
Can Australian Law Better Protect Freedom of Religion?

Nicholas Aroney*

The Religious Freedom Review was established to examine whether the human right to freedom of religion is adequately protected in Australian law. This article expounds the relevant human rights principles and identifies several ways in which Australian law fails adequately to protect freedom of religion. These include problems with the interpretation of religious freedom exemption clauses in antidiscrimination laws and the ineffectiveness of Human Rights Charters. The Expert Panel made two important recommendations to address these problems. The first is that the International Covenant on Civil and Political Rights Siracusa Principles should guide the drafting of laws that would limit the right to freedom of religion. The second is that objects clauses in anti-discrimination laws should be redrafted to reflect the equal status in international law of the human right to freedom of religion. This article argues that while re-drafting objects clauses will provide important guidance to the courts, narrow interpretations of religious freedom protections have been a consequence of providing protection merely by way of exemption. In order for Australian law to implement the Siracusa Principles adequately, anti-discrimination laws should be amended to positively enshrine the right of religious bodies to select staff who share their religious convictions so as to maintain their religious ethos.

I. INTRODUCTION

On 22 November 2017, Prime Minister Malcolm Turnbull announced the appointment of an expert panel to examine whether Australian law adequately protects the human right to freedom of religion. The panel delivered its report on 18 May 2018.¹ The report was not made public until 13 December 2018.

The panel received more than 15,500 submissions. It also held around 90 consultation meetings across the country with 180 individuals and groups representing a diversity of views. These consultations underscored the extent to which Australia is an increasingly diverse country – not only in terms of religion, but also in terms of race, ancestry, sex, and politics.²

Assessing the extent to which Australian law adequately protects religious freedom is an especially difficult task given the diverse ways in which religion is manifested. As Ronan McCrea has put it:

Sometimes [religion] should be seen as a belief akin to political beliefs, other times it is right to treat it as something closer to ethnic or racial identity. Designing legal rules for such a shape-shifting phenomenon that is viewed in so different ways by different people in so many different contexts is immensely difficult.³

There are several dimensions to this diversity. One simple way of identifying it is to compare nation-wide shifts in religious affiliation over time, a measure which indicates a gradual decline in overall Christian adherence, accompanied by a proliferation of Christian denominations, growth in non-Christian religions,

* Professor of Constitutional Law, University of Queensland. Professor Aroney was a member of the Religious Freedom Review Expert Panel.

¹ Philip Ruddock et al, *Religious Freedom Review: Report of the Expert Panel* (Australian Government, Department of the Prime Minister and Cabinet, May 2018).

² Ruddock et al, n 1, [1.9].

³ Ronan McCrea, “Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-discrimination, and the Secular State” (2016) 5 *Oxford Journal of Law and Religion* 183, 209.



and growth in the number of people professing no religion.⁴ However, while similar trends are evident in other Western countries, religion is on the increase globally.⁵ Australia has very high levels of overseas migration. If trends continue, it is quite possible that Australia will become even more religiously diverse and it should not be assumed that the secularising trend will continue indefinitely.

It has been said by some that the Ruddock panel downplayed the existence of threats to religious freedom in Australia. However, because it was not given the investigative powers ordinarily available to royal commissions, the panel was not in a position to authenticate examples of infringements of religious freedom. But it did draw attention to evidence of instances of:⁶

- intolerance, bullying and coercion as a result of expressing religious beliefs in the workplace, at school or in public;
- persecution for apostasy and mistreatment in “cults”;
- discrimination against individuals on the basis of religious dress or observance;
- intolerance against religious minorities, including attacks or threats of attacks on their institutions and places of worship;
- discrimination against LGBTI people – as students in religious schools, patients in faith-based hospitals, employees in religious institutions and members of religious congregations;
- adverse consequences experienced by people of faith as a result of expressing views in favour of same-sex marriage or as a result of their sexual orientation or gender identity;
- concerns that people of faith need to suppress their religious identities or views for fear of ostracism or reprisal;
- church facilities being booked for purposes that are contrary to their religious values;
- venues cancelling, or refusing to provide bookings for, religious institutions that wish to promote a traditional view of marriage.

The panel made 20 recommendations. In its response to the report,⁷ the federal government accepted 15 of them for implementation as soon as practicable. This included development of a Bill that would contain amendments to marriage law, charities law and objects clauses in existing anti-discrimination legislation. One of the 15 recommendations called for enactment of a federal religious discrimination law. While accepting this recommendation, the government indicated it would first seek broad cross-party support for such a Bill. The government also expressed agreement with the principles underpinning the other five recommendations, but in view of the complexities involved, indicated its intention to consult with the States and Territories on the terms of a reference to the Australian Law Reform Commission (ALRC). These five recommendations concerned the difficult issues surrounding the framework of exemptions for religious bodies in anti-discrimination law across all Australian jurisdictions. Notably, the government envisaged that the ALRC would consider drafting options to achieve “the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to discrimination based on a person’s identity while also protecting the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos”.⁸

The High Court of Australia has issued very clear statements of the importance of religious freedom. In *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic) (Scientology Case)*, Mason ACJ and Brennan J observed:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.⁹

The logic of the Ruddock panel’s report was to assess Australian law against internationally recognised principles concerning the protection of freedom of religion. This involved an application of the relevant

⁴ Ruddock et al, n 1, [1.22]–[1.27].

