



because Australians should be free to believe

Freedom 4 Faith's Submission to the Australian Law Reform Commission -
'Traditional Rights and Freedoms - Encroachments by Commonwealth Laws'
27 February 2015

QUESTION 3-1

What general principles or criteria should be appointed to help determine whether a law that interferes with freedom of religion is justified?

QUESTION 3-2

Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

Executive Summary:

Religious freedom consists, at a minimum, of five basic freedoms: freedom to manifest a religion through religious observance and practice; freedom to appoint people of faith to organizations run by faith communities; freedom to teach and uphold moral standards within faith communities; freedom of conscience; and freedom to teach and propagate religion. These basic liberties have long been recognised by the common law and are inherent in the concept of religious freedom in international law, particularly Article 18 of the ICCPR. Freedom 4 Faith believes that the protection and promotion of freedom of religion is essential to Australia's multicultural society and that protecting freedom of religion is an indivisible part of safeguarding other fundamental freedoms.

The Issues Paper provides a brief, but helpful overview of the different freedoms that are under consideration, but the chapter on freedom of religion appears to contain some assumptions and definitive statements that are highly debatable. It is important for the ALRC to identify the unspoken beliefs, values and assumptions that inform its understanding of the role of government in a free and democratic society.

There are no limitations that can be justified on the right to hold a belief. The manifestation of those beliefs is subject to limitations, as expressed in Article 18(3) of the International Covenant on Civil and Political Rights. The test that the ICCPR places on restrictions on religious freedom is a very strict one. It requires that restrictions may only be imposed on the outward manifestation of religion or belief and that any such restriction be necessary. Being 'necessary' is something quite different

from being merely ‘desirable’ or ‘a good idea’. The law should be proportionate to the specific need upon which it is predicated.

The laws of the Commonwealth do not particularly encroach upon freedom of religion, but they do fail to protect it adequately. One area is in terms of conscientious objection. There is a need to amend the Fair Work Act to impose on employers a duty of reasonable accommodation for religiously-based objections in the workplace environment. Often, religiously-based objections, or problems concerning work on religiously-mandated rest days, can easily be dealt with without detriment to the services offered by the business or organisation by making minor adjustments to rosters, or in how staff are allocated to certain tasks. To do so shows proper respect for freedom of religion and conscience.

Freedom 4 Faith thinks it is inappropriate for anti-discrimination laws to address issues of religious freedom by means of exceptions or exemptions from otherwise applicable laws. As the Human Rights Committee of the United Nations has explained, conduct is not ‘discriminatory’ if it is for a purpose which is legitimate under the ICCPR. That is, the right to be free from discrimination sits alongside other human rights such as freedom of religion, freedom of association and the rights of cultural and religious minorities, and the definition of ‘discrimination’ operates within that context. For this reason, Freedom 4 Faith proposes redefining discrimination in accordance with the model drafted by Profs Parkinson and Aroney. Their definition defines both what is, and what is not, discrimination, and will help to avoid further instances of religious freedom being undermined due to a disproportionate focus on competing rights.

1. Introduction

Freedom 4 Faith (“F4F”) is an organisation that was formed to educate the Christian church and wider public on issues relating to freedom of religion in Australia. F4F’s leadership team includes senior Christian leaders from the Anglican, Baptist, Presbyterian, Seventh-day Adventist and Assemblies of God traditions, as well as legal experts.¹

F4F welcomes this inquiry as an important examination of the way in which federal law both protects freedoms and may unnecessarily encroach upon them. Freedoms are in many ways the easiest class of human rights to protect and promote, for all they require of governments and legislatures is restraint from actions that limit those freedoms. Yet precisely because they are defined in terms of a liberty from regulation they are less visible than other rights, and there are not necessarily the same vocal advocacy groups lobbying for them.

