 ('*Freedom of Religion Debate*').

³ Kirrily Schwartz, 'Discrimination: Spotlight on Religious Discrimination' [2020] 65 (April) *Law Society of New South Wales Journal* 36, 39.

autonomy. The article then draws on this analysis to consider the implications for these two contentious provisions of the RDB. To be conceptually consistent, the RDB would need to only include freedom from religious discrimination protections such as the ‘conduct that is not discrimination’ provision, not religious freedom protections more broadly, such as the ‘statement of belief’ provision. The former provision is included by virtue of the incorporation of group aspects.

Part II articulates definitions of religious freedom and freedom from religious discrimination to show that freedom from religious discrimination is a sub-category of religious freedom. Part III suggests both concepts are therefore grounded in a common foundation of autonomy, which also entails ethical independence. However, autonomy does not adequately take the communal nature of religion into account, so the article argues incorporation of group aspects is necessary. Part IV transitions to the RDB and considers its political context with respect to the conceptual relationship between religious freedom and freedom from religious discrimination. Part V applies the principles articulated in Parts II and III, suggesting that the ‘statement of belief’ provision was outside the scope of the RDB because it primarily involved principles of religious freedom more broadly, while the ‘conduct which is not discrimination’ provision was within the scope of the RDB because it primarily involved principles of freedom from religious discrimination.

II. DEFINING RELIGIOUS FREEDOM AND FREEDOM FROM RELIGIOUS DISCRIMINATION

This part argues that freedom from religious discrimination is a sub-category of religious freedom, and as such, the ideas are distinct but conceptually linked.

Religious Freedom

There is no consensus on a definition of religious freedom.⁴ Ilias Trispiotis states that there is a lack of clarity regarding its purpose, its relationship with freedom from religious discrimination, and how it affects areas such as the workplace, education, and the wider community.⁵ In response to this ambiguity, Trispiotis, Heiner Bielefeldt, Tarunabh Khaitan, Jane Calderwood Norton, and Lucy Vickers are prominent examples of authors who attempt to define religious freedom, explain its purpose, and distinguish it from freedom from religious discrimination. These attempts set out below are illustrative rather than comprehensive. It is also worth noting that in this article we will primarily be engaging with the secondary literature. Except for the purposes of illustration, to also engage with the primary materials is beyond the scope of our aim, which is to address particular theoretical problems which arise from the secondary materials and consider the implications for the RDB.

Khaitan and Calderwood Norton note that religious freedom ‘is best understood as protecting our interest in religious (non) adherence’.⁶ They use the term (non) adherence to mean sole ‘commitment to some combination of a set of beliefs or practices’⁷ by religious or non-religious

⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Legal Foundations of Religious Freedom in Australia* (Interim Report, November 2017) 15 [3.1]; Fox (n 1) 20.

⁵ Trispiotis (n 1) 864.

⁶ Tarunabh Khaitan and Jane Calderwood Norton, ‘The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretical Distinctions’ (2019) 17(4) *International Journal of Constitutional Law* 1125–6.

⁷ *Ibid* 1129, 1138.

persons, to the exclusion of other beliefs or practices.⁸ For instance, an individual's adherence to a Christian faith and its practices would therefore mean non-adherence to a Jewish faith.⁹ For a non-religious individual, their adherence to non-practice of a religion means non-adherence to any or all religions.¹⁰ Furthermore, decisional autonomy is considered the foundation for religious freedom, which allows for an individual to have the opportunity to adhere or not adhere to a religion.¹¹ Khaitan and Calderwood Norton take an approach similar to Trispiotis¹² and Vickers¹³ by including non-religious persons in defining religious freedom. Brian Leiter also reflects this view in the sense of grounding 'liberty of conscience' in 'being able to choose what to believe and how to live', which is an autonomy justification that includes non-religious persons.¹⁴ Khaitan and Calderwood Norton give a broad reading to 'beliefs and practices' by acknowledging that religion can be communal and thus extends beyond the individual, and noting the degree of adherence can vary depending on the religion.¹⁵ Heiner Bielefeldt provides implied support for Khaitan and Calderwood Norton's definition, arguing that religious freedom values diversity (that is, the wealth of different beliefs and practices) and the individual's continuous search for meaning.¹⁶ Bielefeldt also considers that religious freedom entails the freedom to proselytise, publicly and privately worship, and to embrace new religious beliefs, among other aspects.¹⁷ An individual's ability to adhere (or not adhere) to a religion should be protected. Khaitan and Calderwood Norton's definition of religious freedom is therefore an appropriate starting point as it is broad enough to protect religious and non-religious individuals and recognises that an individual's degree of adherence can differ depending on the religion.

Trispiotis describes religious freedom as a vertical relationship between the individual, the state, and each other.¹⁸ Trispiotis grounds the concept in 'ethical independence', which is a person's freedom to 'pursue their own ethical or religious commitments' within the limits of state interference.¹⁹ Interference is reasonable where it is 'prescribed by law, pursue[s] a legitimate aim and [is] necessary in a democratic society'.²⁰ It should be noted that ethical independence as the foundation for religious freedom is ostensibly distinct from Khaitan and Calderwood Norton's argument for decisional autonomy as the foundation for religious freedom.²¹ This tension between conceptual foundations is analysed further in Part III.

An important aspect of understanding the scope of religious freedom is understanding when it may be limited. Since state interference is reasonable if it is necessary and pursues a legitimate aim (such as protecting the fundamental rights and freedoms of others), the state plays an active

⁸ Ibid 1129–30.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid 1137.

¹² Trispiotis (n 1) 887.

¹³ Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2nd ed, 2016) 10.

¹⁴ Brian Leiter, 'Why Tolerate Religion?' (2008) 25(1) *Constitutional Commentary* 1, 7. For an extended articulation of Leiter's argument see Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013).

¹⁵ Khaitan and Calderwood Norton (n 6) 1131–2.

¹⁶ Heiner Bielefeldt, 'Freedom of Religion or Belief--A Human Right under Pressure' (2012) 1(1) *Oxford Journal of Law and Religion* 15, 16–7.

¹⁷ Ibid 21–2.

¹⁸ Trispiotis (n 1) 878.

¹⁹ Ibid 866.

²⁰ Ibid 870.