⁵ Ruddock et al, n 1, [1.29].

⁶ Ruddock et al, n 1, [7.6].

⁷ *Australian Government Response to the Religious Freedom Review* (December 2018) 4–6 <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>>.

⁸ *Australian Government Response to the Religious Freedom Review*, n 7, 6.

⁹ *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130.

provisions of international human rights treaties, understood in the light of opinions, reports and recommendations of the UN Human Rights Committee, the UN Commission on Human Rights, the UN Human Rights Council and the UN Special Rapporteur on Freedom of Religion and Belief.¹⁰ This was followed by a survey of the Australian legal framework¹¹ and an assessment of the protection of freedom of religion in Australia. In this assessment, three topics were singled out for close examination: the manifestation of religious belief;¹² vilification, blasphemy and social hostility;¹³ and discrimination on the basis of religion.¹⁴ Questions about the adequacy of legal protections for the manifestation of religion were perhaps the most difficult and controversial. The panel tackled the issues by analysing them in several discrete contexts, namely: (a) the provision of goods and services; (b) charities and faith-based organisations; (c) employment in religious schools; (d) enrolment of students in religious schools; (e) religious and moral education of children; (f) solemnisation of marriages and use of places of worship; and (g) indigenous belief and spirituality.

II. INTERNATIONAL HUMAN RIGHTS

The leading international provision on religious freedom is Art 18 of the *International Covenant on Civil and Political Rights (ICCPR)*. It provides:

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.¹⁵

Several observations can be made.

First, Art 18.1 refers to freedom of thought, conscience and religion. It is not a freedom limited to religious belief, but includes non-religious belief. It protects atheists, agnostics and theists alike. It is also a freedom of conscience. It recognises that beliefs are not necessarily casual things that one can take or leave on a whim. They can involve deep metaphysical and moral convictions that are constitutive of a person's identity. Requiring a person to act in a manner contrary to those convictions is to attack something that makes them who they are.

Second, the freedom to have or adopt a religion or belief, sometimes referred to as the *forum internum*, is an absolute right which cannot be limited for any reason. In a landmark report published in 1960, Special Rapporteur Arcot Krishnaswami observed that the *forum internum* primarily concerns what he called "the domain of the inner faith and conscience of an individual", with the implication that any external intervention into this intimately personal and private domain "is not only illegitimate but impossible".¹⁶ However, this does not mean that protection of the *forum internum* has no "external"

¹⁰ Ruddock et al, n 1, Ch 2.

¹¹ Ruddock et al, n 1, Ch 3.

¹² Ruddock et al, n 1, Ch 4.

¹³ Ruddock et al, n 1, Ch 5.

¹⁴ Ruddock et al, n 1, Ch 6.

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 18.

¹⁶ Arcot Krishnaswami, Special Rapporteur, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Document E/CN.4/Sub.2/200/Rev.1 (1960) 23.

consequences. Article 18.2 protects the *forum internum* by prohibiting any coercion that would impair the freedom of each person to adopt, maintain or change a religion or belief of his or her choice.¹⁷ Such coercion can occur not only through the imposition of punishments or sanctions for holding particular beliefs, but also by requiring people to act in ways that are contrary to the requirements of their religion. This was chillingly illustrated in Shūsaku Endō’s novel, *Silence* (1966),¹⁸ which was recently adapted into a film directed by Martin Scorsese, and which tells the story of the persecution of Catholic believers in 17th century Japan under the Tokugawa Shogunate. The Catholic believers were pressured into renouncing their faith by being required to trample upon a carved image of Christ or Mary (*fumie*).

Anti-religious coercion and pressure can occur in many subtle ways. It may involve outright persecution aimed at the eradication of religious beliefs. It may also involve much more subtle pressure to conform to state-sanctioned or state-endorsed expectations. Adequate protection of the *forum internum* will be sensitive to the myriad ways in which state policies can place religious minorities under pressure to conform to majority viewpoints. The *forum internum* therefore includes an additional “indirect” element which requires states to have respect for the religious convictions and conscientious beliefs of their citizens. This includes the obligation of states, under Art 18.4 of the ICCPR, to have “respect for the liberty of parents to ensure the moral and religious education of their children in accordance with their own convictions”. This liberty right is also absolute and cannot be limited.¹⁹ Notice that it recognises that religious convictions concern matters not only of theological or metaphysical belief, but also standards of ethical or moral conduct. Notice also the emphatic way in which Art 18.4 refers to the parents’ *own* religious and moral convictions – not those of the society, and not those of the state.

Third, Art 18.1 makes clear that the manifestation of religion and belief is also protected, and that such manifestation is not only expressed individually and personally, but also in community with others. Freedom of religion is more than merely freedom to worship; it extends to freedom to manifest one’s religion in observance, practice and teaching, both in private and in public. As Mason ACJ and Brennan J explained in the *Scientology Case*,²⁰ it is of the very essence of a religion that it involves the acceptance of canons of conduct through which adherents give effect to their religious convictions.²¹ To similar effect, Wilson and Deane JJ noted that one of the features of religion is that adherents conscientiously accept certain teachings as “requiring or encouraging them to observe particular standards or codes of conduct”.²² Thus, further, the manifestation of religion through teaching extends not only to the private instruction that may be given to children within families and to religious adherents in the context of religious gatherings, but also the public sharing or promulgation of religious beliefs in the form of what is commonly known as proselytism or evangelism.²³

Consistent with this understanding of freedom of religion, the UN *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* states that the right to freedom of thought, conscience, religion or belief includes, among other things:²⁴

¹⁷ See Human Rights Committee, *General Comment 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) [3] (General Comment 22).

