2018

Religious free speech and anti-discrimination laws in Australia

Isabel Rocha de Sousa
The University of Notre Dame Australia

Religious Free Speech and Anti-Discrimination laws in Australia.

ISABEL REGINA ROCHA DE SOUSA

A thesis in fulfilment of the requirements for the degree of Masters of Law by Research

Faculty of Law

June 2018

ABSTRACT

This thesis addresses the delicate relationship between Religious Free Speech and Australian Anti-discrimination laws. There are an increasing number of conflicts arising between religious and secular speech. Different opinions related to sensitive matters often result in social and legal disputes. Some of these disputes become complaints under Anti-discrimination laws and arguably lead to less freedom of conscience and speech.

This thesis focuses on 'the relationship between Religious Free Speech and Anti-discrimination laws'. This is done though critical analysis of relevant literature, cases and legislation, contextualising them in response to the questions proposed in the research paper.

Keywords: Religious Freedom, Religious Free Speech, Freedom of Speech, Secularism, Anti-Discrimination laws, Freedom of Conscience, International Standards, Human Rights.

DECLARATION

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary institution. To the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Isabel Regina Rocha de Sousa

ACKNOWLEDGEMENTS

Firstly, I would like to thank Professor Dr. Anthony Keith Thompson, my academic supervisor, and Professor Dr. Augusto Zimmermann, my co-supervisor, who were kind enough to take me as their Masters student and helped me throughout this entire journey. Keith, thank you for all your thorough feedback and concern with this thesis. I appreciate our discussions and the opportunities to observe some of your classes and develop a good relationship with you as my supervisor. Augusto, I deeply appreciate the opportunities you have given me, all your feedback, friendship and wise words and resources when I needed them. For both of you I can only say that I was blessed to have you as my supervisors. There was a great effort on your part and I cannot thank you enough for all the time you have given and consideration you have shown me. Thank you for all the help and support you both provided, without it this thesis would not be a reality.

My profound thanks and gratitude go to the Vice Chancellor's Office of the University of Notre Dame Australia, who supported me and provided me with my scholarship, without which this Masters would have not been possible. I would especially like to thank Professor Peta Sanderson and Professor Celia Hammond. I would also like to acknowledge and thank the critical and constructive feedback I received from the examiners of my research proposal and from the research committee regarding this thesis. I would like to thank the Dean of the Law Department of the University of Notre Dame Australia, Sydney campus, Professor Michael Quinlan.

I would like to thank Professor Dr. Jane Stenning for her fruitful advice and direction when needed, for helping me and for going above and beyond to give me the necessary tools to finish this thesis. In particular, providing me with the

study space that was needed, and encouraging me throughout. I would also like to thank Ms Ann-Maree Whelan for helping me deal with the situations which arose at the end of my thesis and encouraging me to develop as a student and a person.

I would like to thank the Research Department of the University of Notre Dame Australia, Sydney campus, for its support thought this entire process. To name a few, Professor Dr. Hannah Ianniello, Ms. Adra Anthoney, Professor Dr. Keagan Brewer, Ms Valentina Panci and especially the Dean of the Research Department, Professor Dr. Qian Garret and the previous Dean of the Research Department, Professor Dr. Kevin Watson.

I would like to thank Ms Regina Armanios and the PSO office at Notre Dame, who invited me to be a student ambassador for the University of Notre Dame, A position that allowed me to get to know much more about my University and to spread my excitement about it with others. I would also like to thank the Marketing Department of the University who developed this opportunity even further. I would also like to thank the Study abroad program that made it possible for me to give it back to the University by helping other international students that came to Notre Dame Sydney. My sincere thanks to all University departments and staff.

I would like to thank Esther Adeyinka, who kindly reviewed the final version of the bibliography and the 5th chapter, Anthony Westenberg who kindly reviewed the final version of 6th and 7th chapters, Pascal Moussa who kindly reviewed the final version of the 3rd and 4th chapters. Last but not least, my dearest friend Susannah Jane Hoffmann, who not only reviewed the final version of the 1st and 2nd chapters but helped me by giving feedback on several occasions including in my candidature process. Not only this, but you have encouraged me all the way

throughout this thesis, always pointing out the positive and building me up. I am very blessed to be your friend for these last nine years and hope you are as blessed for our friendship as I have been.

I would like to thank and acknowledge a good friend that I have made in this Masters at the University of Notre Dame Australia, Professor and PhD candidate Ms Anna Walsh, who taught me, encouraged me and whose friendship, help and advice I cherish and will continue to even after this is finished. I would like to acknowledge friends and their families who have been so generous and kind to me. Especially Valerie and Chris Noone, who kindly received me in their house and treated me as a part of their family, helping me and nurturing me when I needed. Also, to my house mate Christine Lilian Fisk, and Therese and Philip Restucia, who received me in theirs house in this last six months.

I would like to thank Paul Andrew Chircop and Claudio Bettini for sound advice and consideration. I thank my friends Jemimah McMurray and Sarah Lovegrove who spared their time and abilities to help me when I needed it. I would like to thank Philipp Peter Kamlade for bringing out the best of me, helping me to see the good in the situations and the blessings on my way, calming me and encouraging in this journey. I would also like to thank my dear friends Alex Catharino and Marcia Brito, through whom many doors were opened in my life, so I could make it to this far away land.

I thank the Chaplaincy of the University of Notre Dame Australia for many opportunities to further develop myself as a person, a student and a Christian. I am blessed for the opportunity of having daily mass at St Benedict's in our University. Thank you, Father James Baxter, for such good ministry and for all the kindness and generosity expressed to me. I acknowledge all the friends who have kept me and this thesis in their prays, including Padre Jose Geraldo Teófilo

da Silva, NDS, Marcia Motta, Luiz and Marcia Valente, terço Nossa Senhora Rosa Mística, Newton and Cecilia Rodriguez to name a few.

I want to honour the memory of my beloved grandparents, Maria João de Deus Rocha & Ary Cypriano Rocha and Maria Odete Frederico de Sousa & Guilherme Augusto de Sousa, who did not live to see this journey in my life but are still deeply loved and remembered.

I thank my sister Raquel Míriam Rocha de Sousa Chircop, who always challenges and cares for me and has been my safety and support in this new land. I also thank my brother Daniel Henrique Rocha de Sousa for encouraging me to take this step in my life and positively see my potential. I thank my brother David Joseph Chircop who came to my aid when I needed, and lovingly takes care of my sister and my three beautiful nieces. I also bring here my love and thanks for Maria Anna Sousa Chircop, Clara Lucy Sousa Chircop and Sarah Rose Sousa Chircop, my lovely nieces who, when the most difficult times came, were able to bring a smile to my face and joy to my life.

I want to express my gratitude to my father, Nelson Augusto Frederico de Sousa and my mother, Lúcia Maria Rocha de Sousa, who loved and supported me since way before they had any idea what I could do, endured me when they did not understand me and always did their best to raise me and build me up as a strong woman of faith and values that would not be compromised. I am blessed and grateful for having you as my parents. Thank you for supporting me and loving me.

Finally, my thanks to the blessed family, St Joseph, whose intersection brought me to this adventure and Mary, mother who took care of me and in whose University, I came to be. The University of Notre Dame, being the University of

our Lady, represented everything that I ought to expect from such. I am grateful for the opportunity of studying here. To Jesus Christ, St Mary and St. Joseph, this dissertation is dedicated to them.

CONTENTS

GLOSSARY

Declaration on the Elimination of all Forms of Intolerance and Discriminations based on religion or Belief (Religious Declaration)

Human Rights Act (2004) (ACT) ACT (HRA)

Human Rights and Equal Opportunity Commission (HREOC)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Ruddock´s 2018 Religious Freedom Review Committee (Ruddock's Committee)

The Australian Law Reform Commission (ALRC)

Universal Declaration of Human Rights (UDHR)

1ST CHAPTER: INTRODUCTION

I. INTRODUCTION

Religious conflicts are fertile ground for disagreement and have seeded numerous wars in the past.[1] Many international treaties include provisions that protect Religious Freedom in order to minimise animosity and prevent conflict. Religion and personal belief are controversial subjects. Since medieval times different religions have clashed, especially the religions of The Book.[2] Reconciling those religious differences has proven to be a challenge.

There is a connection between the success of a society and the level of Religious Freedom it has.[3] Furthermore, the current tendency to trivialise religious values under the guise of a secular neutrality discourages religious people from taking part in regular activities in their societies and from expressing their opinions.

This thesis analyses the literature, legislation and cases concerning Religious Free Speech and reviews the historical and international background as context for the research. It considers how the issue has been addressed and developed in current Australian Anti-Discrimination laws and defines the parameters of Religious Free Speech for the study of its importance in the diverse Australian environment.

---

[1] See, eg Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 1st vol, 2012); *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, UN Doc A/PV.73 (25 November 1981), preamble.

[2] Commongly recognised as religions with sources in the bible: such as Christianity, Islam and Judaism.

[3] See US Department of State, International Religious Freedom Report for 2015 (2015), 31 May 2018 <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>; Brian J. Grim,, Greg Clark, and Robert E. Snyder, "Is Religious Freedom Good for Business? A Conceptual and Empirical Analysis," (2014) 10, *Interdisciplinary Journal of Research on Religion*.

Religion has contributed to the development of society and should be acknowledged rather than silenced.[4] By considering and analysing 'Religious Free Speech and Anti-Discrimination laws', this study seeks to identify conflicts and help increase the protection of Religious Free Speech. The conflict between Religious Free Speech and Anti-Discrimination laws is best seen by analysis and comparison of cases. Some international comparison and critical analysis is used to suggest future solutions to the current Religious Free Speech concerns in Australia. After analysing the conflicts, this thesis recommends how those concerns can be mitigated.

The suppression of Religious Free Speech has commonly been justified as necessary for the defence of the liberties of newly privileged groups. This repeats a cycle of supressed freedoms. The study of the intersection between Religious Free Speech and Anti-Discrimination laws helps to identify the change required so that Anti-Discrimination laws do not negatively interfere with Religious Free Speech.

[4] See generally Alvin J. Schmidt, *How Christianity changed the world* (Zondervan, 2009); Rodney Star, *The victory of reason : how Christianity led to freedom, capitalism, and Western success* (Random House,1st ed, 2005).

II. THE ENQUIRY

The right of religious manifestation is fragile as it has both private and public dimensions. The expression of minority views in the public square can be interfered with by passing temporary sociological factors. John Rawls would invalidate any public argument that has a religious dimension. It is a restrictive and unrealistic view to believe that people can isolate their metaphysic beliefs from the other areas of their lives.

Religious values often have more influence on the observance of law than the law itself.[5] Metaphysical beliefs influence life choices and affect the decision-making process of the individual. The development of protection for Religious Freedom has become important because of the cultural tendency to undermine it.[6] As Carolyn Evans said:

> the right to freedom of religion or belief is not limited to internally held beliefs, which the state can only interfere with in a very limited way even if it desired to do so. It also protects manifestations of religion. Manifestations include 'teaching, practice, worship and observance' and thus go beyond merely participating in religious rituals, but they do not cover every act motivated by religion.[7]

There is a gap in the literature concerning whether Religious Free Speech is adversely affected by Anti-Discrimination laws. There is also not enough

---

[5] And yet Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* [1943] 67 CLR 116 said that laws suppressing complete freedom of religion can be easily justified since without such control laws, every religious believer would be a law unto herself.

[6] See generally *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[7] See Evans, above n 1, 25.

discussion about how to minimize existing conflicts. Restricting people's speech as a way of changing their minds about specific topics is arguably less reasonable than engaging in a free discussion about it. Suppressing speech stops discussion and development of ideas whether reasonable or unreasonable. Intolerant thoughts are arguably better challenged by ideas and debate.[8]

Durham and Scharffs says that religion works as a social glue and:

> `In his Letter Concerning Toleration, Locke rejected the prevailing notions of church and state in his time. He offered powerful arguments that state coercion is ineffective in matters of religion, that the state can force no person to heaven. At best, state coercion can only derive outward hypocrisy. Moreover, he contended that rather than destabilizing a regime, toleration and respect could have the opposite effect, creating of minority groups a source of social stability rather than social disintegration. Locke profoundly influenced many American thinkers, most notably Thomas Jefferson and James Maddison, who drew upon his work in building their case for a broad understanding of religious freedom. Locke`s insights laid the foundations of modern regimes of religious liberty. `[9]

If Locke`s rationale is accepted, it is valid to question what happens to society if the Religious Free Speech, important part of Religious expression and therefore of religion, is undermined to protect popular current minorities. The author argues that even though thoughts held by a group might seem absurd, they still

[8] See eg, Brazeal, Gregory, 'How Much does a Belief Cost? Revisiting the Marketplace of Ideas' (2011) 21 *Southern California Interdisciplinary Law Journal* 1; Milton, John and John W. Hales, *areopagitica.* (Clarendon Press, 1898); Jefferson, Thomas and Abraham Lincoln, *First Inaugural Address* (Infomotions, Inc, 2000).

[9] Durham, W. Cole and Brett G. Scharffs, *Law and religion: national, international, and comparative perspectives* (Aspen Publishers, 2010), 14.

should be tolerated.[10] Considering this, the object of study of this thesis becomes extremely relevant for addresses the protection of the religious expression.

International instruments that deal with Religious Freedom are usually made to accommodate different cultures and systems. To achieve ecumenical and broad minority accommodation, such instruments are drawn with a generous scope. This is so that they can protect theistic, non-theistic and atheistic beliefs and can become a relevant source of law regarding Religious Freedom in different cultures.

Considering this, the main research question of this thesis is: ´Does Anti-Discrimination legislation limit Religious Free Speech? ´ In order to adequately answer this, the sub-questions ´Why is it important to protect Religious Free Speech? ` and `Why is it important to protect Religious Free Speech in Australia? ` are addressed to establish the foundational ground of the thesis. The final sub-question, ´How can the conflicts between Religious Free Speech and the Anti-Discrimination body of law be minimised? ´, was also necessary for a complete analysis of the primary research question. These questions will be answered through analysis of relevant cases and statutes.

Though the full exhaustion of this topic is not possible in a Master`s thesis, this work aims to enrich the academic debate on the topic. It is hoped that it will encourage further research and questioning regarding the protection that Religious Free Speech has in Australia.

[10] See *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).art 18(3).

III. METHODOLOGY

The thesis presents academic legal research through a critical analysis of relevant literature, cases and legislation. As qualitative research, this thesis contextualises the topics, concepts and legislation covering the field, with insight added by the author.[11] . This is done in order to place the reader into the context of the laws and historical origins of the subject matter.

In terms of the doctrinal perspective in the present research, primary and secondary sources of law are introduced by historical analysis. However, the analysis deals with non-doctrinal methodology, and criticizes the current Anti-Discrimination legal premises.[12]

The first chapters address the two key concepts for the discussion of the thesis: ´Religious Free Speech´ and ´Anti-Discrimination laws´. The first is accomplished by defining Religious Free Speech in general, in the international sphere and determining whether Religious free Speech is the same in Australia as it is in the rest of the world. The second is accomplished by identifying the nature of Anti-discrimination law, their rationale and general structure and then placing them in the context of recognised Human Rights instruments. In approaching Religious Free Speech, this thesis moves from the general to the particular. When considering Anti-Discrimination laws, it approaches from the particular to the general, discussing the international parameters of Human Rights before narrowing the scope to analyse Human Rights instruments in Australia.

---

[11] Michael McConville, Wing Hong Chui and Inc ebrary, *Research methods for law* (Edinburgh University Press, 2007), 21.
[12] Ibid 23.

The middle chapters of this thesis (4th and 5th) deal with domestic and international case law, both in light of the research topic and of each other, to answer the main research question of ´Does Anti-Discrimination legislation limit Religious Free Speech? ´ The Australian cases and discussion present in the 4th Chapter are foundational to the international analysis contained in the 5th Chapter.

In the last part of this paper, possible solutions to the conflict between Religious Free Speech and Anti-Discrimination laws are presented, answering the question ´How can the conflicts between Religious Free Speech and the Anti-Discrimination body of law be minimised? ´. The advantages and disadvantages of each solution are addressed. The intention is to bring a tangible perspective to the problem, providing a possible solution instead of mere criticism.

The methodology requires a review of databases listed in the end of the bibliography.

IV. THESIS OUTLINE

The 2nd Chapter investigates the first key element of the thesis, 'Religious Free Speech', answering the specific questions: `Why is it important to protect Religious Free Speech?` and `Why is it important to protect Religious Free Speech in Australia?` The first is addressed by identifying the importance of Religious Free Speech in existing academic literature, explaining how Religious Free Speech is currently used and protected in the Australian legal system, before discussing whether the existing protection in Australia is adequate. To achieve this, the chapter is divided in three parts: ´The importance of Religious Free Speech´ (I); ´The international standards (II); and ´The importance of Religious Free Speech to Australia´ (III).

Complementing the research question of 'Why is it important to protect Religious Free Speech in Australia', the 3rd Chapter identifies the nature of the Anti-Discrimination laws that currently operate in Australia and interact with Religious Free Speech. To complete this objective, the chapter is divided into three main sections: ´Australian Anti-Discrimination law: an overview of the rationale and general structure´ (II), ´How the Australian Anti-Discrimination law relate to the recognised international Human Rights´ (III), and ´Do the existing Human Rights instruments of the ACT and Victoria provide adequate protection for Religious Free Speech (IV).

The 4th Chapter advances the discussion by approaching the research question ´Does Anti-Discrimination legislation limit Religious Free Speech? ´ This is done by examining the conflict between Religious Free Speech and Anti-Discrimination norms in the provision of goods and services in Australia. The chapter is structured thematically by case studying section II: ´Goods and

services′ (B), ′Life expression and employment′ (C), and ′Life expression and speech′ (D).

After identifying conflicts between Religious Free Speech and Anti-Discrimination norms in the 4th Chapter, the 5th Chapter discusses the nature of the apparent conflict in an international context and identifies the extent to which it is a real conflict. This chapter builds on the thematic structure seen in the 4th Chapter, considering: ′Goods and services: artistic manifestation and the same-sex wedding dilemma′ (B); ′Life expressions and employment′ (C); ′Life expressions and speech′ (D); followed by a consideration of the consequences of a conflict between Anti-discrimination legislation and Religious Free Speech (E).