²¹ Khaitan and Calderwood Norton (n 6) 1127.

role in determining the extent of religious freedom in society.²² Amos Guiora points out that states should be more proactive in limiting freedom of speech and association to prevent and mitigate the rise of religious extremism.²³ In Australia, for example, Poulos notes that there has been heavy politicisation of religious freedom, and as a result, legislators have prevented religious individuals from maximising their religious freedom.²⁴ Vickers also notes the ongoing problem of balancing competing rights.²⁵ Vickers recognises that religious freedom is multifaceted; it includes the right to not have religious beliefs and to be free from religious influences.²⁶ This potentially creates tension in areas such as the workplace and education, especially where non-religious parents are reluctant for their child to follow a religious school's ethos. It is also important to acknowledge that different religious groups have varying needs, and this may conflict with the interests of non-religious groups — and the interests of both groups may change over time.²⁷

Freedom From Religious Discrimination

Similar to religious freedom, there is no consensus on a definition of freedom from religious discrimination.²⁸ It is generally considered to be part of discrimination law and aims at bridging disadvantage due to an individual's belief or religion.²⁹ Khaitan and Calderwood Norton define freedom from religious discrimination 'as protecting our interest in the unsaddled membership of our religious group'.³⁰ Unsaddled membership covers external factors (economic, social, and political) that may influence an individual's religious adherence.³¹ Freedom from religious discrimination protects a person's privileges and mitigates any disadvantages from being part of a religious group.³² They claim an individual's degree of religious adherence is irrelevant, as external disadvantages of religious membership are beyond a person's control.³³ Hence, freedom from religious discrimination sits along the spectrum of discrimination, with the goal of bridging the gap between religious groups and the wider community.³⁴

Khaitan and Calderwood Norton's approach is supported by Trispiotis and Vickers.³⁵ Trispiotis describes freedom from religious discrimination as a horizontal relationship, where protection of this right contributes to distributive justice.³⁶ This means the state is responsible for addressing any disparity and fairly generating opportunities for religious individuals,³⁷ especially within the education and employment sector.³⁸ Where the disadvantages are addressed the individual is able to undertake their life plans.³⁹ However, there are also vertical

²² Trispiotis (n 1) 870.

²³ Amos Guiora, *Freedom from Religion: Rights and National Security* (Oxford University Press, 2013) 10.

²⁴ Elenie Poulos, 'Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom' (2019) 10(10) *Religions* 583, 583.

²⁵ Vickers (n 13) 3.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Fox (n 1) 20.

²⁹ Khaitan and Calderwood Norton (n 6) 1143; Trispiotis (n 1) 866.

³⁰ Khaitan and Calderwood Norton (n 6) 1126.

³¹ *Ibid.*

³² *Ibid* 1133.

³³ *Ibid* 1133–4.

³⁴ *Ibid* 1141.

³⁵ Trispiotis (n 1) 881; Vickers (n 13) 1–2.

³⁶ Trispiotis (n 1) 880.

³⁷ *Ibid* 881.

³⁸ *Ibid* 885.

³⁹ *Ibid.*

aspects to freedom from religious discrimination. For example, if a state imposes a religious test for public office, the state creates a disadvantage for religious individuals and it is the responsibility of the state to remove that disadvantage so that religious individuals are free to adhere to their commitments. Vickers also considers some of the tensions of freedom from religious discrimination.⁴⁰ For example, she states that freedom from religious discrimination may be challenged where religious groups discriminate against an individual, such as in cases where religious schools want to employ persons of the same faith and may therefore discriminate against those who do not share the same faith.⁴¹ She then lists other relationships that may be affected where a right to freedom from religious discrimination is encroached, including discrimination by religious groups with respect to individuals who practice the same religion but have diverse beliefs.⁴² On the other hand, Vickers also notes that freedom from religious discrimination is challenged from the perspective of religious groups where they are unable to choose members which adhere to their doctrine, because then religious groups are not able to exist on the same footing as other groups which choose members on the basis of beliefs (such as political parties).⁴³ This difficulty is particularly illustrated by the ‘conduct that is not discrimination’ provision in the RDB.

In general, Khaitan and Calderwood Norton propose that religious freedom and freedom from religious discrimination are separate rights as each protects distinct religious interests.⁴⁴ Religious freedom protects an individual’s (non) adherence to their religious or non-religious commitments, while freedom from religious discrimination concerns an individual’s interest that their religious group is protected from economic, social, and political disadvantage compared to other religious and non-religious groups.⁴⁵ Ronan McCrea,⁴⁶ Khaitan and Calderwood Norton,⁴⁷ and Trispiotis⁴⁸ also to some extent distinguish religious freedom as an individual right, while categorising freedom from religious discrimination as a group-based right. However, Trispiotis concedes that both concepts overlap.⁴⁹ For example, an individual is unable to experience religious freedom if their freedom from religious discrimination is not protected.⁵⁰ Furthermore, there are cases where individuals experience violence because of their religious group membership, or cases where a religious group is denied legal status.⁵¹ The religious freedom of both individuals and groups is infringed when individuals or groups suffer religious discrimination. This implies that there is a conceptual link between religious freedom and freedom from religious discrimination even though they are distinct ideas.

Freedom from religious discrimination is aimed at bridging disadvantages due to an individual’s religious beliefs.⁵² Religious freedom is aimed at protecting (non) adherence to an individual’s religious or non-religious commitments.⁵³ These are distinct concerns. Yet, entailed in protecting (non) adherence to an individual’s religious or non-religious

⁴⁰ Vickers (n 13) 2.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid 94–5.

⁴⁴ Khaitan and Calderwood Norton (n 6) 1136.

⁴⁵ Ibid 1145.

⁴⁶ McCrea (n 1) 162.

⁴⁷ Khaitan and Calderwood Norton (n 6) 1141–2.

⁴⁸ Trispiotis (n 1) 880.

⁴⁹ Ibid 868.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid 866.

⁵³ Khaitan and Calderwood Norton (n 6) 1129.

commitments is bridging disadvantage which burdens the ability of individuals to adhere to their religious commitments, as in the religious test example where imposing a disadvantage decreases freedom to adhere to commitments. Thus, we propose that freedom from religious discrimination is more precisely a sub-category of religious freedom. These definitions of religious freedom and freedom from religious discrimination are broad enough to cover both religious and non-religious individuals. Both concepts also require the incorporation of group aspects, and consideration of how to balance state interference and competing interests, such as other human rights, non-religious interests, and other religious groups. These principles are further explored in the following part.

III. THEORETICAL RELATIONSHIP BETWEEN RELIGIOUS FREEDOM AND FREEDOM FROM RELIGIOUS DISCRIMINATION

This part further explores two tensions identified in the previous part. First, it considers the ostensibly distinct conceptual foundations of ethical independence and autonomy, arguing that these can be aspects of the same broader autonomy rationale which undergirds both religious freedom and freedom from religious discrimination (as a sub-category of religious freedom). Second, it argues that any conceptual foundation for these concepts must properly take into account the communal nature of religion, and so this part augments an individualistic autonomy rationale by incorporating group aspects. The principles articulated in this part are then applied in an analysis of the two contentious provisions of the RDB in Part V.

Autonomy and Ethical Independence

Khaitan and Calderwood Norton propose ‘decisional autonomy’ as the foundation for religious freedom.⁵⁴ Decisional autonomy empowers individuals to make their own decision in practicing (or not practicing) their religion, and underpins diversity between and within religions.⁵⁵ Decisional autonomy can be considered a subset of general autonomy, as both share similar preconditions. This includes an individual’s ability to make their own decisions on how to best live out their life, without any internal or external interferences.⁵⁶

Farrah Ahmed agrees with Khaitan and Calderwood Norton and defines autonomy as ‘the ideal of controlling, creating, authoring or shaping one’s own life’.⁵⁷ This ideal is met where the individual has a ‘degree of freedom from coercion and manipulation, and possession of an adequate range of options’, along with identification towards a particular idea or belief.⁵⁸ Ahmed argues that autonomy is widely recognised as a conceptual foundation of religious freedom in both scholarship and relevant case law.⁵⁹ Ahmed acknowledges some weaknesses

⁵⁴ Khaitan and Calderwood Norton (n 6) 1127.