¹⁸ Shūsaku Endō, *Silence* (William Johnston trans, Picador, 2016).

¹⁹ General Comment 22, n 17, [8]. See Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, 2005) 177–182. Note also Art 23, which states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

²⁰ *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

²¹ *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

²² *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 173–174.

²³ General Comment 22, n 17, [5]. For a detailed study of the right to convert, the right not to be forced to convert, and the right to try to convert others by means of non-coercive persuasion, see Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion and Belief*, UN Doc A/67/303 (13 August 2012).

²⁴ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, Supp No 51, UN Doc A/RES/26/55 (25 November 1981) Art 6.

- freedom to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- freedom to establish and maintain appropriate charitable or humanitarian institutions;
- freedom to write, issue and disseminate relevant publications; and
- freedom to train and appoint appropriate leaders consistent with the requirements and standards of any religion or belief.

It follows, fourth, that freedom of religion intersects closely with several other fundamental rights and freedoms protected by the *ICCPR*, including freedom of expression (Art 19), freedom of assembly (Art 21), freedom of association (Art 22) and the right to participate in public affairs (Art 25).²⁵ The intimate connection between these freedoms was highlighted by Special Rapporteur Arcot Krishnaswami in his landmark report.²⁶ Having noted that “the followers of most religions and beliefs are members of some form of organization, such as a church or a community”, and that any compulsion to join or remain a member would be contrary to freedom of religion, he observed that matters of structure and management of religious organisations are frequently determined by religious doctrine, and that as a matter of general principle “every religion should be accorded the greatest possible freedom in the management of its religious affairs”.²⁷ As Manfred Nowak observed in relation to freedom of association, the *ICCPR* thus protects:

- the right to found an association with like-minded people;
- the right of a group of people to a legal framework making possible the creation of juridical persons;
- the collective right of an existing association to represent the common interests of its members;
- the individual negative freedom to leave freely, or not to join an association; and
- the collective negative freedom of an association to expel a member who has breached the terms of association.²⁸

The close connection between freedom of religion and freedom of association underscores the principle that Art 18 applies to all religions and also protects the beliefs of those who profess no religion. Freedom of religion is therefore a right enjoyed by all persons and especially by minorities within any society. The *ICCPR* accordingly requires all recognised rights to be protected without discrimination on religious grounds (Art 2), prohibits discrimination on the ground of religion (Art 26), and specifically protects the rights of persons belonging to ethnic, religious or linguistic minorities (Art 27). It is sometimes suggested that conflicts between rights in these domains involve a clash between liberty rights to freedom of religion and equality rights to non-discrimination. But this is misleading. The liberty rights protected by the *ICCPR* (thought, conscience, religion, opinion, expression, assembly and association) are rights which State Parties have undertaken to respect and ensure to all individuals “without distinction of any kind” (Art 2). No matter a person’s race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – all have the same liberty rights to thought, conscience, religion, opinion, expression, assembly and association.

This intersection of human rights raises a fifth important point, namely that while the right to manifest one’s religion can be subject to limitations, these must comply with the strict requirements set out in Art 18.3 of the *ICCPR*: they must be “prescribed by law” and they must be “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.²⁹ The *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*,

²⁵ On this last point, Special Rapporteur Ahmed Shaheed has warned that states which attempt to “sanitize” the public sphere from the expression of religious views may contravene “their duty to respect the right to manifest one’s religion or belief”: Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion and Belief*, UN Doc A/HRC/37/49 (28 February 2018) [49].

²⁶ Arcot Krishnaswami, Special Rapporteur, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Document E/CN.4/Sub.2/200/Rev.1 (1960) 21.

²⁷ Krishnaswami, n 26, 16, 21, 51. For an analysis of the tension between the individual and the collective in the report, see Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP, 2010) 34, 37–38.

²⁸ Manfred Nowak, *CCPR Commentary* (Engel, Kehl am Rhein, 1993) 386–389, cited in Rivers, n 27, 39.