In order to protect these freedoms properly, it is necessary to consider not only reducing encroachments but to consider how to affirm these human rights. This is a particular issue in relation to religious freedom, for many rights which might conflict with this freedom are enshrined in legislation, and the right to freedom of religion is defined largely by way of exception to laws that are otherwise generally applicable. This may create the misleading impression that faith-based groups are receiving certain unjustifiable privileges. The law must balance conflicting rights in an

¹ Please visit our website (www.freedom4faith.org.au) to review our submissions and other publications.

appropriate and defensible manner. It cannot do this adequately if one person's right is defined as an entitlement, and another person with a conflicting right merely has an exemption.

2. The essential elements of religious freedom

Religious freedom consists, at a minimum, of the following five basic freedoms:²

- Freedom to manifest a religion through religious observance and practice
- Freedom to appoint people of faith to organizations run by faith communities
- Freedom to teach and uphold moral standards within faith communities
- Freedom of conscience to discriminate between right and wrong
- Freedom to teach and propagate religion.

These basic liberties have long been recognised by the common law and are inherent in the concept of religious freedom in international law, particularly Article 18 of the ICCPR. Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief,³ offers another such list:

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

² Patrick Parkinson, 'A National Agenda for Religious Freedom, (2010) available at http://www.freedom4faith.org.au/resources/Reading/Prof%20Patrick%20Parkinson_A%20National%20Agenda%20for%20Religious%20Freedom_May%202010.pdf

³ GA Res. 36/55 of 25 November 1981, UN Doc. A/36/51 (1982).

Australia has had a long-standing common law tradition of religious freedom. The affirmation of that tradition in Commonwealth legislation is necessary in order to recognize and respect the importance of religion in the lives of so many Australians. It is also critical to having a successful and harmonious multicultural society. Multiculturalism, as it has been said, requires both majority and minority groups to adapt to one another.⁴ It requires a tolerance for different viewpoints and values on moral and social questions.

3. Comments on the language of the Issues Paper

The Issues Paper provides a brief, but helpful overview of the different freedoms that are under consideration, drawing upon domestic law, international human rights conventions and various statutory bills of rights.

a) Implicit and questionable assumptions

F4F is nonetheless concerned that in an Issues Paper which is meant to raise questions, some assumptions are either explicit or implicit in the text which are highly debatable, or which appear to minimise the complexity of the moral, social and political questions. For example, in the section on justifications for encroachments, the following statements are made:

3.23 While some discrimination in employment practices— by religious schools for example—has been tolerated and even protected by law, limits on discrimination on religious grounds have been justified to ensure the protection of vulnerable people. Freedom of religion is fundamental, but so too is freedom from discrimination on the grounds of gender, race, sexual orientation or some other protected attribute. Freedom from discrimination is also a fundamental human right.

With respect, the language of this paragraph raises concerns about whether the ALRC sees freedom of religion as a right which is at best to be tolerated. The paragraph seems to express its author's surprise that the law protects religious freedom in circumstances where its exercise might lead to 'discrimination'.

While we do not quarrel with the idea that various rights have to be balanced against one another, there are really huge issues involved, on which there is a substantial legal, political and philosophical literature. Are governments justified in interfering with the rights of organisations that are formed around a set of beliefs to prevent them from organising themselves in conformity with those beliefs? For example, should the Australian Parliament require the Catholic Church in Australia to ordain women as priests, or allow priests to marry, because gender and marital status are protected attributes in the law of the nation-state? When is government entitled to limit the freedom of association of people to form organisations based upon religious values and to select people for employment on the basis of their suitability for the mission of that organisation? It is much too simple just to say that while freedom of religion is a fundamental right, so too is freedom from discrimination.

⁴ W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995).

These questions are not answered simply by reference to the identification of different rights as ‘fundamental’.⁵ They raise issues that go to the heart of the question of the role of government in a free and democratic society. Totalitarian governments interfere with the autonomy of churches and other faith-based organisations. Totalitarian governments limit the rights of people to freely associate in accordance with their religious or political beliefs and cultural practices. Societies built upon the Western legal tradition do not.

b) Religious values and non-discrimination principles

The next paragraph is also rather troubling:

3.24 Where there is conflict between religious teaching and the rights of citizens to engage in public life without fear of persecution, religious freedoms may be limited. This arises in Commonwealth anti-discrimination legislation. Such a conflict may arise for example between religious teaching concerning sexuality, and the non-discrimination principles which inform unlawful dismissal provisions in employment law.