⁵⁵ Ibid 1138.

⁵⁶ Farrah Ahmed, ‘The Autonomy Rationale for Religious Freedom’ (2017) 80(2) *Modern Law Review* 238, 239; Khaitan and Calderwood Norton (n 6) 1138–9.

⁵⁷ Ahmed (n 56) 239.

⁵⁸ Ibid 241.

⁵⁹ Ibid 239. See, eg, Nicholas Hatzis, ‘Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination’ (2011) 74(2) *Modern Law Review* 287, 292; Vickers (n 13) 39; Khaitan and Calderwood Norton (n 6) 1137; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001) 33. English and Canadian courts have applied autonomy as the rationale for religious freedom in cases such as *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 and *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, and international law recognises autonomy as a rationale in seminal cases such as *Kokkinakis v Greece* (1994) 260 Eur Court HR (ser A) and *Sahin v Turkey* [2005] XI Eur Court HR 173. There are of course other potential theoretical foundations for religious freedom such as theology and natural law: see, eg, J Daryl Charles, *Natural Law and Religious Freedom* (Routledge, 2018); Karen

of grounding religious freedom under autonomy. She particularly cites manipulative proselytism and the hesitance of religious individuals to revise their beliefs.⁶⁰ Firstly, manipulative proselytism is most relevant where parents decide to raise their children in accordance with a religion. This may include enrolling them in a religious school, thus undermining children's autonomy.⁶¹ Secondly, an individual's autonomy is weakened when they have religious beliefs that become inconsistent with their personal beliefs.⁶² For instance, an individual's religious belief might mandate that voluntary assisted dying is evil, but after empathising with a friend who is suffering a serious illness, the individual personally believes otherwise.⁶³ The individual is then unable to make an autonomous decision supporting or dissenting from their longstanding religious belief. Therefore, they cannot experience true religious freedom.⁶⁴ Trispiotis also contends that an autonomy rationale 'cannot justify' a broad protection of religious freedom 'which includes practices that do not enhance autonomy, such as those involving autonomy-diminishing resistant beliefs and manipulative proselytism'.⁶⁵

In response to these weakness, Ahmed suggests Ronald Dworkin's principle of authenticity as an alternative to autonomy, which is linked to Dworkin's rationale of 'ethical independence'.⁶⁶ Dworkin describes ethical independence as a relationship where the state is unable to restrict the freedom of citizens, thus allowing them to decide how to live their life.⁶⁷ This means an individual can be authentic in the sense of making their own decisions regarding their religious views.⁶⁸ Interference is limited to cases where the state needs to protect a vulnerable group by, for example, protecting them from harm or facilitating their welfare.⁶⁹ Dworkin argues that religious freedom is better grounded in ethical independence because it covers both religious and non-religious individuals, and ethical independence assumes that no particular faith or belief is superior to another.⁷⁰ As already noted in the previous part, Trispiotis agrees, claiming that ethical independence allows for individuals to pursue their life plans, while maintaining the balance between state interference and liberty.⁷¹

Ahmed therefore considers ethical independence as an important aspect of religious freedom because it places the burden on the state to enable an individual to have options in living a religious life (which extends to religious doctrine and personal belief).⁷² Autonomy conversely places the burden on the individual to actively make the decisions to enable themselves to live (or not live) a religious life.⁷³ However, ethical independence also has weaknesses. At its core, ethical independence gives no special value to religion.⁷⁴ This presents problems because

Taliaferro, *The Possibility of Religious Freedom: Early Natural Law and the Abrahamic Faiths* (Cambridge University Press, 2019). We do not consider these in this article for the sake of space and instead focus on autonomy as one of the most prominent options.

⁶⁰ Ahmed (n 56) 240.

⁶¹ Ibid 257.

⁶² Ibid 247.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Trispiotis (n 1) 874.

⁶⁶ Ahmed (n 56) 260.

⁶⁷ Ronald Dworkin, *Religion without God* (Harvard University Press, 2013) 130 ('*Religion Without God*').

⁶⁸ Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 211.

⁶⁹ Dworkin, *Religion without God* (n 67) 130.

⁷⁰ Ibid 134.

⁷¹ Trispiotis (n 1) 865, 873.

⁷² Ahmed (n 56) 260–1.

⁷³ Ibid 239.

⁷⁴ Matthew Clayton, 'Is Ethical Independence Enough?' in Cécile Laborde and Aurélia Bardou (eds), *Religion in Liberal Political Philosophy* (Oxford University Press, 2017) 142.

ethical independence does not protect individuals who believe they must follow their religious beliefs, such as conscientious objectors.⁷⁵ Ethical independence also cannot account for religious exemptions because these may accommodate some but not all religions, and therefore not all individuals are given options for how to best live their life.⁷⁶ In addition, such individuals are also vulnerable to instances of religious discrimination, limiting their options to live a life of their choosing.⁷⁷

Decisional autonomy and ethical independence can be reconciled as a common conceptual foundation for religious freedom and freedom from religious discrimination. Both decisional autonomy and ethical independence focus on the ability of an individual to choose how to live their life with respect to religion without external interference (religious freedom). Choice is appropriately extended to both religious and non-religious individuals.⁷⁸ Some individuals experience a disadvantage which hinders this choice, perhaps due to external interference (religious discrimination). Mitigating disadvantage (freedom from religious discrimination) provides the conditions for an individual to freely pursue the religion of their choice (religious freedom).⁷⁹ Freedom from religious discrimination is therefore a necessary condition for religious freedom. This fact further supports the claim that freedom from religious discrimination is a sub-category of religious freedom, despite their distinctive emphases on mitigating disadvantage and life choices respectively.

Though ethical independence focuses on the state as the enabler of choice, this can be incorporated into the autonomy rationale: the state is responsible for allowing its citizens to have autonomy in the sense of protecting them from coercion and manipulation and ensuring they have access to a wide range of options, but this state interference can also be reasonably limited to maintain the autonomy and ethical independence of others.⁸⁰ For example, a religious individual can have autonomy in the workplace where accommodation for their religious beliefs is proportional to competing religious interests and does not interfere with the ethical independence of the employer and non-religious employees.⁸¹ Combining autonomy and ethical independence also addresses the weaknesses of both rationales. Autonomy can facilitate the choice of religion as a special way of authoring one's life which can be accommodated through exemptions and conscientious objections, while ethical independence can facilitate genuine choice which addresses situations where autonomy is limited by interference, such as manipulative proselytism and revising beliefs.

Hence, autonomy is a broader conceptual framework that can entail ethical independence.⁸² It provides a more robust rationale which is recognised in the scholarship and international law (as noted above) and incorporating ethical independence can address the shortcomings of both rationales. In this sense autonomy can properly be considered as a conceptual foundation for religious freedom and freedom from religious discrimination.⁸³ The next section continues to refine the autonomy rationale by considering the group aspect of religion.

⁷⁵ Ibid 141.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Khaitan and Calderwood Norton (n 6) 1138; Dworkin, *Religion without God* (n 67) 134.

⁷⁹ Ahmed (n 56) 239; Khaitan and Calderwood Norton (n 6) 1134; Dworkin, *Religion without God* (n 67) 130.

⁸⁰ Ahmed (n 56) 243; Trispiotis (n 1) 865–6.