The 6th Chapter finalises the reflection on the problems addressed in this thesis and answers the last question: ′How can the conflicts between Religious Free Speech and the Anti-Discrimination body of law be minimised?′ The possible solutions which are discussed are: ′Making s 116 of the Australian Constitution binding for the states′ (B), ′Extinguish all the Anti-Discrimination laws′ (C), ′ Pass federal legislation implementing the international Human Rights instruments ratified by Australia in a way that would trump inconsistent law′ (D), ′Pass a Bill or Charter of Rights (E), and ′Detailed Religious Freedom Act′ (F).

2ND CHAPTER: RELIGIOUS FREE SPEECH IN AUSTRALIA.

I. INTRODUCTION

This thesis discusses the relationship between Religious Free Speech and Anti-Discrimination laws, analysing the conflicts between both and suggesting possible solutions to prevent such conflict. In order to answer: ´Does the Anti-Discrimination legislation limit Religious Free Speech? ´, it is prudent to first identify and define ´Religious Free Speech´ and ´Anti-Discrimination law´. This chapter focuses on Religious Free Speech, by answering two key questions: ´Why is it important to protect Religious Free Speech? ` and `Why is it important to protect Religious Free Speech in Australia? `

This chapter begins by identifying the importance of Religious Free Speech from existing academic literature, measuring existing Australian protections (of Religious Free Speech) against international standards. This discussion is structured in three parts: the importance of Religious Free Speech as described in academic literature (II); the international standards (III); and the importance of Religious Free Speech (IV).

II. THE IMPORTANCE OF RELIGIOUS FREE SPEECH

The necessity of framing Religious Free Speech and concepts such as Religious Freedom, Human Dignity, Human Rights and Freedom of Speech is fundamentally necessary, as they remain abstract concepts with vastly different interpretations and perceptions. The importance of Free Speech must be defended and justified because it is no longer universally assumed to be a human good. Although Religious Freedom 'is the bedrock for every human right'[13] and 'provides a sturdy foundation for limited government',[14] many now doubt that religion is a human good[15] and, accordingly, do not think that speaking about it serves any good human purpose and should not warrant protection.

The object of this section, however, is not to extensively develop the philosophical concepts of Religious Freedom and Freedom of Speech, despite their importance to an understanding of Religious Free Speech. In order to narrow the broad concept of Religious Freedom for the scope of this work, this thesis accepts it as a good accordingly to the *UDHR* and adopts the Australian Law Reform Commission (ALRC) that '[r]eligious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.'[16]

---

[13] Jennifer A. Marshall, 'Why Does Religious Freedom Matter?' (20 December 2010) The Heritage Foundation <https://www.heritage.org/religious-liberty/report/why-does-religious-freedom-matter>

[14] Ibid.

[15] See Lori G. Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford University Press, First ed, 2017), 29-30; Eliyabeth Shakman Hurd, 'The International Politics of Religious Freedom' (2013) 40 *India international Center Quarterly* 225.

[16] The Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, Report No 129 (2015) 1.28.

Religious Freedom is closely connected to the right to Freedom of Speech. According to Campbell and Whitmore,[17] Freedom of Speech is the freedom without which no other freedom could survive and by such is the freedom *par excellence*. The *UDHR*, defines the right to Religious Freedom as `freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. `[18] From this interpretation Religious Freedom includes the right to manifest one's religious views.[19] This is expressed primarily through Freedom of Speech.

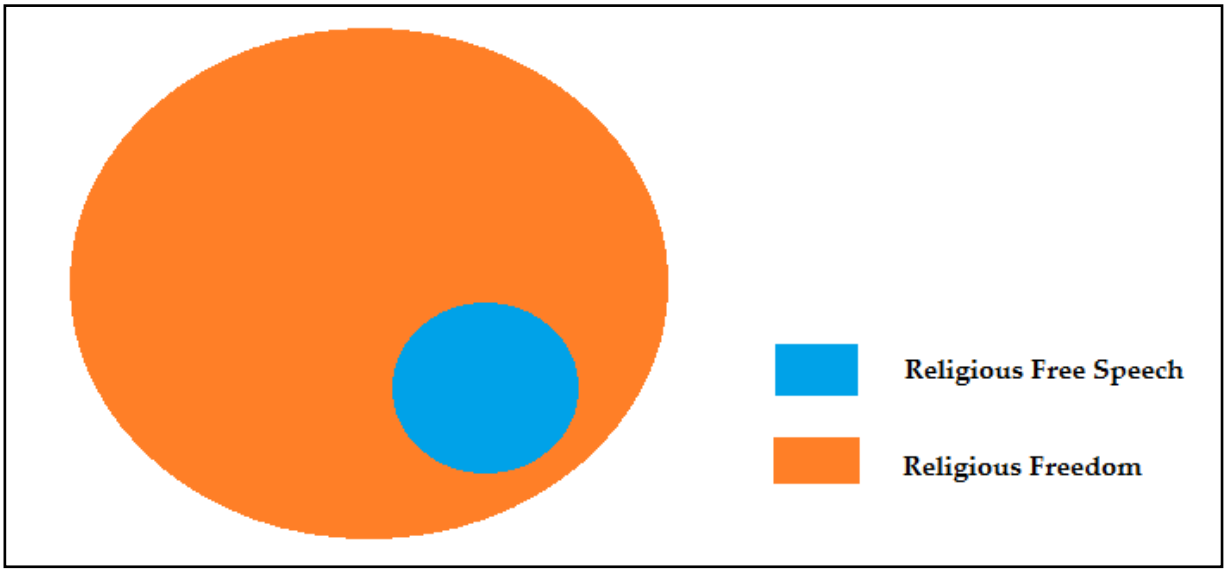
Barendt argues that Freedom of Speech is important in the realisation of other fundamental freedoms such as freedom of religion, thought, and conscience - freedoms that reflect what is to be human.[20] By extension, Freedom of Speech can be considered the highest freedom upon which western society rests, for it encompasses the externalisation of all these interior autonomies. It may be reasoned that Freedom of Speech, association and conscience are inseparable freedoms, being collectively the highest freedom.[21]

---

[17] Harry Whitmore and Enid Campbell, *Freedom in Australia* (Sydney University Press, 1966), 113.
[18] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).
[19] See, eg, Jay Newman, *On Religious Freedom* (University of Ottawa Press, 1991) 100; Lindholm, Tore, Facilitating Freedom of Religion or Belief: A Deskbook (Ringgold, Inc, 2004) vol 19.
[20] Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.
[21] "the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.", "the fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency," In General Comment No. 22 (Article 18) in UN doc. HRI/GEN/1/Rev.5, Compilation of General Comments and General Recommendations adopted by Human Rights Bodies, p. 144.

Religious Freedom, Free Speech and Religious Free Speech are deeply intertwined. The protection of either Religious Freedom or Freedom of Speech necessarily contains the protection of the Religious Free Speech.

In simplified terms, Religious Freedom includes all the areas of religion, from the choice of which religion to follow (or not), to the external expressions of religious or non-religious choice. This means that Religious Freedom is broader than Freedom of Religious Speech (the external expression of one's inner religious beliefs and the following of religious and moral customs), nevertheless it contains all expressions of Religious Free Speech as demonstrated in Graph 1.

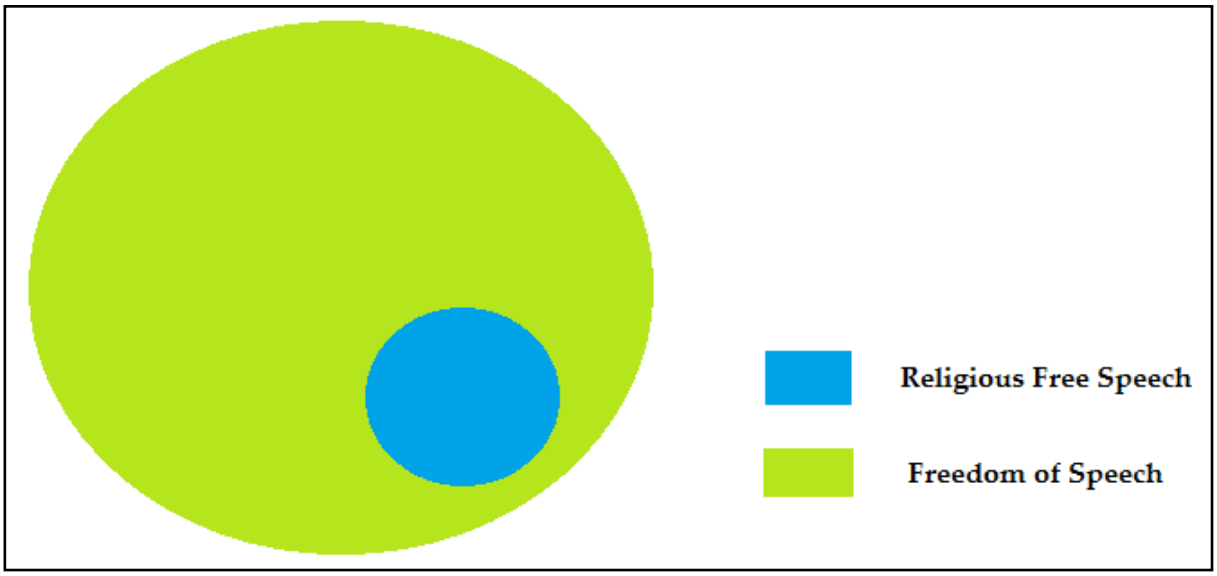


Graph 1: Religious Freedom

Freedom of Speech also incorporates a wider parameter than the expression of religious beliefs. It contains the expression, verbal or non-verbal,[22] of essentially everything that translates the thought and essence of the individual. That is from the manifestation of trivial thoughts up to the expression of religious or political

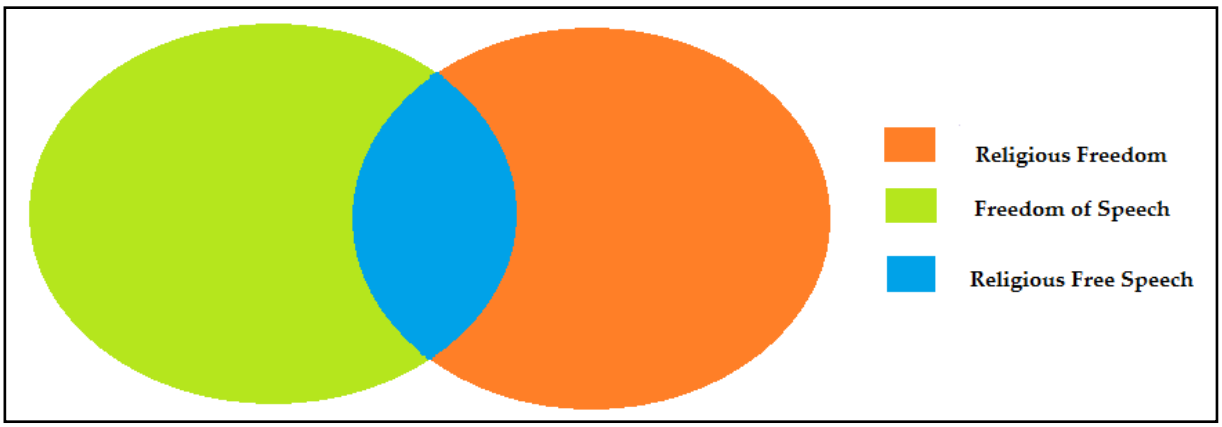
[22] See *Levy v Victoria* (1997) 189 CLR 579

views. Consequently, Religious Free Speech is contained within Freedom of Speech, as demonstrated in Graph 2.



Graph 2: Freedom of Speech

Religious Free Speech is the intersection of both of those concepts. Referred to as the verbal expression of religious manifestation, it is contained inside the parameters of both Religious Freedom and Freedom of Speech. This intersection is demonstrated in Graph 3.



Graph 3: Religious Free Speech

Accordingly, the protection of Religious Freedom and Freedom of Speech necessarily requires the protection of the Religious Free Speech.

In order to properly identify and consider the importance of Religious Free Speech, it is necessary to frame the concept of Human Dignity, as the justification of one concept is intimately connected to the other. This is because to the extent that Religious Free Speech exists as a Human Right, is derived from two fundamental Human Rights (Religious Freedom and Freedom of Speech). Both of these rest on the idea that all human beings have inherent dignity because they are human. The existence of Human Rights that are universal and applicable to every human being regardless of their social, physical, psychological or any other factor requires the assumption of a fundamental equality among human beings.

There are two main justifications for the equality of human beings that are adopted in this thesis. The first can be traced to Judaeo-Christian concepts that all man were made equal by God.[23] Even if the philosophical aspect of such a construction alone is considered, its structural result of equality among people is an important common ground on which western society rests

The second justification is the practical experience of the 20th Century. Even for those who reject philosophical concepts grounded in religious sources, recent history points towards the necessity of the assumption of equality among all human beings. The mass destruction of human life of the first and second World Wars demonstrated the relevance of such concepts, to ensure the mistakes of the past are not repeated in the future. The extension of this assumption bears directly on the consequential Human Rights construction from the historical experience of western society.

[23] Augusto Zimmermann, *Christian Foundations of the Common Law - Volume 3: Australia* (Connor Court, 2018), forthcoming.

Human dignity is understood here as the inherent irrevocable respect owed to every human being for simply being human, and from which the right to exercise freedom is inseparable.[24] For this reason human beings owe to each other the intrinsic respect to freely seek their own choices, including Freedom of Religion and Speech.[25] These were among the first Human Rights to be formally recognised by the international community, known as blue Human Rights or first generation Human Rights, core to assuring other rights.[26] It must be recognised that Religious Free Speech, as a Human Right, transcends Australian ground.

As a fundamental Human Right, Religious Free Speech as a fundamental Human Right goes further than the national experience. It is a right of all human beings. This universality justifies the introjection of international law and experiences of other jurisdictions in this thesis.[27] This logic is corroborated in Kateb`s work,[28] for it can be observed in it that Human Dignity is important regardless of the societal structure for its existence and is correlated to the human existence.

David Little argues that there are difficulties involved in attempting to understand the language of Human Rights apart from religious perspectives, manifesting a deep suspicion to the idea of considering Human Rights as a purely secular system. The scholar reports that many take issue with a view of Human

---

[24] See Jack Donnelly, *International Human Rights* (Westview Press, 2nd ed, 1998); Vatican II, *Declaration on Religious Freedom: Dignitatis Humanae – On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* (7 December 1965) <www.vatican.va/archive/hist_councils/ii_vatican_council/ documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>

[25] See also Barendt, above n 20, 13; Rex Ahdar, and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, Second; Second ed, 2013) 128.

[26] See also Whitmore and Campbell, above n 17, 113.

[27] The concrete existence of Human Rights does not form a consensus in political-philosophical discussions See eg, Robert Alexy, 'Law, Morality, and the Existence of Human Rights' (2012) 25 *Ratio Juris* 2.

[28] George Kateb, *Human dignity* (Belknap Press of Harvard University Press, 2011)

Rights as superior rights 'thereby encouraging a secularist form of intolerance and, consequently, creating the risk that the very system designed to protect persecuted religious believers might itself become their oppressor'.[29] Going further, Habermas says that Human Rights are the normative language adopted to spell out the equal dignity of all man.[30] If the previous religious routes of Human Dignity are an unpleasant idea to those who are more pragmatic, this same concept can be corroborated by this authors work.

Religious Free Speech is a Human Right because it is a part of both Freedom of Religion and Freedom of Speech under international Human Rights instruments. As previously explained, Human Rights have their source in Human Dignity. By building on this principle of human dignity, this thesis argues that Religious Free Speech is necessary for a pluralistic society, regardless of the specific protections provided, or not provided, by different legal authorities.

One of the essential foundations of a democratic society is this Freedom of Speech from which Religious Free Speech is derived.[31] Accordingly, Freedom of Speech is one of the necessary conditions for the progress and development of every man.[32] Freedom of Speech is not only applicable to speech that is ´favourably received´, ´regarded as inoffensive´ or ´a matter of indifference´. It extends even to those views that ´shock or disturb the State or any sector of the population´.[33]

[29] John Witteand M. Christian Green, *Religion and human rights: an introduction* (Oxford University Press, 2012), 136.
[30] Jürgen Habermas, '*the Concept Of Human Dignity And The Realistic Utopia Of Human Rights* (2010) 41 *Metaphilosophy* 464, 464-467.
[31] See *Handyside v the United Kingdom* (1976) Eur Court HR (ser A) 737, 754.
[32] Ibid.
[33]Ibid.

This is a precondition for the pluralism, tolerance and broadmindedness which are essential for a democratic society such as Australia.[34]

Intolerance towards religion breeds social and economic instability in any society and should ultimately be avoided.[35] This is exemplified by the religious persecution that has spanned across history. Considering the extent of religious persecution globally, and its effect on human life, the international community has makes an effort to protect Religious Freedom through diplomacy, international legislation and case law interpretation.

Separating religious manifestation from the public square divorces religiosity from its public expression.[36] As expressed on Michael Bird´s[37] submission to the Ruddock Religious Freedom Review Committee:[38]

> When it comes to religion, confident pluralism will not allow us to take punitive actions against religious groups with beliefs that we do not care for, whether that is the Church of Scientology, Islam, the Roman Catholic Church, Jehovah's Witnesses, or Australian Baptists. Any attempt by an over-reaching state to create social homogeneity by compelling religious groups into 'sameness' or punishing religious groups for their dissent or

---

[34] In John Sandeman, ´Religious freedom panel gets a diverse response´, *Eternity News* (online), 4 April 2018 <https://www.eternitynews.com.au/australia/religious-freedom-panel-gets-a-diverse-response/> Australian MP Tim Wilson writes: 'A free society does not seek to homogenise belief or conscience but instead, affirms diversity and advocates for tolerance and mutual respect.´

[35] See, eg, Frank B. Cross, *Constitutions And Religious Freedom* (Cambridge University Press, 2015), 5-7.

[36] See Anthony Gray, 'The reconciliation of freedom of religion with anti-discrimination rights' (2016) 42 *Monash University Law Review* 72, 122; John Rawls, *Political Liberalism* (Columbia University Press, 1993) 212–22; Peter Cane, Carolyn Evans and Zoe Robinson, *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, First Paperback ed, 2011.

[37] In Sandeman, above n 32.