²⁹ See also Human Rights Committee, *General Comment 27: The Right to Freedom of Movement (Art 12)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11], [14]; Human Rights Committee, *General Comment 34: Freedoms of Opinion and Expression (Art 19)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [22].

adopted by the UN Commission on Human Rights in 1984, state that limitations on human rights may be imposed only on the grounds permitted by the terms of the *ICCPR* and that such limitations clauses must be “interpreted strictly and in favour of the rights at issue”.³⁰ The requirement that limitations must be “necessary” is also vitally important. The Siracusa Principles insist that limitations must not only be based on one of the specified grounds, they must respond to a “pressing public or social need”, they must pursue a “legitimate aim”, and they must be “proportionate to that aim”.³¹ Moreover, when applying a limitation, a State must use “no more restrictive means than are required for the achievement of the purpose of the limitation”.³² These are very exacting requirements. In its General Comment on Freedom of Religion under Art 18 of the *ICCPR*, the UN Human Rights Committee has similarly observed that limitations clauses are to be “strictly interpreted”, limitations may be applied “only for those purposes for which they were prescribed” and they must be “directly related and proportionate to the specific need on which they are predicated”.³³

Two fundamental rights in respect of which these principles are particularly relevant are the non-discrimination rights guaranteed by Arts 2 and 26, and the requirement under Art 20.2 of the *ICCPR* that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” must be prohibited by law. In relation to discrimination, it is important to note that the UN Human Rights Committee has observed that this does not mean that individuals must be accorded “identical treatment in every instance”, for “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.³⁴ Neither the right to freedom from discrimination nor the right to freedom of religious manifestation are absolute; both rights must be accommodated. The people of a particular ethnicity, sex, sexuality, religion or political opinion often exercise their rights to freedom of association by forming organisations to pursue their particular interests. It is not necessarily a breach of non-discrimination principles for these organisations to apply conditions of membership which differentiate on these grounds. For it is difficult to see how they can maintain their distinct identities without adopting conditions of membership of one kind or another. In this way, freedom of thought, conscience, religion, opinion, expression, assembly and association are essential to the maintenance of a diverse, multicultural society.

The prohibition of hate speech in Art 20.2 also has implications for freedom of religion and freedom of expression. Notably, however, Art 20.2 is limited to *advocacy of hatred* which constitutes *incitement to discrimination, hostility or violence*. An Expert Workshop convened by the UN High Commissioner for Human Rights concluded in its 2013 report that Art 20.2 deliberately establishes a “high threshold” because “as a matter of fundamental principle, limitation of speech must remain an exception”. Read together, Arts 19 and 20.2 require that any restriction of hate speech must be “clearly and narrowly defined”, “least intrusive”, “not overly broad” and “proportionate”, and must accord closely with the precise language of Art 20.2.³⁵ Similar observations about Arts 19 and 20.2 have been made by the UN Human Rights Committee in its General Comments on the *ICCPR* and in its Reports assessing the compliance of particular countries with the *ICCPR*, including its 2009 Report on Australia.³⁶ Australia entered a reservation in relation to its obligations under Art 20, but this reservation relates to its obligation

³⁰ United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) A.1, A.3.

³¹ United Nations Commission on Human Rights, n 30, A.10.

³² United Nations Commission on Human Rights, n 30, A.11.

³³ General Comment 22, n 17, [8].

³⁴ Human Rights Committee, *General Comment 18: Non-discrimination (Articles 2 and 26)*, 37th sess, UN Doc HRI/GEN/1/Rev.8 (10 November 1989) [8], [13].

³⁵ *Rabat Plan of Action on National, Racial or Religious Hatred (Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, Appendix)* (11 January 2013) UN Doc A/HRC/22/17/Add 4, [18], [21].

³⁶ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia* (7 May 2009) UN Doc CCPR/C/AUS/CO/5 [26].

to prohibit hate speech under that article. It does not affect its obligation to protect freedom of expression under Art 19.³⁷

Human rights are “universal, indivisible and interdependent and interrelated”.³⁸ The relevant international instruments do not recognise a hierarchy of rights and it cannot be said that some rights are more fundamental than others.³⁹ However, one indication of the relative importance of the right to freedom of religion in comparison with other rights is that religious freedom is one of the few rights listed in the *ICCPR* from which derogation is not permitted in time of public emergency.⁴⁰ In cases of conflicts of rights protected by the *ICCPR*, the Siracusa Principles propose that “especial weight” should be afforded to non-derogable rights such as freedom of religion.⁴¹

III. AUSTRALIAN LAW

Australian law intersects with the human right to freedom of religion in numerous ways. In its survey of the domestic legal framework,⁴² the Ruddock Panel noted the very limited protections accorded by the common law,⁴³ by s 116 of the *Commonwealth Constitution* and by s 46 of the *Tasmanian Constitution*,⁴⁴ and the partial protection of freedom of religion accorded by the human rights charters of Victoria and the ACT, to which Queensland can now be added.⁴⁵

These protections are described as limited and partial for several reasons. The protection afforded by the common law principle of legality means that in the absence of express language a statute will not be interpreted to override fundamental rights, including, it seems, freedom of religion.⁴⁶ But if a legislature expresses a clear intention to override such rights, the principle of legality will not prevent it from doing so.⁴⁷ Section 116 of the Constitution only limits the legislative power of the Commonwealth; whatever its application to the Territories might be, it does not bind the States.⁴⁸ And even in its application to Commonwealth legislation, s 116 has received a relatively narrow interpretation which limits its application to legislation which has as its purpose the restriction of religious practice. This means that it will not necessarily apply to a law the effect of which is to burden religious practice, even if this burden is unjustifiable.⁴⁹ The practical effect of s 46 of the *Tasmanian Constitution* is also limited and doubtful, particularly because it is not constitutionally entrenched and can therefore be amended simply by the enactment of inconsistent legislation.⁵⁰

³⁷ See *Sixth Report of Australia to the United Nations Human Rights Committee* (2016) [48]; Human Rights and Equal Opportunity Commission, Article 18: *Freedom of Religion and Belief* (1998) Ch 5.