⁸¹ Vickers (n 13) 65; Trispiotis (n 1) 873.

⁸² See, eg, Michael J Sandel, 'Religious Liberty--Freedom of Conscience or Freedom of Choice?' 1989(3) *Utah Law Review* 597, 609.

⁸³ Ahmed (n 56) 261.

Individual and Group Aspects

This section examines the group aspect of religion to refine autonomy as a conceptual foundation for religious freedom and freedom from religious discrimination. Calderwood Norton grounds religious freedom in the individual, who is then able to join (or form) religious organisations. This provides the individual with access to further guidance and knowledge for a better religious life.⁸⁴ An individual's religious freedom is enriched by membership within a religious organisation; without this, an individual cannot fully live autonomously and maximise their religious freedom.⁸⁵ Government interference (a kind of religious discrimination) which hinders membership of a religious organisation also conflicts with an individual's autonomy to live a religious life, again illustrating how freedom from religious discrimination is a sub-category of religious freedom in the specific context of groups.⁸⁶

Calderwood Norton distinguishes between the internal and external activities of religious groups with respect to autonomy.⁸⁷ External activities include matters within the public sphere that are 'external or outside the essential purpose of the [religious group]'.⁸⁸ More autonomy is given to religious groups for activities that are internal to the group and part of their essential religious purpose, thus allowing religious groups (comprised of individuals) more options on living their lives alongside their religious beliefs.⁸⁹ There are difficulties in providing examples for internal activities, as both kinds of activities overlap and the categorisation of internal or external shifts depend on perspective. A non-religious approach might draw sharp boundaries between internal and external activities, while some religious individuals and groups do not view their religious practice as something that is so easily divisible.⁹⁰ For instance, employment in a religious organisation is both an internal and external activity because it draws in an external person, but that person may be required to meet particular religious conditions set by the organisation.⁹¹ In this context there are tensions between protecting the internal doctrine of the religious organisation, protecting the interests of the external applicant, and protecting the state's external interest in removing employment discrimination.⁹² Although there are potential abuses in allowing religious groups full autonomy with respect to internal activities, Calderwood Norton resolves this concern by arguing that the state retains power to interfere in cases where group activities are inconsistent with autonomy or where an individual is at a risk of harm when they decide to join the group.⁹³

External activities are more likely to be subject to discrimination law and state interference.⁹⁴ As external activities include 'engaging with non-members' the state has a larger concern in protecting individuals from harm or discrimination from religious groups.⁹⁵ For instance, religious groups supply goods and services to both their followers and the general

⁸⁴ Jane Calderwood Norton, *Freedom of Religious Organizations* (Oxford University Press, 1st ed, 2016) 37.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* 39.

⁸⁸ *Ibid.* 205.

⁸⁹ *Ibid.* 199–200.

⁹⁰ *Ibid.* 200, 202.

⁹¹ *Ibid.* 202; Joel Harrison, 'The Liberal Political Imagination and Religious Liberty: Autonomy, Boundary-Refining, and State Power in Jane Calderwood Norton's *Freedom of Religious Organizations*' (2017) 42(1) *Australian Journal of Legal Philosophy* 280, 289–290 ('*The Liberal Political Imagination and Religious Liberty*').

⁹² Calderwood Norton (n 84) 202; Harrison, *The Liberal Political Imagination and Religious Liberty* (n 91) 289–90.

⁹³ Calderwood Norton (n 84) 31, 65.

⁹⁴ *Ibid.* 65.

⁹⁵ *Ibid.*

community.⁹⁶ Calderwood Norton argues that theoretically this means religious groups consent to obey state laws and acknowledge that these laws will not unnecessarily burden their religious doctrine or purpose. She concedes that religious groups may seek exceptions to increase their autonomy and maximise religious freedom.⁹⁷ In the United Kingdom, for example, there are sexual and religious discrimination exceptions for religious groups in providing goods and services. Religious groups are allowed to restrict the provision of goods or the use of a place where it is normally used for religious purposes on the basis of ‘belief or sexual orientation’.⁹⁸ Similar to the earlier example on seeking employment in religious organisations, these exceptions involve overlaps between internal and external activities because there is a tension when goods and services are offered externally by a religious organisation, but only on the basis of internal conditions set by the doctrine of the organisation.⁹⁹

Nicholas Aroney disagrees with Calderwood Norton’s perspective regarding the individual autonomy foundation of the religious group, as he argues that religion is irreducibly communal and, thus, transcends the individual. The religious freedom of individuals is maximised when individuals join a religious group, not because it increases their autonomy but because religious freedom starts and ends with religious groups.¹⁰⁰ Religious freedom ‘must necessarily have individual, associational and communal dimensions’ which support the ability of religious individuals to gather together in groups to manifest their religion, and supports the ability of groups to maintain their ‘distinctive identity’.¹⁰¹ Aroney illustrates his argument using the freedom of religion provision in Section 116 of the Australian Constitution and international law.¹⁰² Firstly, the freedom of religion provision in s 116 of the Australian Constitution contains the term ‘religion’, which is a set of beliefs or ideas shared by a group, and manifested by conduct.¹⁰³ The ordinary meaning of religion therefore itself implies religion is communal, in comparison to the implication if the constitutional drafters used the terms ‘belief, conscience or conviction’.¹⁰⁴ In addition, according to an ordinary reading, s 116 protects any legal personality, including individuals, associations, and corporations.¹⁰⁵

Aroney’s reading of the case law affirms the argument that s 116 protects both individuals and groups.¹⁰⁶ In *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)*,¹⁰⁷ Mason ACJ and Brennan J state that individuals and groups are both entitled to practice the religion of their choice, notwithstanding the type of religion.¹⁰⁸ Additionally, Wilson and Deane JJ suggest that group identity is a strong factor supporting the existence of a religion, regardless of whether the group has a clear doctrine or is loosely formed.¹⁰⁹ Murphy J similarly concluded

⁹⁶ Ibid 163.

⁹⁷ Ibid 205–6.

⁹⁸ *Equality Act 2010* (UK) sch 23 para 2(3). Australia has similar provisions in s 47B of the *Marriage Act 1961* (Cth), which allows bodies established for religious purposes to refuse to provide goods or facilities for the solemnisation of a marriage if the refusal conforms to the doctrine of the body.

⁹⁹ Calderwood Norton (n 84) 206.

¹⁰⁰ Nicholas Aroney, ‘Individual, Community and State: Thoughts on Jane Norton, Freedom of Religious Organizations’ (2017) 42(1) *Australian Journal of Legal Philosophy* 270, 274–5.

¹⁰¹ Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33(1) *University of Queensland Law Journal* 153, 183–4 (*Freedom of Religion*).

¹⁰² Ibid 154–5.

¹⁰³ Ibid 156.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 158.

¹⁰⁷ (1953) 154 CLR 120 (*Church of the New Faith*).

¹⁰⁸ Ibid 136; Aroney, *Freedom of Religion* (n 101) 162.