We agree completely that citizens ought to be able to engage in public life, including standing for an elected office, without fear of persecution,⁶ but the second sentence seems to bear no relationship at all to this. It is not clear what point is being made about Commonwealth anti-discrimination legislation in general, or in particular sections 37 and 38 of the Sex Discrimination Act 1984 (which are cited in a footnote). Nor is it clear how the term ‘persecution’ relates to these provisions. There is no discussion of how, if at all, non-discrimination principles ought to apply when people seek employment in a religious organisation but do not share the values of that organisation. Is a faith-based organisation entitled to adhere to the teachings of the faith? For centuries, the answer to that question has been “of course”! It is only now that it is being questioned, as it has been in the last century in certain totalitarian societies which have had little respect for human rights.

We are concerned that implicit in the drafting of this chapter is an unspoken assumption that freedom from discrimination ought to be seen as the right which trumps all others. The issues of balancing rights are much more complex than this. Central to the issue is the legitimate scope of anti-discrimination laws. How far should their reach extend? Former academic and US federal judge, Michael McConnell, has explained well the shifts which have occurred in liberal thought over the last few years. The old view of liberalism was one of neutrality in matters of religion.⁷

⁵ Furthermore, labelling certain rights as ‘fundamental’ raises questions about who is authorised to make that judgment if a particular right is not described as ‘fundamental’ in the major international declarations and covenants. It also raises questions about the criteria upon which such an assessment is made. The issue of where ‘rights’ come from, if one does not believe in natural law or derive authority from a religion, is one which has perplexed many philosophers.

⁶ If the ALRC means by ‘public life’ the wide definition given in section 22 of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, then the proposition is more controversial. It is sufficient to note that this Bill was withdrawn after much opposition to it from many different sectors of Australian society.

⁷ Michael McConnell, ‘Why is Religious Freedom the First Freedom?’ (2000) 21 *Cardozo Law Review* 1243 at 1258-59.

“Elements of this liberal polity were state neutrality, tolerance and the guarantee of equality before the law. ‘Neutrality’ meant, fundamentally, that the government would not take sides in religious and philosophical differences among the people....Tolerance meant something like ‘live and let live’”.

In contrast:

“Today there is a widespread sense not only that the government should be neutral, tolerant and egalitarian, but so should all of us, and so should our private associations.”

The view that the law should be invoked to require all members of society to adhere to the moral and social values of the lawmakers even in their private associations is a major shift from traditional liberal values. It suggests a very broad view of the right of government to suppress freedom in the name of another perceived social good.

Dr Joel Harrison and Prof. Patrick Parkinson argue in a forthcoming article that the balance between religious freedom and non-discrimination is to be found in recognising where the commons are in the life of a community, and what lies outside of those ‘commons’.⁸ They argue that “there are places or encounters where people who may be different from one another in all kinds of respects, including gender, sexual orientation, beliefs and values, can expect not to be excluded. This could be called a ‘commons’. The commons is not simply whatever is public as distinct from private....Rather, the ‘commons’ is more focused on particular spheres of official authority or commercial enterprise, where non-discrimination should be expected”. Beyond these commons, they argue, “lies a range of associations – natural, educational, charitable, voluntary, or commercial. Voluntary associations of the like-minded, those who share opinions, interests, or a shared identity and are not engaged in profit-making” lie outside the commons and have their own criteria for inclusion and exclusion from the group which should not be subjected to interference from government.