³⁸ *Vienna Declaration and Programme of Action*, UN GAOR, World Conf on Human Rights, 48th sess, 22nd plen mtg, part I, ¶ 5, UN Doc A/CONF.157/24 (1993) [5].

³⁹ Chris Sidoti, Human Rights Commissioner, “Introducing Human Rights Law” (Speech, Hanoi, 2 May 1997) <<https://www.humanrights.gov.au/news/speeches/introducing-human-rights-law-chris-sidoti-1997>>.

⁴⁰ General Comment 22, n 17, [1].

⁴¹ United Nations Commission on Human Rights, n 30, [36].

⁴² Ruddock et al, n 1, Ch 3.

⁴³ Ruddock et al, n 1, [3.29]–[3.31].

⁴⁴ Ruddock et al, n 1, [3.12]–[3.19].

⁴⁵ Ruddock et al, n 1, [3.24]–[3.28], discussing *Charter of Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). Note also the recently passed *Human Rights Act 2019* (Qld).

⁴⁶ Ruddock et al, n 1, [3.29]–[3.30], discussing *Coco v The Queen* (1994) 179 CLR 427; *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525. See also *Evans v New South Wales* (2008) 168 FCR 576.

⁴⁷ Ruddock et al, n 1, [3.31], citing *Lee v NSW Crime Commission* (2013) 251 CLR 196.

⁴⁸ Ruddock et al, n 1, [3.31], citing *Lamshed v Lake* (1958) 99 CLR 132; *Kruger v Commonwealth* (1997) 190 CLR 1. See also *Grace Bible Church v Reedman* (1984) 36 SASR 376.

⁴⁹ Ruddock et al, n 1, [3.14].

⁵⁰ Ruddock et al, n 1, [3.17]–[3.18], discussing *Corneloup v Launceston City Council* [2016] FCA 974. See also *McCawley v The King* (1920) 28 CLR 106.

In this context it would be tempting to place stock in the protection of freedom of religion under the human rights charters of Victoria, the ACT and now Queensland. But the charters are part of the problem. Their protection of freedom of religion is limited and selective. Their first defect is that they adopt general limitations clauses that do not require the strict scrutiny mandated by Art 18.3 of the *ICCPR*. Instead, they allow that religious freedom, like other protected rights, may be subject to “such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”.⁵¹ This is to adopt a vaguer and lower threshold than is required by the international human rights standards to which Australia is a signatory. The charters do not apply the “necessity” test required by Art 18.3 – a test which requires signatory States to demonstrate that limitations on religious freedom adopt no more restrictive means than is strictly required for the achievement of the purpose of the limitation. Nor do they limit the grounds of restriction to the particular purposes indicated in Art 18.3. Any ostensibly “legitimate” purpose may suffice.

Second, the charters appear, on their face, to contemplate that all aspects of freedom of religion may be limited pursuant to the general limitations clause, even the *forum internum*. This directly contradicts the clear principle of international law that freedom to have or to adopt a religion or belief of one’s choice is an absolute right that cannot be limited. It is true that the charters state emphatically that a person “must not be coerced or restrained in a way that limits the person’s freedom to have or adopt a religion or belief”, but this does not make clear that the limitation clause applies only to the manifestation of one’s religion or beliefs.

Third, the Victorian and Queensland charters contain no protection for the liberty of parents to ensure the religious and moral education of their children as required by Art 18.4 of the *ICCPR*. Why was this omitted? The ACT Charter, to its credit, provides that in order “to ensure the religious and moral education of a child in conformity with the convictions of the child’s parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law”.⁵² This is an improvement on the Victorian and Queensland charters, but it pointedly does not apply to schooling provided by the government. This means that parents or guardians unable to afford the cost of private education are not accorded the protection required by Art 18.4.

Fourth, even if these defects were to be remedied, the charters offer protection only at a very high level of generality. Such generality may be appropriate in the context of international human rights law, but vague human rights standards provide insufficiently specific protection for freedom of religion in the many particular and practical ways in which law and religion can intersect. Although the charters have been operating in Victoria and the ACT for over 10 years, there is no evidence to suggest that religious freedom has been more adequately protected in those jurisdictions than elsewhere. In fact, at times, religious freedom has received weaker protection in those jurisdictions.

One extraordinary example is s 4 of the Victorian *Equal Opportunity Act 2010*, which defines “religious belief or activity” as –

- (a) holding or not holding a lawful religious belief or view;
- (b) engaging in, not engaging in or refusing to engage in a lawful religious activity.

Unlike corresponding definitions in anti-discrimination laws elsewhere,⁵³ this provision contemplates the possibility that holding certain religious beliefs could be unlawful. This flatly contradicts the fundamental principle of international human rights law that freedom of belief is an absolute right that cannot be limited. And yet this definition was enacted by the Victorian Parliament after supposedly receiving the scrutiny required by the Victorian Charter in order to protect human rights.⁵⁴ How is it that such a thing could happen?