¹⁰⁹ *Church of the New Faith* (n 107) 174; Aroney, *Freedom of Religion* (n 101) 163.

that a religious group is a group that ‘claims to be religious or offers a way to find meaning and purpose in life’.¹¹⁰ Therefore, all five justices acknowledged that religion has a ‘group’ element.¹¹¹ In *Jehovah’s Witnesses*, a majority held that the Witnesses were competent to bring their action as an incorporated organisation — which implies the majority assumed the protection granted to s 116 extends to groups.¹¹² Furthermore, group-based religious freedom is reflected in international law provisions, such as Articles 18, 22, and 27 of the *International Covenant on Civil and Political Rights* (‘ICCPR’).¹¹³ These provisions allow individuals with similar beliefs to band together and create a group, and for individuals to exit, not join a group, or be expelled by the wider group, and for the group to express their shared doctrine.¹¹⁴ The fact that religion has group aspects has implications for how tensions between the autonomy of individuals and groups may be resolved with respect to activities of the group.

As Julian Rivers argues, groups should retain full autonomy with respect to membership such that group rights should prevail over individual rights in the event of conflict.¹¹⁵ Calderwood Norton’s solution is problematic because it limits the autonomy of groups (and consequently the autonomy of individuals within those groups) where decisions about group activities limit the autonomy of external individuals or impose harm upon them. As Aroney and Rivers correctly advocate, more weight should be given to the membership criteria of religious groups compared to the individual’s interest in joining the group, such that the distinctive identity, ethos, and doctrine of the religious group can be consistently preserved.¹¹⁶ This autonomy for religious groups might be legally protected in the form of exemptions which allow religious groups to engage in conduct against individuals which is necessary to protect the ethos of the group and consequently the autonomy of the group and its individual members (such as the ‘conduct that is not discrimination’ provision of the RDB).¹¹⁷ Without these exemptions, religious groups must justify their beliefs against non-religious individuals, which potentially compromises the autonomy and identity of religious groups and their religious freedom as a whole.¹¹⁸ Exemptions in this context simultaneously support freedom from religious discrimination for religious groups because it prevents undue external interference which would otherwise create a disadvantage for religious groups and their members. Thus, the autonomy of the group (and the individuals who comprise it) is upheld because the group is allowed to maintain its ethos in how it selects and regulates its members.

However, this does not mean the autonomy of the affected individual is ignored. The autonomy of the individual is also upheld because the individual is free to join another group or form their own group through a right of exit.¹¹⁹ The right of exit refers to an individual’s right to leave a religious group when they ‘no longer wish to live by the terms of [the religious group’s] association’.¹²⁰ Using the example of a religious group acting as an employer, an individual

¹¹⁰ *Church of the New Faith* (n 107) 151; Aroney, *Freedom of Religion* (n 101) 163.

¹¹¹ *Church of the New Faith* (n 107) 132, 135, 151, 174; Aroney, *Freedom of Religion* (n 101) 163.

¹¹² *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116; Aroney, *Freedom of Religion* (n 101) 159–161, 166. This is further reflected in *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, where it was ‘taken for granted’ that the Lebanese Moslem Association could bring the action as a group to protect its right to select its religious leaders.

¹¹³ Opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

¹¹⁴ Aroney, *Freedom of Religion* (n 101) 197.

¹¹⁵ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 321–2.

¹¹⁶ *Ibid*; Aroney, *Freedom of Religion* (n 101) 183–4.

¹¹⁷ Rivers (n 115) 322.

¹¹⁸ *Ibid* 321–2.

¹¹⁹ Calderwood Norton (n 84) 62.

¹²⁰ *Ibid* 57.

who becomes non-religious or wishes to practice a different faith is able to voluntarily leave the group and seek employment elsewhere, or join another religious group. Therefore, both individual and group religious freedom is protected. However, some individuals may not have the option of exiting their religious group.¹²¹ This compromises their autonomy, as they are unable to make fully-formed decisions about their religious beliefs outside of their religious group.¹²² For a right of exit to be sufficient to preserve autonomy, Calderwood Norton emphasises the ‘adequacy of the exit’, which includes educating the individual to be able to make their own decisions in matters of religion and making all choices meaningfully available to them (such as joining a different religious group or not practicing at all) so that they are not forced to continue as a member of the religious group.¹²³ Where there is an adequate right of exit, the individual utilises their autonomy and is able to practice (or not practice) their religious beliefs by joining (or not joining) another religious group, and the religious group is able to retain their autonomy in selecting their members in accordance with their doctrine. Aroney and Rivers therefore supplement a deficiency in Calderwood Norton’s view regarding the autonomy foundation of religious groups (that groups exist to enhance the autonomy of individuals). Rather, religion is intrinsically communal and it is the autonomy of groups which enables the autonomy of individuals (as supported by an adequate right of exit).

Preserving autonomy through a right of exit provides a reasonable avenue to allow religious groups to maximise their religious freedom and freedom from religious discrimination, while respecting those same rights for other religious and non-religious individuals. Both religious freedom and freedom from religious discrimination entail individual and group aspects, which ultimately refines autonomy as a rationale by acknowledging the group as an autonomous entity exercising distinct authority which is greater than the sum of its individual parts.¹²⁴ Hence, freedom from religious discrimination entails particular religious freedom principles through mitigating disadvantage due to an individual’s religion or belief in a group or individual context.¹²⁵ Where freedom from religious discrimination is met, religious groups can better practice their religious beliefs and protect their members, which allows them to ‘live a free and flourishing life’.¹²⁶ Individuals and groups cannot experience religious freedom if there is religious discrimination within their environment, and in this sense freedom from religious discrimination is a sub-category of religious freedom.¹²⁷ The next part considers these principles in an overview of the political context of the RDB before the final part applies these principles in an effort to resolve the question of whether the ‘statement of belief’ and ‘conduct which is not discrimination’ provisions were appropriate to include in the RDB.

IV. LEGISLATIVE AND POLITICAL CONTEXT OF THE RDB

The genesis of the RDB occurred through the same-sex marriage debate, which resulted in Australia recognising same-sex marriage in law through amending the legal definition of marriage. The debate emphasised the challenge of protecting religious freedom to uphold traditional beliefs of family and marriage in the context of a push for legal equality between all

¹²¹ Ibid 60.

¹²² Ahmed (n 56) 247.

¹²³ Calderwood Norton (n 84) 60–1, 157–8.

¹²⁴ Rivers (n 115) 321–2. See also Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020) 49–50, 174, 179.

¹²⁵ Trispiotis (n 1) 871.

¹²⁶ Khaitan and Calderwood Norton (n 6) 1141–2.

¹²⁷ Trispiotis (n 1) 881.

types of couples, regardless of gender or sexual orientation.¹²⁸ Specific issues raised included the freedom of religious celebrants to conduct weddings in accordance with their beliefs and the freedom of religious schools to continue teaching the traditional view of marriage.¹²⁹ In response, then Prime Minister Malcolm Turnbull commissioned an Expert Panel to analyse whether religious freedom is adequately protected within Australian law.¹³⁰ The Panel was colloquially termed the ‘Ruddock Review’ after the Panel’s Chair and former Howard Government Minister, Philip Ruddock.