[38] In late 2017, the Prime Minister of Australia, the Hon Malcolm Turnbull MP, announced the appointment of an Expert Panel to examine whether Australian law adequately protects the Human Right to Religious Freedom.

difference from public policy rests on a deliberate undermining of religious liberty.[39]

Giving a particular group special rights or benefits cannot be allowed if it requires the fundamental rights of others, such as their Religious Freedom, Free Speech, and consequential Religious Free Speech, to be ignored. In practice, not all people are able to enjoy all their Human Rights, let alone enjoy them equally. Nonetheless, all human beings have the same Human Rights and hold them equally and inalienably. For that reason, to deny Religious Free Speech is incompatible with dignity and the zeal for the welfare of mankind. For that reason,

Prohibiting religious speech in the public square denies an aspect of human identity[40] which informs the worldview of most people. The public expression of every person includes the public expression of beliefs, including religious beliefs, and to suppress them is to disrespect their Human Dignity, is damaging to the social structure and ultimately suppresses freedom.[41] To deny human beings the ability to express themselves in the public square is to deny them part of their Human Dignity.

The expression of an individual must include the expression of their religious beliefs as part of their essential human identity. Without this, freedom of

---

[39] In Sandeman, above n 34.>

[40] *R (Williamson) v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246, [15] (Nicholls LJ). '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'

[41] See Frank Brennan, *Acting on Conscience: How Can We Responsibly Mix Law, Religion and Politics*? (University of Queensland Press, 2007), 9.

expression is sterile and meaningless.[42] Freedom of Speech has been protected in international instruments as a means to avoid conflicts and wars that are often the consequence of religious persecution. Denying religious manifestation in the public square[43] is inconsistent with Freedom of Speech in general and the aims and intentions of these international instruments.

[42] "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. . . it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". (Mänskliga Danelius, rättigheter i europeisk praxis, 2nd edition, p. 306, citing the judgment of the European Court dated 25 May in the case of *Kokkinakis v. Greece*, p. 31, Publications Series A, No. 260-A)

[43] The place of religion in the public square can be vastly seen in the literature: See, eg, Brennan, above n 41; Gray, above n 36; Cane, Evans and Robinson, above n 36.

III. THE INTERNATIONAL STANDARD

There are diverse international instruments that relate to fundamental Human Rights. This subchapter addresses the *UDHR*, the `Religion Declaration` and three of what the Commonwealth Attorney-General`s Department has called `the seven core human rights instruments´[44] which have been ratified by Australia.[45] The protections given to international Human Rights can influence and be used in the development of the common law decisions particularly in accord with 'the principle of legality' in Australia although valid Commonwealth statutes can change the law in an instant. It must be added that the Commonwealth has the power to domesticate international Human Rights norms by statute under s 51(xxix) of the Australian Constitution but this has not been done in the area of Religious Freedom.[46]

A declaration, such as the *UDHR* does not, by its nature, enforce legal obligations on the signatories. Signing a declaration is prima facie a public expression of the values shared by the countries who chose to sign it.[47] Nevertheless, this

---

[44] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981; *Convention against Torture and Other Cruel, Inhuman or Degrading. Treatment or Punishment*, opened for signature 10 December 1984; *Convention on the Rights of a Child,* opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990); *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

[45] See Attorney-General's Department, *International Human Rights System* <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx>,; See also Australian Government, Australia´s Human Rights Framework (2010), 8.

[46] Evans, above n 1, 40. According to the author, the closest case on point is *Evans v New South Wales* (2008) 168 FCR 576 (French, Branson and Stone JJ).

[47] To choose to be bound to an international human rights treaty does not automatically make it part of domestic law. According to Brennan J in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42:

declaration is important and is used as source of human rights instruments all over the world.[48] It must also be mentioned that, not only have numerous nations signed in agreement with its principles, the *ICCPR* and *ICESCR* Covenants were enacted to implement its aspirations and to make them binding on the nations which accept and domesticate them.

According to Evans, the modern approach to the protection of Religious Freedom can be traced to *UDHR*. In the research theme that connects to the defense of the Religious Free Speech, a fundamental Human Right, must address the declaration as one of its main sources. The Commonwealth of Australia had an active role in the production and declaration of the *UDHR*. The *UDHR* justified the latter international covenants *ICCPR* and the *ICESCR*. These covenants have binding force in international law and have been signed by many nations, effectively making legal promises to the international community[49] to abide by those principles and implement and protect them in their domestic law.

The *UDHR* is a document that has value in international politics, and its existence illustrates the development of the international community. [50] Protecting religious belief, expression and action is part of the foundation of the whole

'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.

[48] For more see Australian Human Rights Commission, *What is the Universal Declaration of Human Rights?* <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights>

[49] There are a number of authoritative authors who suggest that these rules have achieved binding status as customary international law even if countries have not accepted them. See, eg, Triggs, Gillian Doreen, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2010)

[50] Australia was not only one of the founding members of the UN but was one of the eight countries responsible for the draft of the Declaration largely due to the leadership of Dr Herbert Vere Evatt, head of Australia's delegation to the UN who later in 1948 became the President of the UN General Assembly.

Human Rights project. For this purpose, article 18 of the *UDHR*[51] deals not only with religious matters,[52] but also has regard to freedom of thought and conscience. Limitations may be imposed upon the rights mentioned in the Declaration,[53] but these can only be held in order to assure other rights.

The *ICCPR* is the first instrument on the list of the international treaties on Human Rights that Australia has agreed to be bound by.[54] It turns the affirmation of freedom of religion, present in the *UDHR*, into a positive covenant. By ratifying it, Australia accepted obligations to implement Human Rights, including Religious Free Speech: committing to actively protect religious beliefs and practices of citizens, where they neither harm others nor interfere with the enjoyment of the rights and freedoms of others.[55]

Limitations may be imposed on the right to manifest religion or belief. Evans highlights that the *ICCPR* specifies limitations, and attaches them to each right, rather than imposing a general limitation.[56] The key concept to be understood

---

[51] Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

[52] See, eg, Dr Peter W. Edge et al, *Religion and Law* (Ashgate Publishing Ltd, 2006) 48.

[53] (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

[54] See Australian Human Rights Commission, *Human Rights Explained: Fact Sheet 7: Australia and Human Rights Treaties* <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties> ; Australia has reservations to the ICCPR regarding articles 10, 14 (6), and 20.

[55] *ICCPR* Article 18(3).

[56] Evans, above n 1, 29: '[t]he state must demonstrate that the measures that it has taken to restrict religious freedom are proportionate to the legitimate ends that it seeks to protect.'; and 'Article 18(3) only permits the state to limit 'manifestations' of religion or belief and not the internal right

here is that the legal limitations on manifestation of religion must be necessary. It is not enough for limitations to be supported only by an internal logic, popular demand, or convenience.[57] Limitations on religious manifestation must be strictly proportional to the extent to which other Human Rights need to be protected when in conflict with it.[58] Such limitations can be made by law if that law is objectively necessary to protect public safety or to protect other Human Rights.

The legal consequences of failing to adequately implement protection of Human Rights, such as Religious Free Speech, are limited. The enforceability of international instruments is connected to the delicate balance in the international sphere, currently being connected more to political developments. Nevertheless, considering that Australia is immersed in a globalized world, political consequences to a nation have importance.

According to the High Court of Australia, international legal obligations do not have effect in Australian domestic law before being assimilated into domestic legislation.[59] According to the understanding expressed by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*,[60] international treaties regarding Human Rights should be considered when domestic legislation is ambiguous, and the interpretation given by the courts should try to follow to the best

---

to religion itself. The limitations must be 'prescribed by law', which requires that there be a sufficiently clear law regulating the area, and must be 'necessary''.

[57] Ibid 34.Necessity is a strict test and requires states to demonstrate serious cause rather than mere convenience. Any restrictions placed on religion or belief must be proportionate to the end served. Thus, even if there is sufficient reason to limit religious freedom, that does not give the state a carte blanche to undertake measures that go beyond what is needed.

[58] See Patrick Parkinson, *'Christian Concearns about an Australian Charter of Rights'*, (University of Adelaide Press, 2012) 117.

[59] In *Chow Hung Ching v The King* (1948) 77 CLR 449, Dixon J held that the fact that Australia has ratifies a treaty has "no legal effect upon the rights and duties of the subjects of the Crown" (ibid 477-478). This view subsisted in other opportunities such as *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and McHugh J) and *Kiao v West* (1985) 159 CLR 550 (per Gibbs CJ).

[60] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

application of the international commitments that have been made.[61] This understanding was latter scaled back[62] in *Minister for Immigration and Ethnic Affairs; Ex parte Lam*.[63]. In order to comply with international treaties, legislation must be enacted to internalize them and make them domestically binding.

Australia periodically produces a report to evaluate its performance in this area and demonstrating what has been done to honour the *ICCPR*. This document shows what efforts Australia has made to internalise the commitments made internationally to protect Human Rights, reflecting on its performance and considering whether or not the restrictions made to the Covenant are still necessary.[64]Protecting the right to Religious Freedom, as set out in the *ICCPR*, is important. The Anti-Discrimination laws discussed in the next chapter are expressed as the main mechanism through which Australia internalises its international commitments regarding the protection of Human Rights.[65]

As previously mentioned, international law has to be legislated domestically, it does not automatically become part of Australian law. Nevertheless, a commitment is made to protect the rights upheld in the ratified treaties.[66] This goes to the heart of this thesis, as it addresses the conflict between Religious Free

---

[61] See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Momcilovic v The Queen* (2011) 245 CLR 1, [18]; *Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353.

[62] Matthew Groves, 'Treaties and Legitimate Expectations - The Rise and Fall of Teoh in Australia' (2010) 15 *Judicial Review* 323.

[63] *Minister for Immigration and Ethnic Affairs; Ex parte Lam* (2003) 214 CLR 1

[64]Attorney-General's Department, *United Nations human rights reporting* <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/default.aspx>.

[65] Australian Human Rights Comission, *UN Human Rights Committee report on Australia´s Human Rights Records*, 10 November 2017 <https://www.humanrights.gov.au/news/stories/un-human-rights-committee-report-australia-s-human-rights-record>.

[66] Evans, above n 1, 44.

Speech and Anti-Discrimination laws. Both of these qualify under the Human Rights mechanisms guarded by the *ICCPR*.

Some of the protections found in the Anti-Discrimination laws derive from international instruments. Although relevant for the protection of Human Rights, from the remaining of the so called ´seven core human rights instruments´, only the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child touch on religious matters.[67] The International Convention on the Elimination of All Forms of Racial Discrimination[68] and the Convention on the Rights of the Child[69] both assure the right to freedom of thought, conscience and religion within the scope of assuring protection for groups that are the target of racial discrimination.

The 'Religion Declaration'[70] is a relevant instrument in regards to Religious Free Speech, which is applicable in Australia.[71] The Declaration reaffirms the standard

[67] The Convention on the Rights of the Child also protects against discrimination for the parents or guardians religion in its article 2 and when not in the company of those to be kept in the cultural teaching in its article 20. Article 14 protects the freedom of thought, conscience and religion and in its third part do emphasizes that the restriction to such must be justified by necessity. If the protection for parents in this Convention is implemented, they will be allowed to raise their child/children in a faith of their own choice without state or private interference seen in article 14.

[68] Article 5 (d) (vii) assures the right to freedom of thought, conscience and religion

[69] Article 30 In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

[70] *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, (the *'Religion Declaration'*) Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); reaffirmed by the United Nations by resolution 48/128 in 1993, and declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

[71] *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, (the *'Religion Declaration'*) Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55)- see full reference how to

of necessity in its very first article[72] and is considered an international instrument relating to Human Rights and freedoms for the purposes framed in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).[73] While it was recommended that legislation should be introduced to implement the *ICCPR*'s standard into domestic law, this has not yet been accomplished.[74]

[72] 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever 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 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. Article 4
1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.
Article 5
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

[73] This was said by the than Commonwealth Attorney-General Michael John Duffy on February 8, 1993. *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998.

[74] George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory*, 6th ed., The Federation Press, 2014, 1134-1135 discuss how "[M]any international lawyers argue that the [Universal] Declaration [of Human Rights] has come to form part of customary international law and in this way can be seen as binding on all nations…Australia has ratified both Covenants [the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights*] and thereby agreed to assume the obligations they set out."

IV. THE IMPORTANCE OF RELIGIOUS FREE SPEECH TO AUSTRALIA

This subchapter identifies and considers the mechanisms relevant to Religious Free Speech in the Australian legal system. The first relevant instrument that deals with Religious Freedom is s 116[75] of the Australian Constitution.[76] This section was inspired by the First Amendment of the US Constitution but has been interpreted differently. Australia is a common law system and can use alien sources to assist with the formulation of its legal approach. Those sources are especially, but not limited to, other Commonwealth countries.[77] This does not mean that Australia adopts the interpretation of any other country, including the US.[78] Unlike the US, where the first Amendment is binding upon the states, s 116

[75] The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

[76]George Williams, the Dean of Law at the University of NSW wrote in the *Sydney Morning Herald*, "Section 116 has proved to be a frail and ineffective shield. Despite several attempts, the High Court has never been convinced to use this section to strike down a law." Williams adds, "Australian law fares poorly when it comes to religious liberty. The International Covenant on Civil and Political Rights spells out the international consensus on the need for protection. This is reflected in the national laws and constitutions of every democracy except Australia.".

[77] Isabel Regina Rocha de Sousa, A circulação e intercâmbio jurisprudencial no direito comparado: as State Supreme Courts Australianas. (Trabalho de Conclusão de Curso (Graduação em Direito, Universidade Federal Fluminense, 2014); Russel Smyth, 'Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis' (Monash University, 2008); *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* 1983 154 Clr 120, 131: Of course, when Australian courts are engaged in clarifying concepts important to Australian law, they may be aided by appropriate citation from the judgments of courts outside the Australian hierarchy if there is no binding or sufficiently persuasive Australian authority.

[78] Although recognised in many judgments, Australia renounced US precedents before the *Engenieers Case* in 1920. In the *Amalgamated Society of Engineers and Adelaide Steamship Company Limited* 28 CLR 129 on Knox CJ, Isaacs, Rich and Starke JJ (delivered by Isaacs J) in pg 146 'For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution.' Comments about the DOGS precedent are located further in this thesis case in 1981 where the majority of the HC rejected the argument that the establishment clause in s 116 should be interpreted in exactly the same way as a similarly worded provision is in the *US Constitution.*

of the Australian Constitution is not.[79] Section 116 of the Australian Constitution does not provide restriction upon the states in their legislative measures regarding religious matters, only limiting 'the Commonwealth' or Federal Parliament.[80]

Note that s 116 of the Australian Constitution can be divided into four parts: that the Commonwealth shall make no law 'for establishing any religion', 'for imposing any religious observance', 'for prohibiting the free exercise of any religion' and 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. The protection provided by s 116, as will be seen ahead, provides little protection for Religious Free Speech in Australia and, it must be emphasized, only restricts the legislative and executive powers of the Commonwealth within a very narrow range.[81]

'Establishment' is an elastic term,[82] hence the various understandings of the term in different jurisdictions (such as the Australian and American, despite the fact that the latter inspired the former).[83] From these four main themes in s 116, the one that has the most relevance to Religious Free Speech is the free exercise of

---

[79] Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015), 341, 342.
See also, Annemarie Devereux, *Australia and the birth of the International Bill of Human Rights 1946-1966* (Federation Press, 2005), 173-174.

[80] See *Attorney-General (Vic) Ex rel Black v* Commonwealth (*DOGS Case)* (1981) 146 CLR 559, 652 (Wilson J).

[81] Ibid (Barwick CJ)[Section 116] is directed to the making of law. It is not dealing with the administration of a law. But, if that administration is within the ambit of the authority conferred by the statute, and does amount to the establishment of a religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s 116. That is so, not because of the manner of the administration but because the statute, properly construed, authorizes it.' (emphasis in original).

[82] On the meaning of 'establishment' of religion, see Ahdar and Leigh, above n 25, 75–84.

[83] See *DOGS Case* (1981) 146 CLR 559, 621 (Murphy J); See generally Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 169

religion guarantee. However, the other clauses of this section may still be important for constitutional protection of such expression.

The first case in which the High Court showed signs of a narrow approach to the interpretation of s 116 was *Krygger v Williams*.[84] In this case, Edgar Krygger, a Jehovah`s Witness, declined to participate in military training. He argued that training for military service was, in his religious view, against the will of God. The Court did not accept the defendant's argument[85] that any involvement, even in non-combatant roles, would still be supporting the war effort which was in conflict with his religious beliefs.[86]

Griffith CJ and Barton J dismissed Krygger`s claim. The Chief Justice held that the right to free exercise of religion under s 116 was applicable to laws that prohibit the `doing of acts which are done in the practi[c]e of religion`[87] but this law did not prohibit the free exercise of Mr Kyrgger's religion The interpretation given was that a law that forces someone to act against their religious convictions, in a scenario that is not religious, is not the same as prohibiting the free exercise of religion.[88] Therefore, the challenged law was held to not be a prohibition to Mr Krygger's religion. Barton considered Mr Krygger's arguments to be `as thin as anything of the kind that has come before us`.[89] The s 116 prohibition referred specifically to the exercise of religion in religious circumstances.

---

[84] *Krygger v Williams* (1912) 15 CLR 366.
[85] Niel Foster, 'Religious Freedom in Australia' (Paper presented at the 2015 Asia Pacific JRCLS Conference, University of Notre Dame Broadway Campus, 31/05/2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887798>.
[86] Blackshield and Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014), 1174.´, Evans, above n 1, 75.
[87] *Krygger v Williams* (1912) 15 CLR 369
[88] Ibid. Griffiths CJ says that while 'a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds ... it does not come within the prohibition of section 116'.
[89] Ibid.

In this sense, a law that may be interpreted as prejudicial to a specific religious view, would not be in breach of s 116.[90] The incompatibility of religious views with the concept of traditional frames of religion, as pointed out in the case law, is not sufficient to disregard the importance of one's religious beliefs.[91] When the adoption of a law that goes against the religious conviction of an individual is not considered to be the same as not respecting one's religious manifestation, the protection of Religious Freedom becomes shallow. Since the precedent established in 1912, the High Court has continued to follow this narrow approach to the interpretation of s 116 provided in *Krygger v*. Only twenty years later, in *Judd v Mckeon,*[92] Higgins J held that s 116 could possibly be a protection for encroachments of religious belief that refer to acts which are not made in the practice of religion.[93]

The next time the High Court considered the meaning of s 116 was in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, known as the *Jehovah`s Witness Case*.[94] The case was held in the heat of World War II and involved a challenge to the *National Security (Subversive Associations) Regulations* (Cth). According to the regulations, if an association was declared unlawful it could be dissolved and stripped of its properties.