⁵¹ *Charter Act (Vic)* s 7(2); *Human Rights Act 2019 (Qld)* s 13(1); *Human Rights Act 2004 (ACT)* s 28(1) (omitting the words “based on human dignity, equality and freedom”).

⁵² *Human Rights Act 2004 (ACT)* s 27A(3)(b).

⁵³ For example, *Anti-Discrimination Act 1991 (Qld)* Schedule.

⁵⁴ The same definition was contained in the *Equal Opportunity Act 2010 (Vic)* s 4.

The definition of religious belief aside, the protections for religious freedom under the Victorian *Equal Opportunity Act* are currently among the strongest and most principled in the country,⁵⁵ but the Victorian Charter had nothing to do with that. Under provisions of the *Equal Opportunity Act 2010* (Vic) as first enacted, protections for religious freedom had been significantly reduced,⁵⁶ only to be restored after a change in government.⁵⁷ It seems that the position adopted by the Victorian Parliament on freedom of religion is shaped more by the effects of democratic activity upon votes in the Parliament than anything else.⁵⁸

The irrelevance of the charters to the protection of freedom of religion is further illustrated when two leading Australian cases on the interpretation of religious freedom protections in anti-discrimination laws are compared.⁵⁹ The first of these cases, *OV v Members of the Board of Wesley Mission Council*,⁶⁰ involved the application of religious freedom exceptions under the *Anti-Discrimination Act 1977* (NSW) to a decision of a Wesley Mission child fostering agency to refuse to allow a same-sex couple to become foster carers under their system. The second case, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,⁶¹ involved the application of religious freedom exceptions under the *Equal Opportunity Act 1995* (Vic) to a decision of a youth camp facility established by the Christian Brethren denomination to refuse to allow a same-sex support group to use the facilities for the purposes of providing support to same sex attracted young people. The Victorian legislation provided an exception for anything done by “a body established for religious purposes” that “conforms with the doctrines of the religion” or was “necessary to avoid injury to the religious sensitivities of people of the religion”.⁶² The NSW legislation was narrower. It exempted any act or practice of “a body established to propagate religion” provided the act “conforms to the doctrines of that religion” or is “necessary to avoid injury to the religious susceptibilities of the adherents of that religion”.⁶³ The specific circumstances of the two cases were therefore different and the legislation applied in them was subtly dissimilar, but this does not explain the sharply contrasting approaches to the interpretation of the religious freedom exceptions in each case.

In the Victorian case much was said in the judgments of the Victorian Civil and Administrative Tribunal and the Court of Appeal about the importance of the right to freedom of religion and the right to freedom from discrimination. For the Tribunal, this followed from its finding that the Victorian Charter applied to the case and that the legislation must therefore be interpreted in the light of the rights protected by the Charter.⁶⁴ The Court of Appeal found that the Charter did not apply because the events occurred before

⁵⁵ Indeed, I think they represent an excellent model for the protection of freedom of religion in the context of anti-discrimination law, except that, like all of the other Australian jurisdictions, they are couched in the language of “exceptions” rather than positive rights. For advocacy of the protection of religious freedom through positive rights to select staff who adhere to the beliefs and observe the practices of the religious group in question, see Freedom for Faith, Submission to the Religious Freedom Review, *Protecting Diversity: Towards a Better Legal Framework for Religious Freedom in Australia*, January 2018.

⁵⁶ *Equal Opportunity Act 2010* (Vic) ss 82(3), (4), 83(3), (4), introducing a higher threshold “inherent requirement test” for exceptions to anti-discrimination prohibitions in relation to employment in religious bodies and religious schools.

⁵⁷ *Equal Opportunity Amendment Act 2011* (Vic) ss 18, 19, repealing *Equal Opportunity Act 2010* (Vic) ss 82(3), (4), 83(3), (4).

⁵⁸ See 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.

⁵⁹ For an assessment of several other important cases, see Nicholas Aroney and Benjamin B Saunders, “Freedom of Religion” in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart, 2019).

⁶⁰ *OV v QZ (No 2)* [2008] NSWADT 115; *Members of the Board of the Wesley Mission Council v OV (No 2)* [2009] NSWADTAP 57; *OV v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606 (Allsop P, Basten JA and Handley AJA).

⁶¹ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256 (Maxwell P and Neave JA, Redlich JA dissenting). Leave to appeal to the High Court was refused: *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] HCATrans 289.

⁶² *Equal Opportunity Act 1995* (Vic) s 75(2). The legislation also allowed an exception for any act which was “necessary” for a person “to comply with the person’s genuine religious beliefs or principles”: s 77.

⁶³ *Anti-Discrimination Act 1977* (NSW) s 56(d).

⁶⁴ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613, [29].

the Charter came into force.⁶⁵ However, Maxwell P pointed out that the conclusion arrived at would have been no different had the Charter applied,⁶⁶ for it was still necessary according to principles of statutory construction to bear in mind the fundamental rights to freedom of religion and freedom from discrimination to which the *Equal Opportunity Act* was supposed to give effect.