The Ruddock Review can be seen as a gauge of the public’s interest in religious freedom protection in Australia.¹³¹ The submissions and the Report highlighted the inadequacy of religious freedom protections within Australian legislation, including the inconsistency of religious freedom protections across states and territories, the lack of positive religious freedom laws, gaps within anti-discrimination laws, and the limitations of religious freedom protections in the Australian Constitution.¹³² The Panel considered and rejected enacting a ‘Religious Freedom Act’ which would be aimed at protecting religious freedom, freedom of expression, and freedom of association.¹³³ They argued it would be difficult to prioritise religious freedom and attempt to balance this with other human rights.¹³⁴ They instead favoured a ‘Religious Discrimination Act’ intended to protect freedom from religious discrimination.¹³⁵ This recommendation was accepted by the Australian Government in December 2018 and resulted in the emergence of the RDB.¹³⁶ Importantly, in rejecting a ‘Religious Freedom Act’ and recommending a ‘Religious Discrimination Act’, the Panel itself distinguished between legislation protecting religious freedom and legislation protecting freedom from religious discrimination. This supports the argument that freedom from religious discrimination is a sub-category of religious freedom, and consequently they are distinct yet overlapping rights which should be protected in distinct legislation. It implies the RDB should contain protections for freedom from religious discrimination rather than religious freedom rights more broadly, but in doing so, the RDB will also necessarily protect aspects of religious freedom which are covered by the sub-category of freedom from religious discrimination.¹³⁷

Two exposure drafts of the RDB were released as part of a suite of religious discrimination legislation in 2019.¹³⁸ Overall, both exposure drafts elicited mixed responses before an updated version was introduced to Parliament in 2021.¹³⁹ In then Prime Minister Scott Morrison’s second reading speech in the House of Representatives, he emphasised the aims of the RDB, which included protecting beliefs of religious individuals and mitigating the disadvantages

¹²⁸ Ian McAllister and Feodor Snagovsky, ‘Explaining Voting in the 2017 Australian Same-Sex Marriage Plebiscite’ (2018) 53(4) *Australian Journal of Political Science* 409, 413–4.

¹²⁹ Elenie Poulos, ‘The Power of Belief: Religious Freedom in Australian Parliamentary Debates on Same-Sex Marriage’ (2020) 55(1) *Australian Journal of Political Science* 1, 1.

¹³⁰ *Religious Freedom Review* (Interim Report, 18 May 2018) 3 [1.2].

¹³¹ Harry Hobbs and George Williams, ‘Protecting Religious Freedom in a Human Rights Act’ (2019) 93(9) *Australian Law Journal* 721, 729–30.

¹³² *Ibid* 730.

¹³³ *Religious Freedom Review* (n 130) 41 [1.120].

¹³⁴ Hobbs and Williams (n 131) 730.

¹³⁵ *Religious Freedom Review* (n 130) 5.

¹³⁶ Australian Government, *Australian Government Response to the Religious Freedom Review* (December 2018) 17.

¹³⁷ *Religious Freedom Review* (n 130) 107 [1.435].

¹³⁸ Department of Attorney-General (Cth), *Religious Discrimination Bills: First Exposure Drafts* (Consultation Paper, 2019); Department of Attorney-General (Cth), *Religious Discrimination Bills: Second Exposure Drafts* (Consultation Paper, 2019).

¹³⁹ Religious Discrimination Bill 2021 (Cth) (‘RDB’).

suffered due to their religious beliefs.¹⁴⁰ These aims were consistent with the Panel’s vision for the ‘Religious Discrimination Act’ and a focus on securing protection for freedom from religious discrimination specifically rather than religious freedom more broadly. However, according to the Explanatory Memorandum, the ‘statement of belief’ provision was designed to protect the religious freedom of individuals, which includes expression of their religious beliefs without fear of legal action.¹⁴¹ The ‘conduct which is not discrimination’ provision allows for religious organisations (such as schools) to engage in conduct, consistent with religious doctrine, against an individual in good faith (such as refusing employment due to the prospective employee not sharing the beliefs of the organisation).¹⁴² The Explanatory Memorandum suggests the provision was designed to balance freedom of religion and association of religious groups with freedom of religion and association of religious individuals (both religious freedom principles), purporting to rely on the external affairs power for constitutional validity.¹⁴³ It is beyond the scope of this article to comment on the important question of the constitutional validity of the RDB.

The RDB was largely supported by religious groups, as the above provisions would have expanded protections for their religious freedom and freedom from religious discrimination.¹⁴⁴ However, critics argued that the RDB allowed harmful statements to be made under the façade of being ‘statements of belief’,¹⁴⁵ and allowed for religious bodies to ‘discriminate’ in employment, potentially placing vulnerable groups such as the LGBTQIA+ community at risk.¹⁴⁶ In the face of this division the RDB met an inauspicious end. Shortly after midnight on 10 February 2022 the RDB passed the House of Representatives but with amendments (supported by Coalition Government backbenchers and the Labor Opposition) to protect LGBTQIA+ students in the *Sex Discrimination Act 1984* (Cth) (‘SDA’).¹⁴⁷ It was then shelved by the Government in the Senate before it lapsed following the 2022 Australian Federal Election. The new Labor government has asked the Australian Law Reform Commission to examine the relationship between religious schools and anti-discrimination laws; a consultation process is underway at the time of writing.¹⁴⁸

It has been claimed that the RDB’s underlying issue is that it went beyond the traditional scope of discrimination legislation by incorporating principles of religious freedom — thus creating tensions between protecting religious freedom and protecting freedom from religious discrimination (as exemplified in the two contentious provisions of ‘statement of belief’ and

¹⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2021, 10812 (Scott Morrison, Prime Minister).

¹⁴¹ Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 53 [153], [158] (‘RDB Explanatory Memo’).

¹⁴² *Ibid* 11 [19].

¹⁴³ *Ibid* 10 [21], 11 [22]–[23].

¹⁴⁴ Paul Karp, ‘Faith Leaders Put Pressure on Labor to Support Religious Discrimination Bill’, *The Guardian* (online, 22 November 2021) <<https://www.theguardian.com/australia-news/2021/nov/22/faith-leaders-put-pressure-on-labor-to-support-religious-discrimination-bill>>.

¹⁴⁵ RDB (n 139) cl 5.

¹⁴⁶ Siobhan Marin, ‘Queer and Devout: The Australians Caught in the Middle of the Religious Discrimination Bill’, *ABC News* (online, 23 November 2021) <<https://www.abc.net.au/news/2021-11-23/religious-discrimination-bill-and-queer-christians/100635486>>.

¹⁴⁷ Paul Karp, ‘Anthony Albanese Warns Religious Discrimination Bill Could “Drive Us Apart” as Labor Pushes for Amendments’, *The Guardian* (online, 9 February 2022) <<https://www.theguardian.com/australia-news/2022/feb/09/labor-to-seek-protections-for-lgbtq-students-but-will-pass-religious-discrimination-bill-in-lower-house>>.

¹⁴⁸ See Australian Law Reform Commission, *Consultation Paper on Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, 27 January 2023).

‘conduct that is not discrimination’).¹⁴⁹ The aims of the RDB and the recommendations made in the Ruddock Review suggest that religious freedom and freedom from religious discrimination are distinct rights, and therefore should be in separate legislation. The RDB, as an anti-discrimination law, should only cover freedom from religious discrimination principles because religious freedom rights more broadly are beyond its proper scope. In Part V, we draw on the principles articulated in Parts II and III to engage with these claims, arguing that the ‘statement of belief’ provision is indeed susceptible to this criticism. However, the ‘conduct that is not discrimination’ provision exemplifies the fact that freedom from religious discrimination is a sub-category of religious freedom, and therefore it is appropriate to include in a law protecting freedom from religious discrimination — even though in doing so it also protects some aspects of religious freedom.