In the Issues Paper, the ALRC does not take any stance on the proper scope of anti-discrimination law. We point this out only to show how the text of the Issues Paper suggests assumptions and values that are subterranean. The apparently simple, definitive statements that are to be found in this chapter of the Issues Paper are problematic to the extent that they reveal a lack of awareness of the complexity of the issues.

c) Religious freedom and ‘harm to others’

Another troubling paragraph is this one:

3.25 Religious freedom may be limited where one person’s religious observance may cause harm to another person. In Victoria, for instance, medical professionals who have a conscientious objection to performing a lawful termination of pregnancy are legally obliged to refer a patient to a doctor whom they ‘know does not have a conscientious objection to abortion’.

We agree with the proposition that religious freedom may be limited where one person’s religious observance may cause harm to another person. Whether it should be limited, and to what extent,

⁸ Joel Harrison and Patrick Parkinson ‘Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society’, Monash University Law Review, in press.

depends on the nature of the harm and what might be done to avoid it. However, the example given (section 8 of the Abortion Law Reform Act 2008) is a very controversial one. That section imposes upon doctors who have a conscientious objection to carrying out an abortion, a duty to refer the patient to another practitioner who does not have such a conscientious objection. (More recently, Tasmania passed the Reproductive Health (Access to Terminations) Act 2013 which contains a similar provision).

The Victorian Parliament's Scrutiny of Acts and Regulations Committee drew the attention of the Parliament to the possible breach of the Charter provision on freedom of belief, although abortion itself was excluded from coverage by the Charter (Charter of Rights and Responsibilities Act 2006, s.48). The provision encountered very strong and sustained opposition not only from Churches but also from the Australian Medical Association (AMA) in Victoria.⁹ The AMA pointed out that it already had a very clear and workable ethical code for dealing with conscientious objections to carrying out medical procedures, and that there was no need for a mandatory duty of referral. The AMA's ethical code had been supported by the Victorian Law Reform Commission as providing a reasonable balance between the rights of doctor and patient. Abortion is a procedure that needs no referral from a medical practitioner, unlike, for example, going to a specialist. Furthermore, access to information is hardly difficult. A woman need only go to the nearest public hospital or to contact a pregnancy advice service. The question then, which is begged by the example, is what harm the ALRC considers to be involved and why violating a doctor's freedom of conscience is necessary in order to prevent it.

The Victorian legislation is outside of the terms of reference of this Inquiry, so no more need be said about it. However, the use of this example perhaps indicates a belief within the Commission that freedom of religion can legitimately be restricted by the most minimal and tenuous claim of 'harm' to others.

d) Identifying beliefs and values

It is of course, quite possible that we are reading too much into the language of the Issues Paper. We acknowledge that with the pressures of work in such a large project as this, and with limited resources, not every sentence or paragraph can be given much scrutiny by the Commissioners. Nonetheless, we ask the ALRC, respectfully, to consider what beliefs, values and assumptions its own staff bring to the discussion about freedom from governmental regulation when those freedoms conflict with their personal values, and how those values might affect the Commission's ultimate recommendations.

4. Justifiable Limitations to the Freedom of Religion

We agree with the statement of Lord Nicholls, cited in the Issues Paper, that "...there is a difference between freedom to hold a belief and freedom to express or 'manifest' a belief. The former right,

⁹ For an account of the debates, see Fr Frank Brennan, 'The place of the religious viewpoint in shaping law and policy in a pluralistic democratic society: a case study on rights and conscience'. Paper given at Values and Public Policy Conference: Fairness, Diversity and Social Change, Centre for Public Policy, University of Melbourne, 26 February 2009.

freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified. This is to be expected, because the way a belief is expressed in practice may impact on others.”¹⁰

a) Belief

In our view, which we understand to be consistent with the international jurisprudence on human rights, there are no justifiable limitations to the freedom to hold a belief, or to change one’s belief. As Mason ACJ and Brennan J put it in *The Church of the New Faith v The Commissioner of Pay-roll Tax (Victoria)*, “freedom of religion, the paradigm freedom of conscience, is of the essence of a free society” and extends to the freedom of the individual “to believe and act in accordance with his [or her] belief without legal restraint”.¹¹

General Comment 22 of the UN Human Rights Committee states that the right to freedom of thought, conscience, and religion, is far-reaching and profound. It “encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others”. The Committee also observes that the freedom ‘to have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief, with another. Article 4.2 of the ICCPR states that this provision cannot be derogated from, even in time of public emergency.

b) Manifestation of belief

Article 18 of the International Covenant on Civil and Political Rights distinguishes freedom of thought, conscience and religion from the freedom to manifest a religion or belief which is subject to limitations. Those limitations are expressed in Article 18(3) of the ICCPR:

‘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’.