In the NSW case, much less was said about human rights. At first instance, the Equal Opportunities Division of the NSW Administrative Decisions Tribunal recognised that the exception in the Act existed to preserve freedom of religion,⁶⁷ and the Appeal Panel noted that the Act should be interpreted and applied, as far as its language permits, in a manner that is consistent with Australia's international obligations to protect freedom of religion and maintain freedom from discrimination under Arts 18 and 26 of the *ICCPR*.⁶⁸ However, the Appeal Panel also observed that while these principles were theoretically applicable, they had no practical application to the interpretation of the religious freedom exception in the circumstances of the case.⁶⁹ The NSW Court of Appeal referred only in passing to the purpose of the *Anti-discrimination Act* of protecting the human rights and fundamental freedoms of individuals.⁷⁰ Its focus, rather, was on the statutory language of the exception. And yet, the NSW Court of Appeal adopted an approach to the interpretation of the NSW exceptions which was much more generous to religious freedom than the approach adopted by the NSW Tribunal, the Victorian Tribunal and the Victorian Court of Appeal. It seems, not without some irony, that the more the decision-making body talked about the human right to freedom of religion the more narrowly it construed the relevant statutory exception.

Overturning the decision of the NSW Tribunal, the NSW Court of Appeal held that the relevant "religion" to which the exceptions applied required a focus on the religious doctrines of the particular body established to propagate the religion, namely the doctrines of the Methodist Church derived from the teachings of John Wesley, rather than the recognised beliefs of Christianity as a whole or the official doctrines of the Uniting Church as an entire denomination.⁷¹ By contrast, the Victorian Tribunal and a majority of the Victorian Court of Appeal adopted an approach to the interpretation of the exceptions which were described as "narrow" and "restrictive" by Redlich JA in his dissenting judgment.⁷²

This narrow and restrictive approach was manifested in three principal ways. First, Maxwell P, with whom Neave JA substantially agreed,⁷³ considered that for an organisation to enjoy the benefit of the exceptions, the purposes for which the organisation is established must be "directly and immediately religious".⁷⁴ This meant that the camp operator could not enjoy the benefit of the religious freedom protection because it was engaged in an activity which was held to be essentially "secular" and "commercial" – even though the camp operator was inspired by religious motives and wished to establish a deeply spiritual camping environment which was operated in a manner that was consistent with its religious convictions.⁷⁵ Second, in relation to the requirement that the act must "conform with the doctrines of the religion", Maxwell P considered that such a question simply could not arise in a commercial and secular context,⁷⁶ and even if it could, the relevant doctrinal beliefs of the Brethren denomination concerned only the behaviour of

⁶⁵ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [176].

⁶⁶ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [10], [178]. The Victorian Equal Opportunity and Human Rights Commission did not concede this point.

⁶⁷ *OV v QZ (No 2)* [2008] NSWADT 115, [116].

⁶⁸ *Members of the Board of the Wesley Mission Council v OV (No 2)* [2009] NSWADTAP 57, [36].

⁶⁹ *Members of the Board of the Wesley Mission Council v OV (No 2)* [2009] NSWADTAP 57, [36].

⁷⁰ *OV v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606, [72], in relation to its construction of s 56(c), not s 56(d).

⁷¹ *OV v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606, [35].

⁷² *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [504]–[506], [514].

⁷³ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [361].

⁷⁴ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [232].

⁷⁵ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [232].

⁷⁶ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [269].

religious believers in their private or personal lives and did not have implications for the conduct of a camping site run on a commercial basis, even though the profits of the campsite were returned to the denomination for its religious and charitable purposes.⁷⁷ In effect, the content and implications of the religion were ultimately determined by the Court, even though its judgment differed markedly from the religious believers' own understanding of the relevant teachings of their religion.⁷⁸ Third, in relation to the requirement that the act must be "necessary to avoid injury to the religious sensitivities of people of the religion", Maxwell P considered that the act must be objectively necessary; it is not sufficient that the camp operator held a subjective view to the contrary. Although those who were running the campsite considered that their religion required them to refuse the booking, the Court considered that they were not religiously obliged to do so.⁷⁹

Why was this narrow approach adopted? A key indicator is the observation Maxwell P made about the structure of the *Equal Opportunity Act* as a whole. He remarked that the exceptions do not define the limits of the general prohibitions on discrimination imposed by the Act. Rather, they are exemptions from the full scope of those prohibitions.⁸⁰ Although his Honour went on to say that the exceptions must be given full effect in light of their purpose of protecting religious freedom,⁸¹ his construction of the legislation suggested that the exceptions for religious bodies do not define the limits of anti-discrimination law in aid of religious freedom, but rather are merely exceptions from the full scope of a law avowedly designed "to eliminate, as far as possible, discrimination against people".⁸² It was this overriding statutory purpose, stated explicitly in the objects clause of the Act, which led the Tribunal, and subsequently the Court, to adopt a narrow and restrictive approach to the religious freedom exceptions. The Tribunal put it this way:⁸³

A construction that advances the purposes or objects of the EO Act would favour a narrow, not broad, large or liberal interpretation of the exceptions. The inclusion of the exceptions in the EO Act evidences Parliament's intention to strike a balance between the right to be free from discrimination, and the right to freedom of religious belief, and the point at which the balance is struck. In construing the exceptions, the right to freedom from discrimination must not be curtailed unless "clearly manifested by unmistakable and unambiguous language".

In other words, clear, unmistakable and unambiguous language would be needed to countermand the defining purpose of the *Equal Opportunity Act*, which was to eliminate discrimination as far as possible.