V. RELIGIOUS FREEDOM AND FREEDOM FROM RELIGIOUS DISCRIMINATION IN THE RDB

This part applies the above principles to the ‘statement of belief’ provision and the ‘conduct that is not discrimination’ provision. Fundamentally, where the provisions applied principles of freedom of religion more broadly, they should not have been included in the RDB. Conversely, where the provisions applied principles of freedom from religious discrimination, there was no conceptual problem with their inclusion in the RDB. This is so even in the case where religious freedom principles are simultaneously protected, because if freedom from religious discrimination is a sub-category of religious freedom, then protecting freedom from religious discrimination necessarily entails protecting some aspects of religious freedom. Importantly, we are not commenting on whether the RDB was preferable from a policy perspective if it included broader religious freedom protections. We are merely saying that the RDB would have been more conceptually consistent with freedom from religious discrimination principles if it did not.

Statement of Belief

Statements of belief were not considered to be discrimination under the RDB and related legislation.¹⁵⁰ A statement was a statement of belief ‘if the statement is of a religious belief held by a person and is made in good faith, by written or spoken words...and is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teaching of that religion; or...[if a person is non-religious] relate to the fact of not holding a religious belief’.¹⁵¹ As mentioned above, this provision was made to protect religious freedom, which includes expression of religious views without fear of legal action.¹⁵² Barker explains that a statement of belief provision could primarily be justified as a protection of freedom of religion through the expression of religious speech or speech regarding religion.¹⁵³

This provision potentially involved both freedom from religious discrimination principles and religious freedom principles more broadly. This is because an individual would have been positively allowed to make statements of belief to others, provided it was done in good faith. This is consistent with Khaitan and Calderwood Norton’s framing of religious freedom, as the

¹⁴⁹ Barker, *Freedom of Religion Debate* (n 2) 29; Schwartz (n 3) 39.

¹⁵⁰ RDB (n 139) cl 12.

¹⁵¹ Ibid cl 5(a) (definition of ‘statement of belief’).

¹⁵² RDB Explanatory Memo (n 141) 53 [153], [158].

¹⁵³ Renae Barker, Submission No 6 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Religious Discrimination Bill 2021 and Related Bills* (8 December 2021) 7–8 (‘Submission No 6’).

individual is unable to fully adhere to their religious beliefs if they are unable to voice their opinion, both in the public and private spheres.¹⁵⁴ The provision is also supported by Bielefeldt's rationale for religious freedom, as the individual is empowered to proselytise and change religious beliefs if they can make statements to others about their beliefs.¹⁵⁵ The relationship between the individual and state was also balanced in this provision, as the state allows individuals to make statements about their faith to others even if it may offend the receiver of the statement, provided that the statement was made in good faith.¹⁵⁶

Furthermore, allowing statements of belief enhances group-based religious freedom. Calderwood Norton would argue that this provision enhances individual religious freedom, as individuals (and groups by extension) are better able to live autonomously if they are able to freely state their religious beliefs.¹⁵⁷ Therefore, statements of belief, to the extent they are externally directed, are external activities; the provision primarily protects religious individuals who express their religious beliefs to the wider community from interference.¹⁵⁸ Consequently, the state is warranted in limiting statements of belief to those made in good faith and genuinely in accordance with religious belief.¹⁵⁹ Protecting statements of belief also enhances the autonomy of religious groups by enabling them to commune with their members around a central published doctrine.¹⁶⁰ However, the autonomy of individuals and groups who reject those doctrines may be compromised to the extent that those statements of belief undermine their ability to make decisions on controversial issues such as abortion and voluntary assisted dying.¹⁶¹ That is, autonomy is undermined if statements of belief are critical of views or beliefs that support making such decisions. Rightly or wrongly, this kind of criticism at least implicitly narrows decision-making options by making those decisions less palatable.

This provision could also be framed as a freedom from religious discrimination provision. Khaitan, Calderwood Norton, and Trispiotis define freedom from religious discrimination with a focus on external factors that affect religious adherence. Addressing these factors bridges the gap between religious and non-religious individuals.¹⁶² This provision might be perceived as bridging a gap, as statements of belief by religious individuals cannot be used as a basis for discriminating against them under this provision, even if such statements are controversial or offensive. However, there are two problems with this framing. First, the provision does not equally protect religious and non-religious statements of belief. Religious statements of belief are protected if they are 'in accordance with the doctrines ... of that religion' while non-religious statements of belief are only protected if they 'relate to the fact of not holding a religious belief'.¹⁶³ The effect is to give religious people a much broader right to make statements of belief than non-religious people.¹⁶⁴ This actually creates a disadvantage for non-religious people compared to religious people, which is antithetical to freedom from religious discrimination principles. Second, the provision is susceptible to abuse. It may increase

¹⁵⁴ Khaitan and Calderwood Norton (n 6) 1129, 1131–2.

¹⁵⁵ Bielefeldt (n 16) 21–2.

¹⁵⁶ Trispiotis (n 1) 866.

¹⁵⁷ Calderwood Norton (n 84) 37.

¹⁵⁸ *RDB Explanatory Memo* (n 141) 26 [67].

¹⁵⁹ *RDB* (n 139) cl 5(a) (definition of 'statement of belief').

¹⁶⁰ Aroney, *Freedom of Religion* (n 101) 156; Rivers (n 115) 321–2; Calderwood Norton (n 84) 37.

¹⁶¹ Harrison, *The Liberal Political Imagination and Religious Liberty* (n 91) 289.

¹⁶² Khaitan and Calderwood Norton (n 6) 1126; Trispiotis (n 1) 881.

¹⁶³ *RDB* (n 139) cls 5(a)(iii), (b)(iii); Timothy Nugent, 'Statements of Belief as Political Communication' (2023) 2 *Australian Journal of Law and Religion* 81, 83.

¹⁶⁴ Luke Beck, Submission No 38 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Religious Discrimination Bill 2021 and Related Bills* (17 December 2021) 4–5.

religious discrimination by allowing statements about religion which are offensive, and this may result in less favourable or disadvantageous treatment of a person adhering to the impugned religion.¹⁶⁵ Since these problems undermine freedom from religious discrimination principles, and freedom from religious discrimination is a sub-category of religious freedom, they also ironically undermine religious freedom. This conclusion is supported by the fact that a ‘statement of belief’ is an external activity as Calderwood Norton defines it, because it necessarily involves members of the religious group engaging with non-members or outsiders. The effect of this categorisation is the state has greater scope to limit (or not enable) such an activity if it causes harm and discrimination — which, as just noted, it may well do.