We support this as a general statement, but it is in its specific applications that the difficult policy issues arise.

The test that the ICCPR places on restrictions on religious freedom is a very strict one. It requires that restrictions may only be imposed on the outward manifestation of religion or belief and that any such restriction be necessary. Being ‘necessary’ is something quite different from being merely ‘desirable’ or ‘a good idea’. The law should be ‘proportionate to the specific need upon which it is predicated’, according to paragraph 8 of General Comment 22.

It ought to be demonstrated (and by real evidence, not mere assertion) that without this restraint on religious freedom, damage would be caused to public safety, order, health, or morals or there would be a violation of the fundamental rights and freedoms of others. No other limitation provision in the ICCPR is qualified with the term ‘fundamental’. While those ‘rights and freedoms of others’ may

¹⁰ *R v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 A.C. 246 at [16].

¹¹ (1983) 154 CLR 120 at 130.

limit the manifestation of religion, that does not mean that in any conflict between the non-derogable right of religious freedom and the rights of others, that others' rights should be given precedence. Those rights may themselves be limited by the requirement to protect religious freedom. Limitations are a two-way street.

Article 18 of the ICCPR therefore requires the Federal Government to ensure that there is an appropriately generous zone of protection associated with religious belief, worship, observance, practice and teaching. This recognizes the very important part that religious belief plays in the lives of a large number of Australians, and the nature of freedom of religion as one of the most fundamental human rights.

One of the difficulties that has arisen in terms of the protection of religious freedom has been in the extended reading given by some human rights advocates to the notion of the 'fundamental rights and freedoms of others'. To some, all human rights are 'fundamental' and equal. There are those who see any restraint upon the rights or freedoms of others as being a sufficient a reason to override freedom of belief or conscience on important moral and social questions. An example is the way in which Catholic adoption agencies have been forced to close around the world because they do not support adoption of children to same sex couples.¹² An expansive view of 'fundamental rights' underlies the insistence that everyone ought to be able to access adoption or foster care services from any licensed provider, even from faith-based providers that may have deeply-held views that children should only be adopted by heterosexual married couples. In situations where, as is usually the case, gay and lesbian couples can adopt or foster through state or secular services, the interference with freedom of belief and conscience is troubling. It arises from an implicit worldview that does not see freedom of religion as being important, and does not treat religious values with respect.

While international human rights standards provide useful general guidance (and the Siracusa Principles¹³ on how to interpret the limitation provisions in the ICCPR are particularly helpful), they leave a lot of scope for interpretation. In the context of Australia's multi-faith and multicultural society, a generous ambit must be given to faith-based organisations to operate in accordance with their beliefs and values unless there are compelling reasons for interference based upon the need to prevent a tangible and significant harm to others. Australia is one of the world's most successful multicultural societies, with a long tradition of living and letting live. Governments fund a great variety of schools on a non-discriminatory basis subject to appropriate accreditation standards, and this gives parents choices consistent with Article 18(4) of the ICCPR.¹⁴ Faith based schools are integral to multiculturalism, as faith and culture are often intertwined. Australia also has many

¹² See e.g. *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007 (Charity Tribunal, 26 April 2011); *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (No 2)* [2013] 1 WLR 2106 (TCC).

¹³ Siracusa Principles - UN Economic and Social Council on the limitation and the derogation provisions in the International Covenant on Civil and Political Rights UN Doc. E/CN.4/1885/4.