Acting on behalf of the Cabinet, the Governor General used regulation 3 to find that the Jehovah`s Witnesses' actions were prejudicial to the defence of the

---

[90] Ibid 371.

[91] 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) [2] ('General Comment 22').

[92] *Judd v McKeon* (1926) 38 CLR 380: a case in which the elector justifying it for all the candidates at the election supported capitalism and, being a member of the socialist labour party which worked for the ending of capitalism consequentially as a member he should not vote for any of the candidates,

[93] Ibid. It must be highlighted that the case was not pleaded under section 116.

[94] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* [1943] 67 CLR 116.

Commonwealth and the efficient prosecution of war. Following this, a Commonwealth officer attempted to occupy the hall where meetings and services of the Adelaide Company of Jehovah`s Witnesses Inc were held.[95] The High Court judges held that the relevant regulation went beyond the defence power under s 51 (vi) of the *Constitution but* did not infringe s 116.

In his judgment, Latham CJ held that s 116 protects not only religious belief, but also the 'pursuance of religious belief as part of religion`.[96] However, the argument espoused by the judge did not prevail against the narrow interpretation of s 116 that was given in the final decision by His Honour and his colleagues. Even though his honour defined religion broadly, that broad definition did not allow citizens to do whatever they liked in the name of religious belief or practice. That would allow all religious believers to become a law unto themselves and that could not be the meaning of section. The wide scope of s 116, if it had not been narrowed by the High Court, may have represented an opening for the disobedience of the law for religious reasons, which was not an appealing idea.

Latham CJ also recognised the difficulty of separating religious belief and practices from politics and ethics.[97] The assumption, according to him, is that citizens from any religion can be good citizens and therefore the community should have no interest in prohibiting the free exercise of any religion.[98] His arguments for the limits of religious protections under s 116 were based on the standard of reasonableness, rather than the standard of necessity developed in the more recent international standard. Accordingly, s 116 only protects religious

[95] Ibid 117-119.
[96] Ibid 124.
[97] Ibid 125-126.
[98] Ibid 126.

observance from direct government interference, rather than guaranteeing protection when religious beliefs are in conflict with legal obligations. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, while Latham CJ interpreted religion broadly, he and the court maintained gave it a quite narrow application in the free exercise of religion.[99]

The context in which the case was brought to the Court was unfortunate, for it is one of the few cases regarding s 116 in the High Court which was decided in the political tensions of a war.[100] The use of precedent made in the context of war as a standard for everyday conflicts over Religious Free Speech is not a good parameter. However, the modern ideal of necessity which would arguably enable a broad interpretation of s 116 may be extracted from the judgment of Rich, Starke and Williams JJ.[101] It is understandable that in war periods, the scope of necessity of interference by a government is wider. This is because extended sacrifices are made for the war-effort in virtually all civil areas. Because the necessity is wider, the use of the war-time precedent as a standard for the balance of the protections given to human rights is not appropriate.

In the *DOGS* case[102] Commonwealth financial aid to religious schools was addressed. The High Court held that the fact that a law supports the acts of a religious institution does not mean it was establishing a religion.[103] This meant

---

[99] Mitchell Landrigan, *Can the Australian Constitution Protect Speech About Religion or by Religious Leaders?* (Doctor of Philosophy, University Of New South Wales, 2014) 86.

[100] Rich, Starke and Williams JJ in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* [1943] 67 CLR 116, 160 said: 'When, therefore, the safety of the nation is in jeopardy, so that the right to such free exercise can only survive if the enemy is defeated, laws which become necessary to preserve its existence would not be laws for prohibiting the free exercise of religion.'

[101] Ibid 149-160 (Rich, Starke and Williams JJ).

[102] *DOGS Case* (1981) 146 CLR 559.

[103] Ibid 583 [34], Carolyn Evans (2009), *Legal Aspects of the Protection of Religious Freedom in Australia*, paper presented at Centre for Comparative Constitutional Studies, Melbourne Law School, 28, available at <https://www.humanrights.gov.au/sites/default/files/content/frb/papers/Legal_%20Aspects.pd>

that Commonwealth funding for religious schools was not an establishment of religion and that s 116 did not provide an impediment to such aid in general.[104] As has been discussed, 'establishment' can be understood differently. The *DOGS* precedent prevents the Federal Legislature from purposefully creating a national church or religion. However, it does not preclude the Federal Government from passing legislation that provides financial assistance to non-governmental religious schools.

Justice Murphy[105] dissented and argued that s 116 should be interpreted more widely, as not simply limiting the legislative power of the Commonwealth, but also fundamentally guaranteeing the right of every Australian to freedom of and from religion. He argued that even non-preferential aiding or sponsoring of religion could be interpreted as establishing a religion. Justice Murphy's approach drew on the interpretation of the American Constitution in regard to freedom of religion but is represents only one dissented interpretation and not the law in Australia.

Religious institutions such as schools provide services with governmental financial aid and, specifically in the case of education, such institutions provide educational services for people that the government school system itself might not be able to embrace.

In the 1988 referendum, which proposed to extend the application of s 116 to the states and territories, one of the arguments against such an extension was that it would be directly against the precedent set by the *DOGS* case, and, therefore,

---

[104] *DOGS Case* (1981) 146 CLR 559

[105] *DOGS Case* (1981) 146 CLR 559, 632-633 Murphy J rejected this narrow interpretation of estabilishment defendind that the funding in the case did infringe the establishment clause.

would threaten the funding of religious schools.[106] This referendum failed in every state in Australia.[107] It seems that this massive failure may have had more to do with the fear of such consequences for the funding of religious institutions rather than the desire not to extend the protection of Religious Freedom. It can also be argued that the extensive amount of issues to be decided by the same referendum, lowered the possibility of an approval.[108]

In addition, the narrow interpretation of free exercise of religion under s 116 by the High Court provides limited protection to Religious Free Speech. For this reason, it can be argued that the potential benefit of expanding s 116 to the states would not be so positive. This is because the states can give a more extensive protection to Religious Freedom if they choose to do so, as they are not bound by s 116 and the High Court's interpretation[109] being able to protect it better than the Commonwealth if they chose to do so.

In *Church of the New Faith v. Commissioner of Pay-Roll Tax (Victoria)*,[110] known as *the Scientology case*, the issue was whether or not the Church of the New Faith was entitled to tax exemption under a provision of the Victorian tax legislation on the basis that it was a religious institution.[111] Section 116 was not the focus of the case

---

[106] Doogue, Michelle Grattan; Edmund, ' "Bishops to deal blow on referendum', *The Age*, 15 August 1988 <https://news.google.com.au/newspapers?id=U1kpAAAAIBAJ&sjid=gZYDAAAAIBAJ&pg=3303,3701810&dq=referendum+religion+australia&hl=en>,
Seccombe, Mike, 'Bowen assurance to schools on 'yes' vote', *Sydney Morning Herald.*, 16 August 1988?

[107] Blackshield, A. R. et al, *Blackshield and Williams Australian constitutional law and theory: commentary and materials* (Federation Press, 6th ed, 2014), 1184.

[108] Other suppositions for the failure. See, eg, Scott Bennett and Sean Brennan, 'Constitutional Referenda in Australia' (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1999) table 1 www.aph.gov.au/library/ pubs/rp/1999-2000/2000rp02.htm , discuss the reasons given for the failure of constitutional proposals and the lack of empirical research in this area.

[109] Other cases in which s 116 was addressed by the High Court although interesting it seems not to have a straight impact into religious free-speech.

[110] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic*) [1983] 154 CLR 120

[111] Section 10 of the *Payroll Tax Act 1971* (Vic).

and the question was not what religion is, but what a religious institution is. Nevertheless, the High Court judges sought to define the concept of religion and decided that Scientology is a religion.[112]

The definition of religion chosen by the High Court in the case is broader than the frame that would include traditional religions. Mason ACJ and Brennan J held that there must be `belief in a supernatural Being, Thing or Principle', `acceptance of canons of conduct in order to give effect to that belief` and that `there may be a different intensity of belief or of acceptance of canon of conduct among religions or among the adherents to a religion`.[113] In the case, Murphy J was the only judge that declined to define religion, for he held that any attempt to do so would pose a threat to Religious Freedom.[114] It must be highlighted here that the High Court had already decided cases about s 116 without defining what it understood as religion. It is not within the scope of this thesis to define how far the concept of religion should be taken and, for this reason, the definition of religion of the High Court in *the Scientology case* will be adopted.[115]

---

[112] It must be noted that s 116 was not the debated in this case, but the Court did try a definition of religion that would solve the practical case. The concept of religion has previously been addressed only by Latham C.J. and McTiernan J in *Company of Jehovah's Witnesses Inc. v Commonwealth.* A broader understanding of what constitutes a religion was given by the High Court, but the narrow understanding that to force someone by law to do something that is against their religious beliefs is not an offence to the free exercise of religionstill stands as a great barrier (the High Court also adopted this understanding in *Krygger v Williams*).

[113] [1983] 154 CLR 120, 136.

[114] Ibid 150.

[115]'Religious Freedom. Religious freedom is a fundamental theme of our society. That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or the judiciary to determine what religion is, this poses a threat to religious freedom. Religious discrimination by officials or by courts is unacceptable in a free society. The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions

The understanding of what protection to Religious Free Speech is provided by s 116 seems to point to an unhopeful future. The *Australian Constitution* seems to ultimately fail to explicitly provide a personal or individual right to Religious Freedom.[116] Restrictions provided by the Commonwealth of Australia are not consistent with the necessity requirement or with the substance of article 18 of the *ICCPR*.[117]

Kruger v Commonwealth (Stolen Generations Case)[118] concerned a constitutional challenge by Northern Territory Aboriginals to the validity of a Northern Territory ordinance that appointed the Chief Protector of Aboriginals as legal guardian of every aboriginal child in the Northern Territory. This ordinance had enabled Aboriginal children to be removed from their parents and families without tangible cause and detained in Aboriginal institutions or reserves or made wards of states and given to other families to raise. The plaintiffs argued that this limited the free exercise of religion of those children, contravening s 116. The High Court held that the Northern Territory Ordinance was not made *for* the purpose of establishing religion as in s 116 of the Constitution. This is because the interpretation of this section is focused on the law-making process.

---

are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is "one in, all in". In Ibid,7.

[116] *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 604 (Gibbs J); *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 268. See also Tony Blackshield, George Williams and Michael Coper (eds*), Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 93–4; Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion* (Routledge, 2005) ch 4 ALRC Report 129, 2015, 5.27.

[117] See also Witte Green, above n 29, 261-62.; Silvio Ferrari,et al, *Law, Religion, Constitution: Freedom ofRreligion, Equal Treatment, and the Law* (Ashgate, New ed, 2013), 29-30.; Chris Ronalds and Elizabeth Raper, 'Discrimination Law and Practice' Federation Press, <http://UNDA.eblib.com.au/patron/FullRecord.aspx?p=1170027>, 49.

[118] (1997) 190 CLR 1.

The constitutional provision that enables international instruments to be made binding in Australian domestic law is s 51(xxix). This constitutional mechanism has the potential to protect Religious Free Speech and other Human Rights under s 51 (xxix), for the external affairs power allows the Commonwealth to legislate about matters that are related to international matters and agreements.[119] As mentioned previously, international commitments made by Australia are not automatically domestically enforceable, .[120] The cases on the ability of the Commonwealth to give effect to its international obligations are *Koowarta v Bjelke-Petersen*,[121] *Commonwealth v Tasmania (Tasmanian Dams Case)*[122] and *Queensland v Commonwealth (Daintree Rainforest Case)*.[123]

In 2015, the Law Reform Commission submitted a report to the Attorney General on the encroachments on traditional rights and freedoms by Commonwealth laws. Among the items analysed were Religious Freedom and Free Speech.[124] The Commission noted there are not many provisions that interfere with Religious Freedom , but it did recognise that '[t]he main areas of tension arise where Religious Freedom intersects with Anti-Discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and

---

[119] Sir Daryl Dawson, "The Constitution – Major Overhaul or Simple Tune-up?" (1984) 14 *Melbourne University Law Review* 353, 358- "there is no theoretical limit to what may be the subject-matter of international agreement...[and hence] the external affairs power, may, as a matter of constitutional theory, be regarded as open-ended".

[120] In *Chow Hung Ching v The King* (1948) 77 CLR 449, Dixon J held that ratification of a treaty committed Australia internationally but holds "no legal effect upon the rights and duties of the subjects of the Crown" (ibid 477-478). The High Court has kept this understanding in cases such as *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and McHugh J) and *Kiao v West* (1985) 159 CLR 550 (per Gibbs CJ). *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, 298, 303-304, 315; *J H Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500.

[121] (1982) 153 CLR 168

[122] (1983) 158 CLR 1.

[123] (1989) 167 CLR 232 at 238.

[124] ALRC Report 129, 2015

worship settings.'[125] In practice, this causes unjustified interferences with Freedom of Speech.[126] In addition, the Commission observed that some terms in the legislation lack clarity and, as a consequence, unjustifiably interfere with Freedom of Speech.

The report did not commit itself to definitively stating whether the Commonwealth Anti-discrimination laws significantly encroach on Religious Freedom in Australia. It concluded that in future initiatives to consolidate the Anti-Discrimination laws, whether Religious Freedom should be protected through a general limitation clause in a new Commonwealth law protecting Religious Freedom instead of exemptions should be considered.[127] Religion plays a major role in human life and has a fundamental role in people's understanding of right or wrong.[128]

Freedom of Speech is not protected by a specific statute in Australia, even though the external affairs clause in the Constitution does make such protection possible if the appropriate legislative measures are taken. The Law Reform Commission pointed out that the principle of legality[129] would provide some protection to Freedom of Religion[130] because, when interpreting a statute, the courts should presume that Parliament did not intend to interfere with Religious Freedom.[131]

---

[125] Ibid 1.29.
[126] Ibid 4.207; 4.208.
[127] Ibid 5.124.
[128] See also Joseph Boyle, 'The Place of Religion in the Practical Reasoning of Individuals and Groups' (Pt University of Notre Dame) (1998) 43(1) *American Journal of Jurisprudence*; Steven D Smith, *The Constitution and the Goods of Religion*, University of San Diego School of Law Research, 131-133.
[129] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J): 'a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right'.
[130] See e.g. ALRC Report 129, 2015. 5.39-39; Denise Meyerson, 'The Protection of Religious Rights under Australian Law' (2009) 3 *Brigham Young University Law Review* 529, 542; *Lee v New South Wales Crime Commission* (2013) 302 ALR 363,[314] (Gageler and Keane JJ).
[131] Meyerson, ibid 542.

Nevertheless, the absence of an express protection opens the door for Religious Freedom to be diminished or abrogated by any unambiguous law passed by the legislature, such as the Anti-Discrimination laws.

In regard to the implied freedom of political communication,[132] Aroney[133] argues that religious speech would be protected if such speech were political.[134] This is because political discourse is protected under the Australian Constitution and, therefore, a religious speech that is also political speech would be protected.

The development in the High Court of the concept of the implied freedom of political communication is reasonably recent. While there had been hints in judgments over the previous decades, it was only affirmed in 1992.[135] The High Court has found that the freedom is actually a limitation on the legislative and executive powers, rather than an individual right,[136] and it includes not only speech but nonverbal communication of political matters.[137] There is uncertainty of the range of speech that is actually protected by the implied mechanism. It must also be considered that this protection could still be abrogated by an unambiguous law passed by the legislature.

---

[132] *See Australian Capital Television Pty Ltd and New South Wales v Commonwealth* 177 CLR 106; in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 123 the political speech was defined by the High Court and remains unaltered.

[133] Nicholas Aroney, 'The constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation (2006), 34 *Federal Law Review* 288, 292.

[134] See also *Monis v The Queen* (2013) 249 CLR 92, [60] (French CJ)

[135] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News'*);*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106('ACTV'). *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 112 ('the Lange test'): `First, does the law effectively burden freedom of communication about government or political matters, either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.`

[136] *Tajjour v New South Wales* (2014) C:R 508, 42 (Crennan, Kiefel and Bell).

[137] See *Levy v Victoria* (1997) 189 CLR 579, 594-5 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-4 (McHugh J), 638-41 (Kirby J) ('*Levy'*).

V. CONCLUSION

The objective of this chapter has been to *identify* and *consider* the importance of Religious Free Speech in general, and in Australia. It seems that to overlook the very principles which are foundational to our society is to disregard society itself and to lose the cornerstones on which all other rights are based. Denying the expression of fundamental beliefs of people's lives is to condemn dialogue, development and construction of rational thinking. Without the tolerance of ideas, even the ones we disagree with, a door to persecution is left open.

International sources are relevant for domestic legislation on human rights and to ignore them is to ignore the commitments made by Australia and the history of respect of those rights. The sovereignty of nations[138] is a cornerstone to the existence of the international community and the existence and respect of the covenants signed internationally pose no threat to the independence of each nation. Human rights are not circumstantial and should not be addressed differently depending on geographical areas, especially within a country. Ultimately, as pointed by the Australian Law Reform Commission, 'much of the value of calling something a right will be lost if the right is too easily qualified or diluted'. [139]

Human rights as the common expression of Human Dignity cannot be overlooked by a pluralistic society such as Australia.[140] If Human Rights spell out

---

[138] See eg, Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008).

[139] ALRC Report 129, 2015, 2.58.