Fundamentally, this provision aligned with religious freedom principles more broadly. The statement of belief provision would have been a positive law enabling religious and non-religious individuals and groups to state their good faith opinions in accordance with their religious belief. Therefore, individuals and groups would have been better able to pursue their religious beliefs and commitments without external interference. The provision promoted religious freedom to make statements of belief but may have increased religious discrimination in principle by not extending equal protection to non-religious persons, and in practice if a statement is critical of other beliefs (which in turn undermines religious freedom). Since the ‘statement of belief’ provision aligned with the principles of religious freedom more broadly, and potentially enhanced religious discrimination, it was not appropriate for inclusion in the RDB.

Conduct That is Not Discrimination

This provision stated that religious organisations do not discriminate by acting in accordance with their religious beliefs in areas such as employment, education, and the provision of services.¹⁶⁶ As discussed above, it ostensibly aimed to protect the religious freedom of groups, with the effect that non-religious individuals would have been potentially disadvantaged from accessing employment and services from religious organisations.¹⁶⁷ This disadvantage was resolved by only exempting conduct which was consistent with religious doctrine in order to balance individual and group rights of religious freedom and freedom of association.¹⁶⁸ There are certainly freedom of religion principles protected by this provision. This provision is consistent with religious freedom principles as religious individuals and groups would have been allowed to engage in conduct and perform services in accordance with their religious beliefs, enabling them to maximise their religious freedom in public and private.¹⁶⁹ Using Vickers’ example, where religious organisations are able to prefer potential employees of the same faith, both parties are better able to experience religious freedom and adhere to their religious beliefs. The organisation can promote its autonomy and the autonomy of its members by selecting employees in accordance with its doctrine, and potential employees can exercise their autonomy by choosing another organisation which better suits their religious beliefs.¹⁷⁰

However, this provision more primarily reflected freedom from religious discrimination principles, specifically the need to mitigate disadvantage between religious and non-religious

¹⁶⁵ Vickers (n 13) 2, 10.

¹⁶⁶ RDB (n 139) cl 7.

¹⁶⁷ RDB Explanatory Memo (n 141) 10 [21].

¹⁶⁸ Ibid 11 [22]–[23].

¹⁶⁹ Khaitan and Calderwood Norton (n 6) 1129, 1131–2.

¹⁷⁰ Ibid; Vickers (n 13) 2.

groups.¹⁷¹ For example, where religious groups such as schools are able to favour hiring applicants with similar faith, these groups are able to overcome an externally imposed disadvantage of being legally compelled to hire applicants who would not be able to preserve the ethos and doctrine of the school.¹⁷² In effect, this provision would have placed religious organisations on an equal footing with non-religious organisations so that all parties are able to pursue their commitments without external interferences which could constitute a disadvantage.¹⁷³ This simultaneously incorporates religious freedom principles because all parties are better able to exercise their autonomy and adhere to their religious doctrine.¹⁷⁴ In this sense, the provision exemplified the fact that freedom from religious discrimination is a sub-category of religious freedom. A religious group cannot fulfil its purpose if it cannot engage in differential treatment to preserve the integrity of its doctrine and membership. Prohibiting a religious group from engaging in such conduct actually discriminates against the religious group by rendering it impotent, which in turn undermines freedom of religion by removing the autonomy of the group and its constituent members.¹⁷⁵

There are consequent implications for individual and group-based religious freedom in this context. Membership within a religious group is part of an individual's experience of religious freedom.¹⁷⁶ Where a religious group is able to preference applicants of the same faith, both the individual and group are able to maximise their religious freedom. This provision also illustrates the overlap between internal and external activities. The provision would have protected internal activities, as the state would allow religious groups such as schools to reasonably decide on preferring applicants of a similar faith, increasing their autonomy on matters concerning their religion. However, this provision also related to external activities, as the provision would have allowed religious groups to discriminate against non-members, placing non-members at a disadvantage in seeking employment.¹⁷⁷ This is the tension within freedom from religious discrimination identified by Vickers in Part II.¹⁷⁸

On the one hand, religious organisations would argue that this provision, although potentially discriminatory, is justified as their autonomy and religious freedom is compromised if they are unable to prefer hiring applicants with the same faith.¹⁷⁹ They are at a disadvantage without the provision. The person seeking employment is at a disadvantage with the provision where they seek employment with a religious group with different beliefs. The disadvantage of both parties is remedied by the existence of a right of exit with respect to religious groups. The right of exit resolves the problem of individual discrimination by enabling a person to form their own group or join a different group that shares their beliefs. Also, religious members who disagree with their group's doctrine are able to break away and form or join a different group which reflects their developing beliefs. The right of exit in conjunction with the provision resolves the problem of group discrimination by providing religious groups with the autonomy to maintain their ethos through selecting members.¹⁸⁰ Employment with a religious organisation as both an external and an internal activity links to reconciling the autonomy of

¹⁷¹ Khaitan and Calderwood Norton (n 6) 1133.

¹⁷² Ibid 1126; Trispiotis (n 1) 881.

¹⁷³ Trispiotis (n 1) 885.

¹⁷⁴ Khaitan and Calderwood Norton (n 6) 1126, 1129.

¹⁷⁵ This is reflected in, eg, Barker, 'Submission No 6' (n 153) 2–3; Freedom for Faith, Submission No 96 to Senate Standing Committee on Legal and Constitutional Affairs, Religious Discrimination Bill (2021) 5–6.

¹⁷⁶ Calderwood Norton (n 84) 37.

¹⁷⁷ Harrison, *The Liberal Political Imagination and Religious Liberty* (n 91) 289.

¹⁷⁸ Vickers (n 13) 2, 94–5.

¹⁷⁹ Calderwood Norton (n 84) 206.

¹⁸⁰ Ibid 57.

the group and the individual — namely, the state can justify non-interference with the autonomy of the group to select its members (as an internal activity) on the basis that affected external individuals have a right of exit. In this way, the ‘conduct that is not discrimination’ provision would have mitigated the disadvantages suffered by religious groups and individuals, and was therefore a genuine application of freedom from religious discrimination principles (even if it also implemented some religious freedom principles — this is a function of freedom from religious discrimination being a sub-category of religious freedom). Implementing freedom from discrimination principles necessarily entails implementing a limited subset of religious freedom principles. This means the ‘conduct that is not discrimination’ provision was therefore appropriate to be included in the RDB because it reflected the principles of freedom from religious discrimination.

VI. CONCLUSION

This article has suggested that freedom from religious discrimination is a sub-category of religious freedom, with both concepts sharing autonomy as a rationale. Both rights have individual and group aspects, and autonomy is upheld in both these aspects through the right of exit. These principles were identified in the political context leading to the RDB, and were applied with respect to two contentious provisions of the RDB: the ‘statement of belief’ provision and the ‘conduct that is not discrimination’ provision. If the impugned provisions applied principles of freedom of religion more broadly, they should not have been included in the RDB. Conversely, if the provisions applied principles of freedom from religious discrimination (which necessarily entails applying some aspects of religious freedom, since freedom of religious discrimination is a sub-category of religious freedom), then there would have been no conceptual problem with their inclusion. Following this standard, the ‘statement of belief’ provision applied religious freedom principles more broadly and would have potentially undermined freedom from religious discrimination principles (in turn ironically undermining religious freedom), and therefore should not have been included in the RDB. Conversely, the ‘conduct which is not discrimination’ provision applied principles of freedom from religious discrimination (which necessarily includes some aspects of religious freedom), and therefore it was appropriate to include this provision in the RDB.