¹⁴ Article 18(4) is supported by Article 5 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and Article 27 of the ICCPR, which expresses the rights of ethnic minorities to promote identity and cohesion within their own communities.

successful faith-based welfare organisations which do a great deal of the ‘heavy lifting’ in terms of the care of the vulnerable and needy in our society.

The continuing vitality of this multi-faith, multicultural society depends on accepting a generous approach to freedom of religion, while recognizing that it has its limits. Freedom of religion cannot be used to justify female genital mutilation for example. As the UN Human Rights Committee has said, in accordance with article 20, “no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁵

There are many legitimate examples of where freedom to manifest a belief must be limited, but to do so must go no further than ‘necessary’ to achieve the protective purpose, and should adopt the least restrictive means for achieving that purpose. Warren CJ, has rightly said in relation to the Victorian Charter, that the onus of justifying a limitation on a right rests with the party seeking to uphold it, and that the standard of proof is high.¹⁶ Her Honour went on to indicate that the ‘more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justifiable’¹⁷.

5. Reasonable accommodation for religious belief or conscientious objection

The laws of the Commonwealth do not particularly encroach upon freedom of religion, but they do fail to protect it adequately. One area is in terms of conscientious objection.

The UN Human Rights Committee¹⁸ states that the right to conscientious objection can be derived from Article 18, particularly in the case of military service, as the performance of military service may seriously conflict with freedom of conscience. The Committee goes on to state that there should be no discrimination against conscientious objectors. There are other examples where a right to conscientious objection has been recognized in decisions of the Committee.¹⁹

One of the most pressing issues concerns reasonable accommodation for religiously-based objections in the workplace environment. There are just a few issues on which people feel deeply which may impact upon their willingness to perform the full range of services that an organisation might offer. The issue has long arisen for medical professionals in terms of abortion. Increasingly, around the world, same-sex marriage is creating similar dilemmas. As Judges Vučinić and De Gaetano said in a recent decision of the European Court of Human Rights²⁰ the right to conscientious objection ‘is one of the most fundamental rights inherent in the human person’, and further said that:

¹⁵ General Comment 22.

¹⁶ Re an application under the Major Crime (Investigative Powers) Act 2004, [2009] VSC 381, at [147].

¹⁷ Ibid at [150] quoting R v Oakes [1986] 1 SCR 103 at 44.

¹⁸ General Comment 22.

¹⁹ See e.g. Human Rights Committee, Comments on Zambia, U.N. Doc. CCPR/C/79/Add.62 (1996).

²⁰ Eweida and Others v The United Kingdom, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.

‘We are of the view that once a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual’s freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her).’

In numerous cases around the Western world, people with deeply held and genuine conscientious objections to same-sex marriage or who have expressed difficulties about counselling same-sex couples have lost their jobs on the basis of ‘serious misconduct’, even when their conscientious objection could very easily have been accommodated through simple appointment-scheduling arrangements.²¹

Another issue is the right of people to manifest their belief in the manner in which they dress or where they have a religiously-based objection to working on certain days. Of course, there have to be limitations on this. Certain forms of religious dress may be so incompatible with the uniform requirements of the organisation that they cannot be accommodated. A religiously-based objection to working on a certain day, such as a Saturday, may be too difficult for some small businesses to deal with, consistently with the needs of the business. However, it may readily be accommodated by larger businesses which can adjust rostering arrangements accordingly. The key issue is that the request for accommodation must be reasonable in the circumstances.

The Fair Work Act should impose upon employers a duty to make reasonable adjustment for an employee who has a conscientious objection to the performance of a particular duty or who, for religious reasons, seeks particular arrangements concerning dress code, rostering or otherwise, provided that the employer is able to accommodate such requirements of religion or conscience without discrimination in the provision of services in a manner which would be contrary to an anti-discrimination law and without unjustifiable hardship.