[140] Dr Keith Thompson, 'Accommodating Rights? Religion, Speech and Equality in Australia' (Speech delivered at the ALRC Freedoms Symposium, Adelaide, 21 September 2015) <https://www.alrc.gov.au/accommodating-rights-religion-speech-equality-keith-thompson>: ` the only limitations on Freedom of Speech and conscience that can be justified in democratic societies, are those which would interfere with public safety, order, health, or morals or the fundamental rights and freedoms of others…[legislation or other government action which]

the normative substance of the equal dignity of every human being′, Religious Free Speech is necessary regardless of the specific protections provided. The reason for people's obedience to the law, and the rules that are fundamental to the survival of society, commonly passes through religious views by a categorical imperative.[141] Religious Freedom brings about a more peaceful society[142] and it is a necessary tool for social stability.[143]

The inadequate level of protection of Religious Free Speech in Australia should be of concern to its citizens.[144] As Williams observes, Australia is the only democratic nation that does not protect Freedom of Speech in its constitution.[145] The international standard being recognised, Australia's incomplete protection is revealed in both the absence of Commonwealth and state/territory laws protecting Freedom of Religion (including that of Religious Free Speech) and in the narrow way the High Court has interpreted the free exercise of religion set out in s 116 of the Constitution. This thesis takes the position that the quick succession in which the various jurisdictions of Australia enacted Anti-

---

exceed[s] those limits overreach…because [they are] impatient. [They] overreach because they penalize…speech that does not incite violence…[They are] impatient because [they] seek…to impose a standard rather than to allow that standard to be accepted and become binding on the nation's conscience as the patient result of free and open debate… If [legislation or other government action] succeed[s] in suppressing… debate, the opportunities to teach those who still discriminate …[will] have been lost…[limitations which overreach international standards] chill…more debate than [they] enable… Rawls' idea of Public Reason, which undergirds some of the opinion that would narrow the scope of our public dialogue, is subversive of freedom of conscience and speech despite the endeavours of Rawls' disciples to prove otherwise. Milton, Adam Smith, Locke and their successors are correct that the market place of ideas will weed out ideas that grow as tares in our democratic gardens.

[141] See Immanuel Kant, *Lectures on Ethics* (Harper & Row, 1963)

[142] See also Frank B. Cross, *Constitutions and Religious Freedom* (Cambridge University Press, 2015) 5-7.

[143] Schmidt, above n 4; Star, above n 4.

[144] Brennan, above n 41, 85: 'Persons with religious views or religious motivations were treated not only as if they held no trump cards at the table. They were treated as if they had no cards at all. The only cards which could be played from the hand were cards which would be valued by liberal atheists.

[145] George Williams, 'Protecting freedom of speech in Australia' (2014) 39(4) *Alternative Law Journal* 217.

Discrimination laws, while lacking a consistent framework, has the potential to undermine Religious Free Speech in this country. This will be explored in the next chapter.

3RD CHAPTER: THE NATURE OF ANTI-DISCRIMINATION LAW

I. INTRODUCTION

Anti-Discrimination laws are the body of law that prohibit certain conduct, which is considered discriminatory. The idea is that prohibiting the named discriminatory conduct will provide equality. In Australia, the body of law governing this area is of statutory creation and has no criminal development in general, being a part of the civil law branch.[146] This chapter intends to frame the Anti-Discrimination laws themselves. Some provisions of Anti-Discrimination law conflicts with Religious Free Speech and that conflict is the focus of this thesis. This body of law has brought controversial opinions regarding the focus of this thesis. Anti-Discrimination law in Australia has typically implemented second tier Human Rights without working through and giving judicial officers direction as to how conflicts with first tier Human Rights should be balanced. This chapter will therefore identify the nature of the Anti-Discrimination laws and highlight which of those laws come into conflict with Religious Free Speech in Australia.

Commonwealth, state and territory laws often overlap in the areas addressed by Anti-discrimination statutes. Nevertheless, both Commonwealth and state (or territory) laws must be complied with to the extent that they are not inconsistent.[147] Some of the grounds that are covered in the domestic Anti-discrimination laws include: race, age, sex, nationality, disability, sexual orientation and political opinion.

---

[146] Ronalds and Raper, above n 117,.Neil Rees, Katherine Lindsay and Simon Rice, *Australian anti-discrimination law: text, cases and materials* (The Federation Press, 2008).

[147] Australian Human Rights Commission, *A quick guide to Australian discrimination laws* <https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/quick-guide-australian-discrimination-laws> (*'A quick guide to Australian discrimination laws'*)

According to Margaret Thornton, discrimination 'consists of a plethora of formal and informal practices modified by societal acculturation and intertwined with messages from the inner consciousness`.[148] In certain cases, the use of laws that aim for equal treatment of people can be a source of unequal opportunity. Australia's state and federal Anti-discrimination laws have been passed to resolve those cases of unequal treatment which have become socially unacceptable (and which have become the focus of policy reform agendas). The legislative purpose of Anti-discrimination law is to achieve a position of social equal opportunity, trying to bring balance to discriminatory situations. But the way balance is to be achieved when other Human Rights are implicated in the balancing equation can be unclear especially when the relevant anti-discrimination statute does not direct judges how that balance is to be worked out.

This chapter is divided into three main sections. The first provides an overview of the rationale and general structure of Australian Anti-discrimination laws (II). The second identifies how Australia's Anti-discrimination laws relate to recognised international Human Rights (III). The third examines if the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic) provide adequate protection to Religious Free Speech (IV) and is followed by a short conclusion which introduces the next chapter (V).

[148] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) , 7.

II. AUSTRALIAN ANTI-DISCRIMINATION LAW: OVERVIEW OF THE RATIONALE AND GENERAL STRUCTURE

Human Rights are not an Australian creation. They have a long history in the international sphere where treaties have been created to protect them. Inside a country it is impossible to talk about human rights without mentioning international sources. Human Rights, as mentioned in the 2nd Chapter, are sourced from Human Dignity. Both Human Rights and Human Dignity are held to be universal. For that reason, the influence of international legislation as a source to the solution of problems not yet solved in this country must naturally be considered.

Though Australian law is separate and independent from the law of other countries, it has been significantly influenced by legal development in both the UK and the US. [149] Australia's defence of its 'White Australia policy' in resistance to US efforts to eradicate racial discrimination from the 1860s and particularly after the 1940s .The international ideas and discussions around racial discrimination drew increasing attention from the general public around the world, particularly from the middle of the 20th century.[150] This factor, joined with the internal developments in Australian society, progressively influenced the 1967 amendment of the *Australian Constitution*, the ratification of the *International Convention for the Elimination of all Forms of Racial Discrimination*,[151] the first state

[149] The US *Civil Rights Act of 1964*, Pub L No 88-352, 78 Stat 241 and also the sex discrimination laws passed by the UK parliament in mid 1970s have considerably influenced Australian anti-discrimination law.

[150] For example, the practice of apartheid raised considerable attention at the time, not only in the USA with the American Civil Rights Movement, but globally with a plurality of racial discriminatory structures brought to question.

[151] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('International Convention on the Elimination of All Forms of Racial Discrimination')

Anti-Discrimination Act in South Australia and the passage of the *Racial Discrimination Act 1975* (Cth).

The White Australia policy was formally dismantled a year before the *Constitution* was amended to remove the provision that distinguished indigenous and non-indigenous Australians for specific purposes.[152] Considering the overseas ideological pressure which influenced these changes to Australian law, the impact that international structures have on the law-making process will therefore be addressed in the present chapter.

The first Anti-Discrimination law that was passed in Australia came from the South Australian Parliament in 1966. The *Prohibition of Discrimination Act 1966* (SA) prohibited racial discrimination in some aspects of employment and in the provision of goods and services. This piece of legislation came shortly after the end of the White Australia policy and represents the change of attitude that began to develop in Australia regarding the previous prejudiced culture.

The first Anti-discrimination law in the federal sphere also targeted racial discrimination. Even though the Commonwealth Parliament had no express constitutional authority to enact Anti-Discrimination law,[153] it relied on its indirect external affairs and races powers in ss 51 (xxvi) and (xxix) of the Constitution with the *Racial Discrimination Act 1975* (Cth).[154] In 1982 the Act

---

[152] See also Ronalds and Raper, above n 117, 3; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd edition ed, 2014) vol 2nd 1.

[153] While there is no express power that specifically authorised the Commonwealth to pass this law, when the law was challenged in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the Commonwealth argued that the races power (s 51(xxvi) and the external affairs power (s 51(xxix) authorised this legislation. The High Court held that the legislation was not authorised under the races power but was indirectly authorised under the external affairs power

[154] This Act is still the target of intense critiques e.g. Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18c is Wrong* (Connor Court Publishing Pty Ltd, 2016) is an interesting and current approach criticizing s 18C. A 1995 amendment to the Act went

survived a High Court challenge to its constitutional validity in *Koowarta v Bjelke-Petersen*.[155] As the federal legislation was substantially based[156] on t*he International Convention on the Elimination of All Forms of Racial Discrimination*[157] the government was able to rely on the external affairs power in s 51 (xxix) [158] of the Constitution to establish its legislative competence to enact the statute.[159]

New South Wales passed its first Anti-discrimination law in 1977, prohibiting discrimination on the basis of race, sex and marital status relating to employment, public education, delivery of goods and services and others.[160] In 1981, physical

---

further than was allowed by the underlying international treaty and they argued that this single provision about free speech should be struck down.

[155] In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 it was held that the relevant constitutional provision did not give the Federal Pairlament the power to enact such an instrument.

[156] In Australia's combined 18th-20th reports under the Convention on the Elimination of All Forms of Racial Discrimination submitted in 2016 in its pg 6 item 22, specifically says ´The principal way Australia implements the Convention on the Elimination of All Forms of Racial Discrimination is through the Racial Discrimination Act 1975 (Cth) and the work of the Australian Human Rights Commission (AHRC).´

In Australia's combined 18th-20th periodic reports to the UN Committee on the Elimination of Racial Discrimination it expressly noted: ´The principal way Australia implements the Convention on the Elimination of All Forms of Racial Discrimination is through the Racial Discrimination Act 1975 (Cth) and the work of the Australian Human Rights Commission (AHRC).´ See, Australian Government, *Eighteenth to twentieth periodic reports of States parties due in 2014: Australia**, CERD/C/AUS/18-20 (2 February 2016), 6 [22].

[157] Some of the cases which have recognised the Act's reliance on the *International Convention on the Elimination of All Forms of Racial Discrimination* include: *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Gerhardy v Brown* (1985) 159 CLR 70; *Brandy v HR&EOC* (1995) 183 CLR 245.

Other cases have held the reliance of such act on the International Convention on the Elimination of All Forms of Racial Discrimination: *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Gerhardy v Brown* (1985) 159 CLR 70; *Brandy v HR&EOC* (1995) 183 CLR 245.

[158] The two landmark cases on the capacity of the Federal Government to give effect to its international obligations are *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania (Tas manian Dams Case)* (1983) 158 CLR 1 per Mason J at 124-4 and Deane J at 258.

[159] See, eg, Ronalds and Raper, above n 112, 3.; Rees, Rice and Allen, above n 147, 1. The two landmark cases on the capacity of the Federal Government to give effect to its international obligations are *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1, 124 (Mason J) and 258 (Deane J)

[160] Anti-Discrimination Board of NSW, *History of the Anti-Discrimination Act 1977 (NSW)* <http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_antidisclaw_history.aspx>

disability was added and in 1982 intellectual disability and homosexuality were also added. Impairment grounds were allocated later on and a broader ground of disability in 1994. As time passed, other grounds continued to be added to the New South Wales Act such as racial vilification (1989), compulsory retirement (1990), age and homosexual vilification (1993), transgender (1996), carers' responsibilities (2000) and breastfeeding (2007).

In 1977 a similar law to the New South Wales Act came into operation in Victoria. The law prohibited discrimination on the grounds of marital status and gender in the sphere of employment, education, accommodation and the provision of goods and services.[161] In Victoria, the matter of discrimination on the grounds of religious belief or activity was combined with discrimination on the grounds of race in the *Racial and Religious Tolerance Act 2001* (Vic), which will be addressed in greater detail in item IV of the present chapter. The Human Rights Commission (HREOC) recommended a federal anti-religious discrimination law, but the federal government took no action. South Australia considered it, but again took no action. Only Victoria followed the HREOC 1998 recommendation.

Queensland produced the *Anti-Discrimination Act 1991* (Qld),[162] adopting a similar definition of religion to Victoria, namely that 'religious activity means engaging in, not engaging in or refusing to engage in a lawful religious activity' and 'religious belief means holding or not holding a religious belief.' In 2001, Queensland also passed legislation which introduced religious vilification; the

[161] *Equal Opportunity Act 1977* (Vic).

[162] The Act prohibits discrimination on the basis of sex, relationship status, pregnancy, parental status, breastfeeding, race, age, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, and association with or in relation to a person who has any of the attributes prescribed by the law when it occurs in work, education, provision of goods and services, superannuation or insurance, disposition of land, accommodation, club memberships and affairs, administration of state laws and programs.

Anti-Discrimination Amendment Act 2001 (Qld). In this legislation, a person was prohibited from publicly act in a way that would 'incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religion'.[163] The state also criminalised serious religious vilification in a manner that is similar to Victoria.

Western Australia adopted broader legislation. The *Equal Opportunity Act 1984* (WA) aimed to provide equality of opportunity and remedies in respect of discrimination on different grounds. [164] In its Act, Western Australia merged political and religious convictions into the same ground and stipulated that 'religious or political conviction shall be construed so as to include a lack or absence of religious or political conviction'. As such, in Western Australia, political and religious view are weighed alongside each other, as though they are of a similar foundation.

The Anti-discrimination legislation enacted in the Australian Capital Territory is the *Anti-Discrimination Act 1991* (ACT).[165] Regarding the religious sphere, it stipulates that:

> religious conviction includes— (a) having a religious conviction, belief, opinion or affiliation; and (b) engaging in religious activity; and the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people; and (d) engaging in the cultural heritage and distinctive spiritual

---

[163] *Anti-Discrimination Amendment Act 2001* (Qld) s 124A(1).

[164] Discrimination is prohibited on the grounds of sex, pregnancy, race, religious or political conviction, or involving sexual harassment. The initial grounds of the Act have been expanded to include impairment (1988), family responsibilities, family status, age (1992), racial harassment (1992) gender reassignment (2000) and sexual orientation (2002). The *Spent Convictions Act of 1988* deals with the ground of spent convictions.

[165] Discrimination on the basis of sex, sexuality, gender identity, relationship status, status as a parent or carer, pregnancy, breastfeeding, race, religious or political conviction, disability, including aid of assistance animal, industrial activity, age, profession, trade, occupation or calling, HIV spent conviction, and association (as a relative or otherwise) with a person who has one of the above attributes is prohibited in the spheres of in employment, education, access to premises, provision of goods, services or facilities, accommodation, clubs, and requests for information .

> practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; and (e) not having a religious conviction, belief, opinion or affiliation; and (f) not engaging in religious activity.[166]

As will be seen, states have brought some sort of definition of religion. However, they have not, in general, actively protected Religious Freedom or its subset Religious Free Speech which as seen previously is far from ideal.

The Anti-Discrimination legislation in force in the Northern Territory is the *Anti-Discrimination Act 1992* (NT).[167] In the religious sphere, it prescribes that '[f]or the purposes of this Act, religious belief or activity shall be construed to include Aboriginal spiritual belief or activity.'[168]

In Tasmania, the *Anti-Discrimination Act 1998* (Tas)[169]is the key Anti-Discrimination law. However, the *Constitution Act (1943)* (Tas) also contains a section that protects Religious Freedom, which means that there is arguably no need for a specific Anti-´Discrimination legislation. Such constitutional provision

---

[166] *Discrimination Act 1991* (ACT)

[167] The *Anti-Discrimination Act 1998* (Tas) provides protection against discrimination on the attributes of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, irrelevant criminal record, political opinion, affiliation or activity, irrelevant medical record, and association with a person with an above attribute. Discrimination on these grounds is prohibited from occuring in the following contexts: education, work, accommodation, the provision of goods, services and facilities, clubs, insurance, and superannuation

[168] Australian Human Rights Commission, above n 147, '*A quick guide to Australian discrimination laws'* Australian Human Rights Commission, *A Quick Guide to Australin Discrimination Laws* <http://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/quick-guide-australian-discrimination-laws>.

[169] The Act protects against discrimination on the basis of age, breastfeeding, disability, family responsibilities, gender, gender identity, intersex status, industrial activity, irrelevant criminal record, irrelevant medical record, lawful sexual activity, marital status, relationship status, parental status, political activity, political belief or affiliation, pregnancy, race, religious activity, religious belief or affiliation, sexual orientation, and association with a person who has, or is believed to have, any of these attributes in the grounds of employment, education and training, provision of facilities, goods and services, accommodation, membership and activities of clubs, administration of any law of the State or any State program, and awards, enterprise agreements and industrial agreements.

has not prevented cases concerning Religious Free Speech arising in the state, as will be discussed in the 4th Chapter. Section 19 of the *Anti-Discrimination Act 1998* (Tas) outlines certain restrictions on public actions, with the intention of preventing religious vilification.

There have been a few attempts to internalise the protections to Religious Freedom which were promised internationally. Examples of this are the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006* and Tasmania's *Constitution*,[170] all providing limited protection. The limitation in these instruments occurs because the frame in which Religious Freedom is set is not enough for the protection of Religious Free Speech, as will be seen in the cases to be seen in the 4th chapter. This is similar to what occurs in the case of s 116 of the *Australian Constitution*. The protection promised by such statutes have shown to not be effective in practice, as the protection provided by the mechanisms is limited when it comes to a court of law.

In addition to passing the first Anti-Discrimination legislation in Australia, South Australia was also the first Australian state to legislate to prevent the discrimination of women. The *Sex Discrimination Act 1975* (SA) was also followed by a new racial discrimination law in 1976 and a law for people with physical disabilities in 1981. These laws were later replaced by the *Equal Opportunity Act 1984* (SA).[171]

However, while South Australia was once the vanguard of Anti-discrimination legislation, Acts have been passed by other states which provide greater

[170] It should be noted that the section in the *Tasmanian Constitution* existed before the *UDHR*, which shows an interesting vanguard in the matter.
[171] See also, Ronalds and Raper, above n 117, 3; Rees, Rice and Allen, above n 152, vol 2nd 1.

protections. Discrimination on the grounds of religious belief or activity, for instance, is not subject to protection under the Anti-Discrimination laws of South Australia. The legislative behaviour towards the theme gives cause for uneasiness in the protection of religious liberties, a fundamental human right that is becoming the subject of deep disqualification in secular society.[172] [173] A number of Anti-discriminatory laws which clash with Religious Free Speech has demonstrated that the current state of protection is not enough.