IV. CONCLUSIONS

It was considerations such as these that led the Ruddock Panel to recommend that Commonwealth, State and Territory governments should have regard to the Siracusa Principles when drafting laws that would limit the right to freedom of religion and should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.⁸⁴

At present the exceptions for religious organisations in Australian anti-discrimination laws vary considerably. In Western Australia and the Northern Territory there are general exceptions for bodies established for religious purposes similar to the Victorian law considered in *CYC v Cobaw*.⁸⁵ In other

⁷⁷ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [237], [280]–[290].

⁷⁸ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [274]–[279].

⁷⁹ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [292].

⁸⁰ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [186].

⁸¹ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [187]–[188].

⁸² *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [1], citing *Equal Opportunity Act 1995* (Vic) s 3(b). See also *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [180].

⁸³ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613, [221].

⁸⁴ Ruddock et al, n 1, Recommendations 2 and 3.

⁸⁵ *Anti-Discrimination Act 1992* (NT) s 51(d); *Equal Opportunity Act 1984* (WA) s 72(d).

jurisdictions, however, these exceptions are limited in various ways. In the ACT, the act must conform to the doctrines of the religion *and* be necessary to avoid injury to the religious susceptibilities of adherents of the religion.⁸⁶ In Tasmania, an exception drafted in similar terms applies only to discrimination on the ground of religious belief, affiliation or activity,⁸⁷ and in South Australia the exception applies only to discrimination on the ground of sex, sexual orientation or gender identity.⁸⁸ In Queensland, the exception does not apply in relation to employment or education.⁸⁹

In relation to employment in the field of primary and secondary education, protection for religious freedom in Queensland only exists if four things are established: first, that the school is “under the direction or control of a body established for religious purposes”; second, that the person discriminated against openly acts in a way that is contrary to the employer’s religious beliefs; third, that it is a “genuine occupational requirement” that the person act in a way consistent with the employer’s religious beliefs in the course of or in connection with the person’s employment; and fourth, that the act of discrimination is done “in a way that is not unreasonable”.⁹⁰

Much will depend on the way in which the concept of a genuine occupational requirement is interpreted. As was seen in the NSW *Wesley Mission* case and the Victorian *CYC* case, a key question concerns the weight given to the religious organisation’s own interpretation of what its religion requires. Will the court or tribunal respect that interpretation or substitute its own? All religious schools have expectations of staff that are a function of the particular religious ethos and environment that they wish to establish and maintain. In many cases the ethos of the school is understood as something to which all staff contribute, from the chaplain, to the groundskeeper, to the maths tutor, and all in between. In this connection, Christopher McCrudden has drawn attention to the importance of courts’ understanding and respecting the “internal point of view” of religious organisations.⁹¹ As Paul Babie, Joel Harrison and I have argued elsewhere, litigants are entitled to expect judges to be willing and able to appreciate and understand the religious group in terms of the group’s own ways, practices and standards.⁹²

A large part of the difficulty is that religious freedom is protected in anti-discrimination laws through legislative exemptions. These provisions carve out exceptions to the central objectives of the statute, which is to eliminate discrimination. Carefully drafted objects clauses which make clear that the objectives of the statute include protection of freedom of religion may help to orient courts to an interpretation which strikes a more appropriate balance between freedom of religion and freedom from discrimination, avoiding the narrow and restrictive interpretations that were applied in the *CYC* case. But as Maxwell P pointed out in that case, the restrictive interpretation was also a consequence of the fact that religious freedom was protected by way of exemption rather than positive right.⁹³ For this reason, the re-drafting of objects clauses might not be enough to ensure that Australian law has respect for the Siracusa Principles in the drafting of anti-discrimination statutes. Those Principles require not only that interferences with religious freedom must respond to a “pressing public or social need”, pursue a “legitimate aim”, and be “proportionate to that aim”,⁹⁴ they must also use “no more restrictive means” than is necessary to achieve the objective.⁹⁵

⁸⁶ *Discrimination Act 1991* (ACT) s 32(d).

⁸⁷ *Anti-Discrimination Act 1992* (Tas) s 52(d).

⁸⁸ *Equal Opportunity Act 1984* (SA) s 50(c).

⁸⁹ *Anti-Discrimination Act 1991* (Qld) s 109(1)(d), 109(2).

⁹⁰ *Anti-Discrimination Act 1991* (Qld) s 25(2)(b), 25(3)(b). Whether the act of discrimination is reasonable or unreasonable depends on all of the circumstances of the case, including whether the act is harsh or unjust or disproportionate to the person’s actions, and the consequences for both the person and the employer should the discrimination happen or not happen: s 25(5).

⁹¹ Christopher McCrudden, “Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered” (2011) 9(1) (2011) *International Journal of Constitutional Law* 200, 220–221.

⁹² Aroney, Harrison and Babie, n 58.

⁹³ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [186].

⁹⁴ United Nations Commission on Human Rights, n 30, A.10.

⁹⁵ United Nations Commission on Human Rights, n 30, A.11.

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. Each religious organisation will have different conceptions of what that religious ethos requires, some relatively liberal, others more conservative. But whatever your personal view on these matters, that is a consequence of living in a diverse society which respects religious freedom.