6. Redefinition of discrimination in the federal discrimination statutes

Religious freedom is accommodated in Australia’s anti-discrimination laws only by way of exceptions or exemptions. There has been strong advocacy in Australia for the position and scope of religious exceptions to be narrowed. Great care needs to be taken to ensure that a focus on the freedom from discrimination does not diminish freedom of religion, freedom of association, and the right of minority groups to express and practice their faith in accordance with values that may differ from the secular mainstream.

There is no universal approach to religiously-based exceptions in Australia, but religious based exceptions from non-discrimination requirements generally focus on two areas:

- Employment and membership in organized religion, and
- The employment and service-related decisions of connected bodies, such as schools and charitable bodies.

²¹ Patrick Parkinson, ‘Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace’ (2011) 34 University of New South Wales Law Journal 281; Ian Leigh and Andrew Hambler, ‘Religious Symbols, Conscience, and the Rights of Others’ 3 Oxford J. Law & Religion 2.

For example, the Sex Discrimination Act 1984 (Cth) provides exceptions for the ordination of priests and ministers, (s37(a)), practices of a body established for religious purposes, (s37(d)) and employing staff in a religiously-based educational institution (s38). The Fair Work Act 2009 (Cth) includes exemptions for action taken against staff in good faith and on the basis of religious doctrine or to avoid injury to the religious ‘susceptibilities’ of adherents (s351(2)).

Conversely, the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth) amended the Sex Discrimination Act, removing the exception to non-discrimination in respect of services if the religious body is providing Commonwealth-funded aged care in s37(2). That amendment went against the historic tradition of allowing faith-based organisations to adhere to the values that motivate them in the context where there is a variety of services for people to choose from. It is an example of a situation where a restriction on freedom of religion requires a clear and coherent justification which is supported by evidence of the need to limit the manifestation of belief. The amendment was rushed through Parliament with little consultation, so it is not clear that the limitation on religious freedom was justified in this instance as necessary within the terms of Article 18(3) of the ICCPR.

F4F thinks it is inappropriate for anti-discrimination laws to address issues of religious freedom by means of exceptions or exemptions from otherwise applicable laws. As the Human Rights Committee of the United Nations has explained, conduct is not ‘discriminatory’ if it is for a purpose which is legitimate under the ICCPR.²² That is, the right to be free from discrimination sits alongside other human rights such as freedom of religion, freedom of association and the rights of cultural and religious minorities, and the definition of ‘discrimination’ operates within that context.

For this reason, we propose redefining discrimination in accordance with the model drafted by Professor Patrick Parkinson and Professor Nicholas Aroney. Their definition, which defines both what is, and what is not, discrimination, is as follows:²³

1. Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.

2. A distinction, exclusion, restriction or condition does not constitute discrimination if:
 - a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or

²² The UN Human Rights Committee in General Comment 18, para 13 states that differentiation of treatment will not 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’.

²³ Prof Patrick Parkinson AM, and Prof Nicholas Aroney, Submission on the Consolidation of Commonwealth anti-discrimination laws (2011), available at <http://www.freedom4faith.org.au/reading.aspx..>

- b. it is made because of the inherent requirements of the particular position concerned; or
 - c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
 - d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
3. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 2(a).
4. Without limiting the generality of subsection 2, a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:
- a. it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
 - b. it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or
 - c. in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfill its religious purpose.
5. Without limiting the generality of subsection 2, a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfill that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

...[the exercise of other protected human rights the exercise of which do not amount to discrimination against others, or the enumeration of other legitimate objectives that ought to be given specific legislative expression].

7. Conclusion

As Lord Nicholls has said:²⁴

Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society.

²⁴ R v Secretary of State for Education and Employment ex parte Williamson [2005] 2 A.C. 246 at [15].

Religious freedom and associated rights are at risk of being undermined in Australian society due to a disproportionate focus on other, sometimes competing, rights. Protecting and promoting religious freedom is an essential and indivisible part of a broader program to safeguard fundamental freedoms in Australian life. As a society, we need to 'live and let live', and to accept our differences on all kinds of moral, social and political questions. That is what freedom is all about.