In the federal sphere, the Commonwealth has passed three other statutes which prohibit discrimination on specific grounds: The *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). In 1984 came the *Sex Discrimination Act 1984* (Cth) using the external affairs power in s 51(xxix) which implemented the *International Convention on the Elimination of All Forms of Discrimination Against Woman*.[174] This was influenced by the international debate on the theme, which flamed after 1975 when the United Nations declared the International Women's Year. Relevant amendments to the Act include the addition of family responsibilities and in 1992 the revision of the definition of sexual harassment. Later in 1995 there was the revision of the definition of indirect discrimination.[175]

The debate over the unjustified difficulty that people with disabilities have in specific circumstances resulted in the *Disability Discrimination Act 1992* (Cth), which was implemented using the external affairs power in s 51(xxix).[176] This

---

[172] See Ferrari, above n 117, 20-25.
[173] See Ferrari, Silvio et al, *Law, religion, constitution: freedom of religion, equal treatment, and the law* (Ashgate, New ed, 2013), 20-25.
[174] The constitutional validity of that Act was confirmed in several decisions such as: *Aldridge v Booth* (1988) 80 ALR 1; *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251; *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217.
[175] Ronalds and Raper, above n 117, 4
[176] The validity of the Act was confirmed in *X v Commonwealth* (1999) 200 CLR 177 and *Soulitopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584, 599

followed partially the US with Disabilities Act.[177]Amendments to such Act were made in August 2009. [178]

The last Anti-Discrimination legislation passed on the federal sphere was the *Age Discrimination Act 2004* (Cth)[179] and it relies on four international instruments: *the ICCPR, the International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* and the International Labour Office`s *Discrimination (Employment and Occupational) Convention*. [180]

Section 351 of the *Fair Work Act 2007* (Cth) has provisions about discrimination in the work place, although is not purely an Anti-Discrimination Act the Human Rights Commission was established in 1981 and replaced latter in 1986 by the current *Human Rights and Equal Opportunity Commission Act*.[181] In August 2009, HREOC was renamed the Australian Human Rights Commission and the title of the legislation was changed to the *Australian Human Rights Commission Act*.

The general idea of introducing Anti-Discrimination legislation[182] is that it would bring balance to unequal discriminatory situations by discouraging certain behaviours. This is done through binding civil penalties to discourage certain behaviours. This is seen as a way to balance a relation that was unbalanced for discriminatory nature and to bring equality.

Some believe that the idea behind such laws intended to radically change the social structures by overcoming the exclusion of particular groups. Another

---

[177] See also, Ronalds and Raper, above n 117, vol 4th 4; Rees, Rice and Allen, above n 147, vol 2nd 1
[178] Ibid
[179] Ibid
[180] *Age Discrimination Act 2004* (Cth) s 10(7)-(11)
[181] Australian Human Rights Commission, above n 147, '*A quick guide to Australian discrimination laws'*
[182] Rees, Rice and Allen, above n 152, vol 2nd, 2.

perspective is that the Anti-Discrimination laws are a mechanism designed to silence the clamour of groups that perceive themselves mistreated for reasons of unfair discrimination.

The ideal of equal opportunities has to take into account an entire social structure and this might be the first weakness of the mechanism. Introducing legislation as a main mean to achieve equality is to assure future inequality. Once the aimed balance in the relations is achieved the harmonizing mechanisms will still be active unbalancing the configuration for it will continue to give preferential treatment to groups that no longer will need them.

Historically the changeability between suppressor and supressed points out that mechanisms that blindly benefit one group might multiply minorities and this is unlikely to change any time soon. In the scope of supressed becoming suppressor, the narrow interpretation of religious liberty given in the Australian scenario and the narrower implementation of the international mechanisms that protect religious liberty points to a difficult future for Religious Free Speech in Australia as to be seen by the developments of the cases in the next chapter.

The achievement of the general equality intended through the Anti-Discrimination laws is to be appreciated not only by academic critical analysis but also the observation of the environmental relation of minorities. To work out whether achievement of the Anti-Discrimination objective was worth the costs to other Human Rights it must be reviewed what other important freedoms are in society and make sure they have not been compromised to an unacceptable level. An extensive number of critics to the political choice of the Anti-Discrimination law is accessible[183] but the branch that deals with the relating regards those laws

[183] See Thornton, above n 143; Rees, Rice and Allen, above n 152, Vol 2.

and the Freedom of Speech is short[184] and regards the Religious Free Speech even shorter. When the sensitive issues underlined by the Anti-Discrimination legislation are confronted with the Religious Free Speech the outcome is controversial. This is because two or more sensitive areas are being confronted and there is no guidance in the legislation on how the sensitivities are to be balanced.

Religion is important in Australia.[185] Brennan asserts that that the religious views or motivations of people that are not valued by liberal atheists are arguably too often disregarded.[186] As noted by Howard, '[i]t remains the fact that the Christian religion is the greatest force for good and progress, and the dignity of the individual in this nation'.[187] Nevertheless negative experiences with religion and personal convictions bring a shift to this. Accordingly, it is not correspondent to the nature of Australia to undermine religion.[188] There is a specific prejudice

[184], Ben O'Neill, 'Anti-discrimination law and the attack on freedom of conscience' (2011) 27(2) *Policy: A Journal of Public Policy and Ideas* 3

[185] See, eg, Anthony Gray, 'The reconciliation of freedom of religion with anti-discrimination rights' (2016) 42(1) *Monash University Law Review* 72

[186] See, Brennan, above n 41, 85; Carolyn Maree Evans, above n 1, 2

[187] *Kevin Rudd: The God Factor,* (ABC Compass, 2005) <www.abc.net.au/compass/s1362997.htm> Peter Costello also stated that '[w]e need a return to faith and the values which have made our country strong': *Evangelist Christian Vote Wanted* (ABC Lateline, 2004) <www.abc.net.au/lateline/content/2004/s1150747.htm>,

[188] In their 'Australian Values Statement', the Australian Government Department of Home Affairs lists "freedom of religion" as one of the key Australian values: See, Australian Government Department of Home Affairs, Fact Sheet - Life in Australia: Australian Values <www.homeaffairs.gov.au/about/corporate/information/fact-sheets/07values>.

towards religion in the current secular Australian society.[189] The disregard for religious views[190] in society is translated in the little case offered to religion.

The short answer to the question of whether the equal opportunity laws achieve their objective is no. They have not only endangered or harmed the freedoms of others, but sensitive groups such as victims of racial discrimination have not been using such mechanisms as was intended. Furthermore, they have not only been an inadequate mechanism to ensure equality, but they have caused further inequality. Besides this, it can be considered that the body of anti-discrimination law created in Australia is underdeveloped and sometimes used as a mechanism of mass litigation for political lobbyists, instead of protecting individuals in unbalanced relationships. Such laws can be used as a weapon because the law does not require tribunal judges to take other freedoms including Freedom of Speech and its subsidiary Religious Free Speech into account.

The Parliaments and courts have not yet managed to successfully integrate rules that require balance between competing human rights that must co-exist in order to develop a solid and coherent basis for such laws.[191] The body of law studied is

---

[189] Fergus Hunter, '"At least I'm not a homophobe": Bill Shorten in tense exchange with Cory Bernardi', The Sydney Morning Herald (Online) 24 February 2016 <http://www.smh.com.au/federal-politics/political-news/at-least-im-not-a-homophobe-bill-shorten-in-tense-exchange-with-cory-bernardi-20160223-gn1xdl.html>); 'Xenophon won't give up on Scientologists', SBS News (Online) 24 February 2015 <http://www.sbs.com.au/news/article/2010/05/12/xenophon-wont-give-scientologists>.Natasha Bita, 'Scientology criminal, says senator Nick Xenophon', The Weekend Australian (Online) 18 November 2009<http://www.theaustralian.com.au/news/nation/scientology-criminal-says-senator-nick-xenophon/story-e6frg6nf-1225799077820>. Joe Kelly, 'Andrew Denton tells church to get out of euthanasia debate', The Weekend Australian (Online) 11 August 2016 <https://www.theaustralian.com.au/national-affairs/health/andrew-denton-tells-church-to-get-out-of-euthanasia-debate/news-story/79d96ef36771d7591fa850304b600966>.

[190] John H Garvey, 'Two aspects of liberty' (2016) 91(4) Notre Dame Law Review 1287, 1297-1297 sais: 'The culture itself cares less about religion, and because it does, the proponents of religious freedom find themselves asking for protection of an activity that is unimportant, or worse. There is ample evidence of a shift in popular convictions about religion. We have not yet given up the faith to the degree the French have but we are trending in that direction.'

[191] Rees, Rice and Allen, above n 152; Rees, Lindsay and Rice, above n 146, 1.

not clearly integrated with other essential Human Rights not present in those laws, which can result in a frustration of the objectives of such Anti-Discrimination laws.[192] This is particularly true for Religious Free Speech. The protection to Religious Free Speech becomes more important in society when 'religious freedom is contested, or religious sectarianism or discrimination is rife'[193] for religious contention can be very destructive and should not be brought back as the effort to help minorities to achieve equality is taken.

[192] In Australia's sixth report to the United Nations Human Rights Committee it noted that it is not necessary to adopt the ICCPR in a single statute, and cited many anti-discrimination laws as examples of how Australia is following the convention. See, *Sixth periodic reports of States parties due in 2013: Australia**, CCPR/C/AUS/6 (2 June 2016)

[193] Evans, above n 1, 2.

III. HOW THE AUSTRALIAN ANTI-DISCRIMINATION LAWS RELATE TO THE RECOGNISED INTERNATIONAL HUMAN RIGHTS

International instruments are not directly enforceable in Australia unless they have been domestically incorporated into law.[194] There is a presumption called ′the principle of legality′ in the Australian common law, however, that Parliament does not intend to breach international obligations made by the executive.[195] That means that international treaties should be considered by courts, and the courts should apply domestic legislation in a manner that is consistent with the commitments made by the executive, especially where the Australian law is ambiguous.[196]In order to construe legislation in a manner that conflicts with the international treaties signed by the Commonwealth it is necessary that a clear statutory purpose exists to support such an interpretation.[197] Further, the legislation must continue to comply with constitutional limitations. [198] Nevertheless a state parliament or the federal parliament can overrule an international Human Rights norm by passing a clear and unambiguous contrary law.

The external affairs clause in the *Australian Constitution* provides the Commonwealth the power to legislate in respect to commitments made

---

[194] In *Chow Hung Ching v The King* (1948) 77 CLR 449, 477-478 Dixon J held that the fact that Australia has ratified a treaty has 'no legal effect upon the rights and duties of the subjects of the Crown'. This view subsisted in other cases such as *Dietrich v The Queen* (1992) 177 CLR 292 (Mason CJ and McHugh J) ; *Kiao v West* (1985) 159 CLR 550 (Gibbs CJ);*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J)

[195] See, eg, *Evans v New South Wales* (2008) 168 FCR 576 (French, Branson and Stone JJ) As noted by Evans, above n 1, 40: 'International human rights protection can also influence the development of the common law, although so far it has not really done so in the sphere of religious freedom.′

[196] See, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Momcilovic v The Queen* (2011) 245 CLR 1, [18]; *Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353; *Evans v New South Wales* (2008) 168 FCR 576

[197] *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 (McHugh J), 643 (Hayne J), 661–2 (Callinan J)

[198] Evans, above n 1, 40.

internationally. That means that international treaties can be used as a basis for internal legislation to protect certain human rights such as Religious Free Speech, and to clarify the parameters in which the Commonwealth is permitted to legislate about the issue.[199] There is space in the external affairs clause for legislation that implements article 18 of *ICCPR*.[200] Furthermore, there is the possibility of applying international protections to Religious Free Speech once this is a subset of Religious Freedom and free-speech. Since *Koowarta* (1982) and certainly after the *Industrial Relation Act case* (1996) it has been clear that the Commonwealth's power under s 51(xxix) was sufficient to implement the *ICCPR* including Article 18 (plus the Religion Declaration) in Australian domestic law. Once the legislative power to protect Religious Free Speech in accordance with international norms exists, the absence of protection to religious discrimination shows a clear inefficiency in the protection of Human Rights, suggesting either that the issue is not politically important enough, or too hard. Regarding having a specific Human Rights act or a specific legislation that protects Religious Freedom, even the churches have been opposed until now for finding that it could be more harmful than helpful to protecting this Human Right for a fear of the weight and interpretation that may be given to it by the courts.

The introduction of legislation in the domestic forum based on international sources can be problematic due to the protection of the national independence that each nation like has. This is one of the reasons why the creation of such legal mechanisms disseminated the debate regards the use of external affairs power to provide basis to domestic legislation. The understanding of what each Human

---

[199] As it can be seen in *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*') the existence of treaties regards religious freedom possibilitates the federal legislative process but does not give *carte blanche*. The legislation must be made whithin the treaty provisions in a way that do not undermine the core existence for which the treatie exists.

[200] Evans, above n 1.

Right protected internationally mean to different countries might differ. This means that slight cultural differences applicable in the legal protection of a right in different countries are to be expected, but those differences cannot be so radical that empties the meaning of the right protected in the first place.

As mentioned earlier, given the absence of a constitutional provision that authorises the Federal Parliament to legislate on matters of anti-discrimination, the Commonwealth is confined to relying upon the external affairs power.

To bolster the legislative power of the Commonwealth in such circumstances, the High Court has given an expansive interpretation to the `external affairs' power in s 51 (xxix) of the *Commonwealth Constitution*.[201] It has held that legislation that aims to protect matters treated in international instruments does not have to repeat the precise words of the international instrument, rather must merely be 'appropriate and adapted' to the purpose of implementing the obligations as intended by the treaty.[202] This independency from the wording of the specific instruments gives the Commonwealth the possibility of developing the appropriate mechanism that is suitable to its national conditions. It must be borne in mind, however, that such power is not unlimited and the more closely a law reflects the treaty provisions, the less likely it is to be subject to challenge.[203]

The obligation to protect Religious Freedom and Religious Free Speech, and to prevent discrimination on the basis of religion or belief is set out in the *ICCPR* and should be upheld by Australia.

---

[201] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 528; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 124-4 (Mason J) and 258 (Deane J); *Queensland v Commonwealth* (1989) 167 CLR 232, 238 .

[202] *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

[203] Evans, above n 1, 43.

Although Australia has many Anti-Discrimination instruments[204] the protection of Religious Freedom and more specifically Religious Free Speech is very shallow and when made has shown to be inadequate.[205] The United Nations Human Rights Committee has expressed concern regarding the lack of protection for religious freedom in Australia.[206] In its reports to the United Nations Human Rights Committee regarding the *ICCPR* the Australian Government extensively points to the Anti-Discrimination legislation all over the country as evidence of Australia's compliance with its international commitments.

The Anti-Discrimination law enacted by the Commonwealth of Australia, namely: The *Racial Discrimination Act 1975,* the *Sexual Discrimination Act 1984* and the *Disability Discrimination Act 1992* represent three of the seven core Human Rights treaties that Australia has agreed to be bound by.[207] Not all seven of the international instruments listed earlier however are incorporated into domestic law.

---

[204] See, eg, *Racial Discrimination Act 1975* (Cth); *Sexual Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Fair Work Act 2009* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NT).

[205] The *Human Rights Act 2004* (ACT) and the *Charter of Rights and Responsibilities Act 2006* (Vic).

[206] Australian Human Rights Commission, *UN Human Rights Committee: report on Australia's human rights record* (10 November 2017) <https://www.humanrights.gov.au/news/stories/un-human-rights-committee-report-australia-s-human-rights-record>.

[207] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976*)*; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

In terms of the States, the choice and justification to the creation of such laws is more related to their political aims. The states have almost unlimited power to pass Anti-Discrimination laws. They do not need to rely on international conventions or treaties. They can pass any laws that suit them provided they are not inconsistent with laws the Commonwealth government has validly passed.

The standards based on the international instruments and particularly the *ICCPR* show a wide range of Human Rights to be protected. The political choice of only legislating for those that are closer to the public eye and therefore more popular goes against the idea of non-discrimination. Leaving some of the *ICCPR* rights out of state Anti-Discrimination regimes is a problem. To get an appropriate balance, all of the rights need to be protected. The choice that was made in Australia of preferencing second generation (new) rights that are not even mentioned in the *ICCPR* and leaving older rights that the UN has considered more foundational out of the range of the specific protection are causing new inequalities in society.

The next topic that requires discussion in this subchapter is the nature of the Religious Freedom that is protected in the *ICCPR.* The ICCPR is the international instrument that provides foundational protection to religious belief. The protection given to Religious Free Speech in Australia is distinct from the international standard as Australia adopts an alternative approach to the issue of when a state is allowed to interfere in religious manifestation. While the gold standard embodied in the *ICCPR* is based on the principle of "necessity" for such intervention, in the Australian landscape the test is based on convenience. The *ICCPR* comes with specific limitations for each right that it protects.[208]In respect to the right to religious freedom contained in article 18(3), a state can only enact

[208] Evans, above n 1, 29.

laws that interfere with 'manifestations' of religion or belief and not the internal right to religion itself. There are two key aspects of article 18(3). First, any interference with religious freedom must be 'prescribed by law', requiring clear law regulating the area. Second, and most importantly, the interference with the freedom must be 'necessary'.'

Public good or convenience are not enough to justify a state's limitation of the right to manifest a religion or belief. It is necessary that the state shows the measures taken which restrict the Religious Freedom are necessary and proportional to the legitimate ends that it seeks to protect.[209] A limitation on the right to manifest a religion or belief can only be imposed if it is shown to be 'prescribed by law' and 'necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'. [210] This means that the state cannot legislate to interfere with religious practice unless it is necessary; that is, unless there is no other way.[211]

[209]Ibid 29.

[210] Ibid 33

[211] According to Evans (ibid 34), '[w]hile international treaties recognise that freedom of religion may be limited because it interferes with the rights and freedoms of others, the determination as to when religious freedom should prevail over other rights has to be undertaken on a case-by-case basis.'

IV. DO THE HUMAN RIGHTS INSTRUMENTS OF THE ACT AND VICTORIA PROVIDE ADEQUATE PROTECTION TO RELIGIOUS FREE SPEECH?

There are two Charters of Human Rights currently operative in Australia, the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*. Although they are not technically Anti-Discrimination laws, in order to accurately analyse the conflict between the Anti-Discrimination laws and Religious Free Speech and the possible solutions to them it is important to connect those legal mechanisms to the research theme and its effectiveness in the protection of Religious Free Speech in Australia once this is a Human right.

The ACT *Human Rights Act* was the first Human Rights charter in Australia. In its formation process, the consultative committee recommended that the charter protect economic, social and cultural rights in addition to civil and political rights.[212] The final document was more conservative than what was originally intended by the committee[213] being limited to rights extracted from the *ICCPR*. The ACT *Human Right Act* also failed to initially require of public authorities to comply with Human Rights, but it is unlawful for public authorities to breach rights[214] and some remedies are available when they do so.[215]

The ACT *Human Rights Act* requires that the ACT courts interpret all legislation consistently with its terms[216] and when this is not possible, those courts must

---

[212] ACT bill of rights Cosuktative Committee, Towards an ACT Human Rights Act (2003), 90.
[213] See, Simon Bronitt, `Two visions of the Human Rights Act 2004 (ACT): A ´Claytons´ Bill of Rights or the New Magna Carta?´(Paper presented at the Forum on the National Implications of the ACT Human Rights Act, ANU, 1 July 2004).
[214] *Human Rights Act 2004* (ACT) s 40B(1)
[215] Ibid s 40C(4). Damages are not usually available for breach of a right protected under the Act: s 40C(4).
[216] Section 30 of the *Human Rights Act 2004* (ACT) provides: 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.

make declarations that a provision cannot be interpreted compatibly with Human Rights.[217] This does not invalidate such law as would be done if it was a Constitutional Charter of Rights, rather it merely requires a notification to be given to the legislative power informing them of such incompatibility.[218] This ACT legislation prohibits discrimination on the basis of religion (among other characteristics) and sets out a right to Religious Freedom. The provision presents in s 14 of the ACT statute[219] is very similar to the language used in the Victorian legislation to be discussed below.

Cases under s 14 of the ACT statute generally do not examine or consider the scope of religion,[220] with the closest being *Buzzacott v R*[221] This case involved a man who was accused of dishonestly appropriating a bronze coat of arms from outside Old Parliament House and was taken to the Aboriginal Tent Embassy. [222] Specificities of the reference to s 14 of the appeal in this case are not made clear as affidavits submitted in the case contained sacred information that were requested to remain only to the knowledge of the judge,[223] what is known is that the appeal was dismissed. [224]

---

[217] Ibid s 32.
[218] Ibid s 33.
[219] Section 14 of the Human Rights Act 2004 (ACT) provides:
(1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
a) the freedom to have or to adopt a religion or belief of his or her choice; and
b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.
[220] *R v AM* [2010] ACTSC 149 (15 November 2010); *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council* (Administrative Review) [2012] ACAT 81 (21 December 2012).
[221] *Buzzacott v R* [2005] ACTCA
[222] Ibid, 7
[223] Ibid, 16
[224] Ibid, 17

The State of Victoria also legislated in 2006 the *Charter of Human Rights*. Like the ACT legislation, the *Charter* requires that courts interpret all legislation consistent with the Human Rights protections contained in the *Charter*[225] and where this is not possible, make declarations that a provision cannot be interpreted compatibly with Human Rights.[226] This does not invalidate such law as would be the case if a law breached a Commonwealth constitutional Charter of Rights which was binding upon states, rather the legislature is merely notified of laws that are incompatible with Human Rights under the Charter.[227]

The Victorian *Charter*, like the ACT statute prohibits discrimination on the basis of religion and sets out a right to Religious Freedom. The difference being that the ACT uses the language of 'everyone', instead of 'every person' and only states that no-one may be 'coerced' in a way that would limit his or her Religious Freedom, rather than 'coerced or restrained' as stated in the Victorian Charter.

Turning now to the cases that have used s 14 of the Victorian *Charter*, the first worthy of mention is *Valentine v Emergency Services Superannuation Board (General)* in which a widow of a former ambulance driver had her pension terminated once she remarried. [228] She was told that her pension would be reinstated if she divorced her current husband or if he died. She consequently complained that she was being penalised on the basis of her religion as her religious beliefs prohibited her from obtaining a divorce**.** Ultimately, she was not successful with the Tribunal ruling against her. In another case, s 14 of the *Charter* was raised in a disciplinary hearing, where a dentist advised a patient suffering from mental

[225] Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides: 'Sofar as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatiblewith human rights'.
[226] Ibid s 36.
[227] Ibid s 37.
[228] [2010] VCAT 2130.

illness that she was afflicted by evil spirits and that she should attend church to be cured.[229] Section 14 was not successful in the case as the Charter was not in force at the time the original decision was made.[230]

Another significant reference to s 14 of the Victorian *Charter* occurred in *Hoskin v Greater Bendigo City Council* where the Court of Appeal held the Bendigo Council was obliged to take into account important human rights provisions, including s 14 when deciding whether to allow the construction of an Islamic mosque in Bendigo. Other cases have included: *Canterbury Municipal Council v Moslem Alawy Society Ltd*,[231] *Rutherford & Ors v Hume CC*[232] and *Fraser v Walker*.[233]

Whilst both the ACT and Victoria have created Human Rights laws, their respective instruments fail to implement the religious limitation contained in the *ICCPR* as mentioned earlier in this thesis. As such, the Human Rights legislation of these states permit secularist liberal interpretations of human rights laws to relegate Religious Freedom to a low position in 'an implicit hierarchy of rights established not by international law, but by the intellectual fashions of the day'.[234] Instead of affirming that Religious Freedom should only be limited in cases where it is necessary 'to protect public safety, order, health or morals or the fundamental rights and freedoms of others',[235] what was used was a general balancing provision that basically destroyed the "necessity" provision in article 18(3).[236]Furthermore, the interpretation of judges in the current grounds provides an unconstrained discretion whether or not to take any account of international

[229] *Dental Practitioners Board of Victoria v Gardner (Occupational and Business Regulation)* [2008] VCAT 908
[230] Ibid
[231] (1985) 1 NSWLR 525.
[232] *Rutherford & Ors v Hume CC* [2014] VCAT 786 (14 July 2014).
[233] *Fraser v Walker* [2015] VCC 1911 (19 November 2015).
[234] Parkinson, above n 58, 121.
[235] *ICCPR* Article 18(3).
[236] Parkinson, above n 58, 98-101.

law in carrying out that work of interpretation of other legislation when balancing to those specific charters rights.

The Victorian *Charter* for instance does gain its moral authority from international Human Rights law but does not comply with that body of law. The Victorian legislation provides people less Religious Freedom rights than the *ICCPR*. This is because the *ICCPR* offers no justification for a hierarchy of Human Rights in which Anti-Discrimination provisions could possibly be above the rights to Religious Freedom and freedom of conscience. Further, the *ICCPR* does not offer any justification for the limitation of fundamental Human Rights[237] such as seen in the parameters shown in the Victorian *Charter*, namely that those limitations are 'justified in a free and democratic society based on human dignity, equality and freedom' subject to the discernment of the person appointed to make such a judgment.

The *ICCPR* provides greater protection than this, article 18 being one of the few rights in the *Covenant* that cannot be derogated from even in a time of public emergency that threatens the life of the nation. [238]This brings us to the conclusion that freedom of religion in Australia is treated as trivial, as if religious beliefs are not important.[239] They are rarely positively protected and when they are protected it is to a lesser extent than required by international standards. This brings uncertainty to religious groups who may be wanting to support or petition for a Religious Freedom Act federally, as will be discussed in the 6th chapter.

---

[237] See also, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).
[238] *ICCPR* Article 4(2). See also, Paul Babie and Neville Rochow, *Freedom of Religion under Bills of Rights* (Cambridge University Press, 2013) 135-136.
[239] See Parkinson, above n 58.

The limitations to which Human Rights can be subjected both in the Victorian *Charter* and the ACT Human Rights legislation are subject to the grounds of reasonableness and not necessity.[240] Neither the ACT nor Victorian legislation can override legislative provisions that are against Human Rights preserving the independence of the parliament,[241] being only possible to notify the inconsistency. An optimistic side of those treaties is that both of those characters is the possibility of using international sources to base decision in domestic tribunals. In practice this has not changed the problem with necessity in those states although considering that the international protection shows a possible larger ground than the Australian one as it is seen on chapter 2 being a doorway to a more comprehensive interpretation. Especially when considering that the case law shapes the behaviour in society.

[240] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2004* (ACT) s 28.

[241] Joanna Davidson, 'Incorporation of human rights in administrative decision-making: the impact of human rights instruments in Victoria and the Act' (2012)(68) *AIAL Forum* 43, 44.

V. CONCLUSION.

The equality aimed for by instruments such as anti-discrimination laws cannot be adequately achieved by means that ultimately intersect and conflict with other Human Rights. [242] Existing anti-discrimination laws in Australia do not provide frameworks that allow tribunals and courts to balance and resolve these conflicts in ways that respect Religious Freedom and its subset Religious Free Speech.[243] Religion relates to virtually every corner of human life. The necessity of constantly litigating and justifying religious speech are burdens or impediments to Religious Freedom.

Instead of creating an even ground between secular and religious views, a battle between those immensurable 'values'[244] takes place, a dispute in which religious beliefs are progressively considered more suitable to a private sphere.[245] Regarding the danger of overlooking religion in the public sphere, Ferrari points out that focusing on non-discrimination, ignoring religious differences and misunderstanding those two by neutrality of the State is likely to negatively neutralize religion expelling it from the public space. [246]

Australia has decided to adopt a large amount of Anti-Discrimination legislation in a short period of time. The grounds in which such laws are based have become larger and not much has been done to harmonise the many, and sometimes overlapping, Anti-Discrimination acts or to translate effectiveness to this

---

[242] See Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.
[243] Ibid
[244] The possible inaccuracy of the word 'values' is extensively considered by Iain Benson, see: 'Do "Values" Mean Anything at All?' (Paper presented at the Education at the Crossroads Conference, University of Calgary, May 11, 2002); 'Do "values" mean anything at all? Implications for law, education and society' (2008) 33(1) *Journal for Juridical Science* 33(1).
[245] For more on the political discussions of religion in Australia, see: Evans, above n 1, 13-19; Frank Brennan, above n 41, 85.
[246] Ferrari et al, above n 117, 20-25.

legislative rush brought to society and the mere optimistic idea that legal mechanisms which ignore or trump them are the tools to lasting positive social change is not appropriate. The use of legislation as a way of enforcing certain social behaviour is valid in certain circumstances, but it is far from being the appropriate mechanism to teach and assure the respect to be aimed in other to reach an equality situation. Anti-discrimination legislation is not working as effectively in Australia as it could because it is ignoring the adequate protection of some fundamental Human Rights such as Religious Free Speech and creating new and dangerous inequalities.

Although Anti-Discrimination legislation has proliferated in Australia, there is not much protection in such acts to the religious sphere. Furthermore, the approach adopted by Australia when imposing limitations on the religious sphere (i.e. the "convenience" rather than "necessity" standard for interference) has resulted in religious speech and practices being in an uncomfortable situation that becomes motive of concern when clashed against Anti-Discrimination laws.

The protection of core human rights is not to be based on the agreeing with the points of view or sharing the worldview but to protect them as part of Human Dignity. An anti-religious feeling is growing with the accentuation of secularism and changing social values. As a result, the protection the Religious Free Speech in Australia is less hopeful than one would wish for.

International human rights instruments currently offer more protection for Religious Free Speech than domestic legislation. It should not be accepted that a multicultural country with zeal for equality and Religious Freedom, is providing less protection than the international standard. This is concerning for a

multicultural country that was once a great defender of human rights.[247] Freedom of religion including freedom of religious speech, is an essential human right in international law, not an optional one. Article 27 of the *ICCPR* points out that there is no contradiction between Religious Freedom and multiculturalism.[248]

An extremist attitude towards third generation rights in Anti-Discrimination legislation, combined with a new negative view towards multiculturalism in this new millennium has led to a view that equality is not compatible with the recognition of anti-discriminatory rights. [249] It is easily forgotten that in multiculturalism, respecting the rights of minorities includes acknowledgingf diversity. [250]

In the domain of Anti-Discrimination legislation there is a sensitive and has signalised to be a backfire against the Religious Free Speech. Activists of different branches of social point of views may make use of the tool designed to protect minorities to create other minorities. The idea behind the policies surrounding Anti-Discrimination legislation would not be to create a mechanism designed to achieve relatively slowly a single voice regarding the most various topics, polemic or not. To develop this way lies one of the dangers of the legislation, that is, the risk of supressing free-speech on empowering a singular view to each topic as considered the correct one. Furthermore, the lack of positive direction and protection to the Religious Freedom when this is confronted with other rights brings intrinsic to itself the expansion of restrictions to human behaviour and

---

[247] There are arguments that point to a suspiscious attitude towards multiculturalism in the advancement of the freedom and dignity of people and the promotion of individual rights. Susan Moller Okin, for example, gave voice to these sentiments in her influential essay, 'Is Multiculturalism Bad for Women?' (1997) 22 *Boston Review* 8. For more views, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995); Babie and Rochow, above n 235, 126.

[248] Ibid 147.

[249] Ibid 127.

[250] Ibid 130.

public debate. The range of discrimination to which such laws are applied grows wider and are being extended to prohibit activity-based discrimination in addition to identity-based discrimination.[251] Religious Freedom, like any other Human Right, is not an absolute one and it may be restricted in specific conditions. The restriction of Religious Free Speech cannot be treated lightly and extended to a large number of topics.

The development of Anti-Discrimination legislation as a tool for the restriction of Religious Freedom and particularly Religious Free Speech is not positive. Even in delicate issues or recognisable just causes the suppression of speech cannot be treated lightly and can only persevere in cases where a deep and irreversible result is at stake. Dissonant thoughts should be protected by free speech. The suppression of thoughts does not make them go away, *au contraire*, it allows them to continue to grow, unchallenged, and to persevere or develop themselves into absolute truths.

It is not defended here that incitation to vilification, violence or hatred towards any individual should be tolerated into a society. Such violence-inciting speech is much closer to a violent behaviour that the manifestation of a correct (or incorrect) point of view for it aims to harm and to be translated as a violence. Reaching deeper on the sphere of the Freedom of Speech and closer to the ground studied in this thesis, is to allocate such in relation to another fundamental Human Right: Religious Freedom. The right resulting of such equation is the Religious Free Speech.

[251] Ben O'Neill, 'Anti-discrimination law and the attack on freedom of conscience' (2011) 27(2) *Policy: A Journal of Public Policy and Ideas* 3

Religion as being the fundamental ground in to which the human being connects spiritually with the reality in which in inserted reaches a fundamental form of its manifestation. For this reason, Religious Free Speech has to be attended with care when confronting with other rights. To assure that a human being is entitling to connect and manifest the beliefs that translates the reason of existence without being persecuted is an essential tool to avoid the rise of other minorities.

The history, mainly of the last two centuries has shown that Religious Freedom is a fundamental principle and inalienable to the prosperity and success for a society, which has been evident in the development of western societies. There seems to be a preference as to which types of Human Rights are protected in Anti-Discrimination law. This preferencing of certain rights seems to be related to the popularity of the demand, which is absolutely not what Human Rights and the protection of minorities is about.

A key aspect of whether a limitation on a right can be justified is whether the limitation is necessary and proportional to the objective it seeks to achieve. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[252] The Australian anti-discrimination laws are an excessive mechanism used by the states and Commonwealth to achieve even relationships between their citizens without having calculated the full results of that legal resource.

[252] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) 8.

4TH CHAPTER RELIGIOUS FREE SPEECH IN PRACTICE AND WHAT THE CASES HAVE SAID ABOUT IT

I. INTRODUCTION

The previous chapters framed the Anti-Discrimination laws and Religious Free Speech in the Australian context. The 2nd chapter focused on Religious Free Speech, outlining its importance, relating it to Human Rights and Human Dignity. It also identified international standards and how the treatment of Religious Free Speech in Australia measures up against those standards. The 3rd chapter explained the Australian approach to Anti-Discrimination laws and examined the intersections between the third generation Human Rights often protected by them and the Religious Free Speech that was declared in the *UDHR* in 1948.

The present chapter advances the discussion by examining some of the cases in which there has been a clash between Religious Free Speech and Anti-Discrimination law in Australia. This discussion will demonstrate that many current Anti-Discrimination laws in Australia do not adequately respect Religious Free Speech in practice.

This chapter is divided into the following sections: (A) introduction, (B) discrimination laws that concern the provision of goods and services, (C) discrimination laws that concern life expression and employment, and (D) discrimination laws that concern life expression and speech.

The first topic addresses the Victorian case of *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*[253] and points especially to the courts definition of religious and life parameters. The second topic addresses the case *Gaynor v Chief of the Defence Force*[254] in which Major Gaynor lodged a complaint against the Australian Defence Force for his termination for failing to comply with the instructions not to make controversial comments. The comments were not made while Major Gaynor was serving as an active member of the Defence Force, rather they were made privately on his personal social media.

In the topic ´Life expressions and speech´ several more cases are considered. The first case is *Fraser v Walker*[255] in which Michelle Fraser was charged with 'displaying an obscene figure in a public place' for standing in a footpath close to an abortion clinic in Melbourne with a poster with images of dead unborn children. The next case, *Preston v Police*[256] draws on a similar problem, Mr Preston was charged under s 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) for protesting by holding a picture of an unborn child less than 150 m away from an abortion clinic.

The third case in this subtopic is *Burns v Corbett*[257] which involved a complaint by Mr Burns, a gay Anti-Discrimination activist[258], against Ms Corbett, who at the time was a candidate for the federal seat of Wannon in western Victoria standing for the Katter Party. Ms Corbett made controversial statements regarding

---

[253] *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014)
[254] Gaynor v Chief of the Defence Force (No 3) [2015] FCA 1370.
[255] *Fraser v Walker* [2015] VCC 1911.
[256] *Police v Preston* [2016] TASMC.
[257] *Corbett v Burns* [2014] NSWCATAP 42.
[258] See, eg, *Garry Burns Gay Anti Discrimination Activist Australia* <https://garryburnsantidiscriminationactivist.com/>.

homosexuals to a western Victorian newspaper and Mr Burns brought a complaint against her in NSW under s 49ZT of the *Anti-Discrimination Act 1977* (NSW). Mr Burns has multiple (over 200) cases lodged under Anti-Discrimination grounds such as this and *Gaynor v Burns*.[259]

The fourth case concerns a complaint lodged against Archbishop Julian Porteous in Tasmania that was subsequently withdrawn. On November 2015, Ms Delaney lodged a complaint under the *Anti-Discrimination Act 1998* (Tas) because of the content of a pastoral letter that explained the Catholic Church's teaching on marriage called 'Don't Mess with Marriage'. The booklet was distributed in Catholic schools in Tasmania.

The last case considered is *Catch the Fire Ministry*,[260] where Catch the Fire Ministries Inc was sued under the religious vilification clause in Victoria by the Islamic Council of Victoria because of the content of some of their talks and publications that presented views on Islam that were not pleasing for some members of the Islamic Council.

[259] *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3.
[260] Islamic Council of Victoria v Catch the Fire Ministries Inc [2004] VCAT 2510

II. CASE STUDIES: WHERE RELIGIOUS FREE SPEECH AND ANTI-DISCRIMINATION LAW CURRENTLY COLLIDE

A. *Introduction*

For people of faith, religion informs almost every aspect of their life. That does not mean that every religiously motivated act is protected as an element of Religious Freedom.[261] One of the concerns is that as Australia becomes demographically less religious, social conventions less consistent with religious teaching will be pushed into a smaller and smaller realm and more laws may interfere with Religious Freedom.[262] This would mean that living a life that is consistent with religious values in the public sphere may not be deemed as something worthy of protection. Religious believers seek protection from laws which they perceive as interfering with this freedom[263] and in Australia there are no particularly good regulatory or legal mechanisms for settling the conflict between Religious Free Speech and the Anti-Discrimination laws.

---

[261] Carolyn Evans, *Religious freedom: One right among many*, The University of Melbourne <https://pursuit.unimelb.edu.au/articles/religious-freedom-one-right-among-many>

[262] Ibid

[263] Ibid

B. *Goods and services*

The Australian case to be discussed regarding the provision of goods and services is *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*.[264] The facts of the case are as follows. A Christian camping organization and its representative, Mr Rowe, were sued for discrimination on the basis of sexual orientation under the *Equal Opportunity Act 1995* (Vic).[265] Mr Rowe's organization refused to approve a booking made by an entity that focused on youth suicide prevention for same-sex attracted young people and presented homosexuality as a normal and ordinary part of life. The group was seeking to use the campsite facilities of Christian Youth Camps Limited ('CYC') to host one of their events. The majority of the Victorian Court of Appeal concluded that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Apostles' Creed and Nicene Creed, neither of which mention specifically sexual activity.[266] The CYC was not considered 'established for religious purposes' by both Courts.

Although considering the Victorian *Charter of Rights*, which contains a right to freedom of religion and religious practice in s 14 and a right to freedom of expression in s 15, the Tribunal ruled against the CYC and Mr Rowe, and held that they had engaged in unlawful discrimination and were consequently ordered to pay a fine.[267] It must be added that the *Equal Opportunity Act 2010* (Vic)

---

[264] *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75

[265] Under ss 42(1)(a) and (c), and s 49.

[266] *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75, [276]-[277].

[267] *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe* [2010] VCAT 1613 (8 Oct 2010)

also contained exemptions based on religion[268] but the tribunal held that none were applicable in the case.

The idea that the religious freedom of the CYC should be restricted to the parameters established by the court demonstrates the minimal respect accorded to Religious Freedom. The Australian Court in this case followed the trend of defining what religious beliefs are or should be, and therefore adjudicated theological matters that are beyond their competence. In the appeal, the court reiterated the view of the tribunal and held that to criticize homosexual sexual activity was tantamount to an attack on those who identify as homosexual.[269] Furthermore, by a 2-1 majority, the court held that both the company and the employee who engage in discriminatory conduct can be held liable.

[268] Sections 75 (2) of the Equal Opportunity Act 2010 (Vic) provides: 'Nothing in Part 3 applies to anything done by a body established for religious purposes that – (a) conforms with the doctrines of the religion; or (b) is necessary to avoid injury to the religious sensitivities of people of the religion.' Whilst, s 77 provides: 'Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.'

[269] In Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors [2014] VSCA 75, 274 [57] Maxwell P, quoting Judge Hampel in Cobaw Community Health Service v Christian Youth Camps Ltd [2010] VCAT 1613, [138] stated: ´To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.´ Furthermore, Maxwell P held that 'her Honour was right to reject the distinction between 'syllabus' and 'attribute', for the reasons which her Honour gave': [59].

C. *Life expression and employment*

In *Chief of the Defence Force v Gaynor*[270] the plaintiff, Major Bernard Gaynor lodged a complaint against the Australian Defence Force (ADF) for the termination of his position in 2013. Gaynor had a distinguished record of service in the Australian Regular Army.

The reason for the termination was that Mr Gaynor failed to refrain from remarking on controversial issues such as the support provided by the ADF to the Gay and Lesbian Mardis Gras. Mr Gaynor also expressed strong opinions on how Australia should deal with the threat of Islamic violent extremism. The plaintiff was not claiming a right to make such comments while a full-time member of the Army or in active service with the Army reserve, but while using social media in his private capacity.[271] Nevertheless, he was charged with disobeying instructions to `refrain from [making] public statements contrary to the ADF policy while he remained a member of the ADF.'[272]

The initial decision in this case indicated strong protection is accorded to freedom of speech and the free exercise of religion in Australia when the relevant speech involves political factors. Buchanan J upheld the legality of the orders given to Mr Gaynor and analysed the constitutionality of orders when confronted with the implied freedom of political speech[273] and s 116 prohibition on the Parliament to authorise unnecessary impairment of the free exercise of religion.[274] In the case

---

[270] *Chief of the Defence Force v Gaynor* [2017] 246 FCR 298

[271] *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370, 223

[272] Ibid [215]

[273] Ibid [220]

[274] Ibid. The court noted, '[t]here were two challenges to the laws on constitutional grounds: one based on the implied right to freedom of political speech, and the other based on the s 116 prohibition of the Parliament authorising undue impairment of the free exercise of religion.'

Buchanan J gives an overview of previous decisions on the implied freedom[275] and applies the *McCloy*[276] framework in determining whether or not the speech restrictions in the case were serving a legitimate purpose `compatible with the system of representative government for which the *Constitution* provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.' The conclusion drawn by His Honour in this case was that the burden applied to Mr Gaynor's political speech[277] was not proportional.[278]

The claims made in regard to the free exercise of religion under s 116 of the *Constitution* were quickly dismissed by his Honour as Buchanan J adopted the narrow view of the High Court in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*,[279] namely that actions based on religion are not "protected" by s 116 if they 'offend against the ordinary laws'. Again, the decision was based on a narrow approach that effectively holds as the orders did not prevent Mr Gaynor from "going to church" they were not breaching s 116.

Mr Gaynor speech, though may `offend` or `insult, ` is also political and for this reason alone should still be protected. This show a potential value to the protection of Religious Free Speech if this is reflected in the political communication protection. The Full Court of the Federal Court (Perram, Mortimer & Gleeson JJ) overturned the previous decision in the case and upheld Mr Gaynors dismissal in 2017. The Full Court the analysis made previously in

---

[275] Ibid [229]-[239]
[276] *McCloy v New South Wales* [2015] HCA 34
[277] *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370, [246]-[248]
[278] 'Membership of the ADF, while on service in one form or another, undoubtedly carries with it obligations of obedience to lawful commands, and all the rigour and restrictions of military service but it does not seem to me that it extinguishes either freedom of belief or, while free from military discipline, freedom of expression.': Ibid [287]
[279] *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120

the case, understanding that his Honour wrongly treated the "implied freedom" as a personal right enjoyed by citizens. It was pointed that, the High Court required that this freedom should be seen as a limit on *legislative power*.[280] What this suggests is that a reserve member of the Armed Forces who makes controversial, religiously motivated, political comments on a private website contrary to the policy of the defence force will have his or her service terminated.

[280] Ibid [47]-[52]

D. *Life expressions and speech*

The focus of this chapter is the Australian jurisprudence on life expressions and speech. The first case is *Fraser v Walker*,[281] which involved Michelle Fraser a pro-life activist who stood outside an abortion clinic in Melbourne displaying a poster with pictures of aborted babies. Fraser was charged and convicted of 'displaying an obscene figure in a public place'.[282] The County Court decided that something could be "obscene" even if it had no sexual connotations but was simply 'offensive or disgusting'.[283]

In her defence, Fraser claimed that the displaying of the poster was part of her 'right to freedom of conscience and religion'.[284] This argument was rejected along with other human rights defences.[285] Lacava J was not satisfied with the claim that the law contravened the implied freedom of political communication in the *Constitution* or that the case was properly characterised as political communication. Lacava J also said that:

> the appellant's right to Religious Freedom does not provide a legal immunity permitting her to breach the provision of the Act in question. Assuming the appellant's stance on abortion comes from her religious belief, the display of obscene

[281] *Fraser v Walker* [2015] VCC 1911
[282] *Summary Offences Act* 1966 (Vic), s 17(1)(b)
[283] *Fraser v Walker* [2015] VCC 1911, [21]
[284] Ibid [38]
[285] Ibid. At paragraph [48] Judge Lacava stated:'I am not satisfied on the facts of this case that what the appellant was displaying could properly be characterised as political communication. That which was displayed by the appellant was not directed at government or those charged with legislative responsibility. In my view, it was nothing more than a communication directed squarely at those who operate the clinic in Wellington Street and those who attended as patients. Section 17 of the Act exists for the purpose of ensuring, where possible, good order in public places such as the footpath in Wellington Street. In the circumstances here, proper application of the provision does not, in my view, burden in an inappropriate way the appellant's right to political communication and is thus enforceable'

> figures is not part of religion nor can it be said the display is done in furtherance of religion.'[286]

The view of the court in this case results in restriction to religious and political manifestation in the controversial area of abortion in a case has an Anti-Discriminatory nature by its contents and for the implication of the Victorian *Charter of Rights*.[287]

In another case related to abortion clinics, *Police v Preston*[288], Mr Graham Preston and two other protestors were charged under s 9 of the *Reproductive Health (Acess to Terminations) Act* 2013 in Tasmania for holding up signs protesting against abortions outside a clinic. The challenge on the basis of the implied freedom of political communication failed.

After analysing the law in accordance with *McCloy*, the magistrate accepted the prohibition was a "significant" burden on their freedom of speech on a political matter.[289] Her Honour concluded that the legislation in this case was a proportionate response to a problem identified by the legislature. The onus imposed on Mr Preston's freedom of expression was not disproportionate as it did not entirely remove the capacity of Mr Preston to express opposition to abortion. [290]

---

[286] Ibid [49]

[287] *Fraser v Walker* [2015] VCC 1911, 37. The court noted: 'The appellant next argues that the *Charter of Human Rights and Responsibilities Act* 2006 ("the Charter") protects and promotes human rights, including civil and political rights which are derived from the *International Covenant on Civil and Political Rights*. Section 32(1) of the Charter provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. If the words of a statute are capable of more than one meaning, the Court should give them whichever of those meanings best accords with the human right in question.'

[288] *Police v Preston* [2016] TASMC

[289] *Police v Preston* [2016] TASMC, [38]

[290] Ibid [53]

Section 46 of the *Constitution Act 1934* (Tas) expressly protects Religious Freedom. The defence raised an argument based on this section that the reason for the protest was religious. The magistrate accepted that this was the nature of the protest, but justified her orders based on the need for 'public order.'[291] This public order analysis reasonably follows a trend of the moment instead of a neat justification on the limitations on Freedom of Religion. Whilst this is a Tasmanian case, similar exclusion zones have been put in place recently in the Australian Capital Territory, the Northern Territory and in Victoria. They have also been considered for introduction in Queensland[292] and in New South Wales.[293]

The case of *Burns v Corbett* connects specifically with the freedom of political communication. Ms Corbett, a candidate for the conservative Katter Party in Victoria, said in an interview to a local paper:[294]

> I don't want gays, lesbians or paedophiles to be working in my kindergarten.
>
> If you don't like it, go to another kindergarten.
>
> When asked if she considered homosexuals to be in the same category as paedophiles, Ms Corbett replied "yes".
>
> "Paedophiles will be next in line to be recognised in the same way as gays and lesbians and get rights," she said.

The general content of her interview was republished online in the Sydney Morning Herald in New South Wales ('NSW') as `she had told [the] reporter both that homosexuality was "against the word of God" and that she was pleased to

---

[291] Ibid 84. The magistrate noted: '[T]he protest activity which is prohibited by s 9(2) of the Act clearly has the capacity to result in a disturbance to public order. Such conduct interferes with the privacy, indeed the medical privacy, of patients attending the premises at which terminations of pregnancies are conducted. The conduct has the potential to lead to some form of public disturbance…'

[292] *Health (Abortion Law Reform) Amendment Bill 2016* (Qld) s24.

[293] *Summary Offences Amendment (Safe Access to Reproductive Health Clinics) Bill 2017 (NSW).*

[294] *Corbett v Burns* [2014] NSWCATAP 42

have "got the front page" of the Hamilton Spectator.'[295] In addition, the article on the Sydney Morning Herald's website reported a statement by Ms Corbett to the effect that 'gays and lesbians and paedophiles were "moral issues"'.[296]

Even though the incident itself happened in Victoria and it was a NSW newspaper that was publicising Ms Corbett's comments, it was held that Ms Corbett could be sued under s 49ZT(1) of the *Anti-Discrimination Act 1977* (NSW).[297] The Appeal Panel said that the statements made by Ms Corbett met the test of 'incitement' understanding that her 'agreement with the proposition that homosexuals are in the same category as paedophiles, 'is "capable of", or has the effect of, "urging" or "spurring on" an "ordinary member of the class to whom it is directed" to treat homosexuals as deserving to be hated or to be regarded with "serious contempt"'.

There was an exception to this conclusion. Ms Corbett had made two additional statements which did not appear in the Hamilton Spectator article but were published on the websites of the Sydney Morning Herald and the Australian, respectively. The NSW Court of Appeal held that these two statements did meet the requirements of s 49ZT (1). Those statements were that 'gays and lesbians and paedophiles were "moral issues" and that homosexuality was "against the word of God".'[298]

There are two main aspects to this case. The first is the jurisdictional issue, which is not the main concern for our purposes (although the fact that Ms Corbett was sued under the Anti-Discrimination instrument of a state other than the one

[295] *Corbett v Burns* [2014] NSWCATAP 42
[296] *Corbett v Burns* [2014] NSWCATAP 42, [10].
[297] *Burns v Gaynor* [2015] NSWCATAD 211
[298] *Corbett v Burns* [2014] NSWCATAP 42

where she made her controversial declarations, should elicit astonishment and concern). The NSW Court of Appeal ruled that the Tribunal had no jurisdiction to issue the orders in this case.

It must be outlined that Mr Burns, the gay activist that sued Ms Corbett, has over 200 cases involving Anti-Discrimination claims.[299] This shows that he uses a mechanism intended to protect minorities as a weapon for mass legal activism. This use of anti-discrimination legislation as a sword rather than a shield is inappropriate. The structure of the anti-discriminatory body of law discussed in the 3rd chapter enables the legislation to be used this way. What this means is that tribunals and courts considering conflicts between Religious Free Speech and other human rights protected under anti-discrimination laws possibly can and will ignore the religious rights since the legislation does not specifically mention it, or even exempt religious expressions. If any person in any state in Australia can be sued under a law from any other state, the protection of Religious Freedom will be profoundly weak.

The second aspect of this case is that the allegations made by a political candidate during their campaigning should be protected under the implied freedom of political communication. The purpose of this freedom is to allow an informed public to fully participate in the election process as established by the High Court in *Lange v Australian Broadcasting Corporation*[300] from ss 7, 24, 41 & 128 of the *Constitution*.

The Archbishop Porteous case, unlike the others that have been presented in this chapter, was not one that actually went to court. A complaint was made in the

[299] Burns, Garry, <https://garryburnsantidiscriminationactivist.com/>.
[300] (1997) 189 CLR 520. See, eg, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018), chapters 27 and 29.

Tasmanian Anti-Discrimination Commission by former Greens candidate Martine Delaney about the distribution in catholic schools of a booklet that explained the position of the Roman Catholic Church regarding the traditional view of marriage.

The complaint was withdrawn for apparent strategic reasons. Archbishop Porteous has expressed disappointment over the case[301] not being continued. In his view, Tasmanians had been 'left under a cloud of uncertainty'.[302] The idea that such case was presented in the only state that provides explicit constitutional provision protecting the Religious Freedom brings uneasiness to the idea of an actual protection of Religious Free Speech. The complaint was withdrawn before any indication of the result could be predicted. In another similar case, Presbyterian pastor Campbell Markham and street preacher David Gee had a complaint lodged against them before Tasmania's Anti-Discrimination Commissioner.[303] The complaint related to comments made about same-sex marriage both on Markham's blog and while Gee was street preaching. This case was also withdrawn.

With the result of the same-sex postal vote delivering a victory for the "yes" campaign, it is hard to predict if more controversy will be raised in the area of same-sex relationships and religious freedom. Although same-sex marriage became lawful in Australia, guarantees of Religious Free Speech were not

---

[301] Augusto Zimmermann, 'Same-Sex Marriage, Freedom of Speech and Religious Liberty in Australia – A Critical Appraisal' (2017) 7(1) *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*.

[302] See, eg, Robert Hiini, 'Anti-discrimination proceedings dropped but Archbishop Porteous disappointed' *Catholic Weekly* (Online), 7 May 2016 <https://www.catholicweekly.com.au/anti-discrimination-proceedings-dropped-but-archbishop-porteous-disappointed/>.

[303] John Sandeman, 'Anti-discrimination case against preachers dropped', *Eternity News* (Online), 7 March 2018 <https://www.eternitynews.com.au/australia/anti-discrimination-case-against-preacher-dropped/>

defined, with no religious exemptions being made.[304] The actual implications or consequences of such legal changes will be observed in the next few months. Predictions in this domain at this stage would be nothing more than speculation.

Exemptions were not put in place in the new marriage legislation and now the Australian public must await the results of the Ruddock Committee to know what legislative measures will or will not be taken by the legislature.

The case of *Catch the Fire Ministries Inc v Daniel Nalliah* and *Daniel Scot v Islamic Council of Victoria Inc and Attorney General for the State of Victoria*[305] (‘*Catch the Fire*’) exemplifies the religious speech of one religion conflicting with another religion. This case is very interesting as it raised the possibility of Religious Freedom clashing with Religious Free Speech. This demonstrates the complexities associated with balancing the different freedoms that are part of a democratic society.

In this case, the Islamic Council of Victoria (‘ICV’) lodged a complaint against Catch the Fire Ministries Inc, an evangelical Christian church. The reason for the complaint was the content of a seminar and published material containing critiques of Islam that, according to the ICV, conflicted with s 8 of the *Racial and Religious Tolerance Act 2001* (Vic).

---

[304] Paul Karp, 'Same-sex marriage bill does not hinder religious freedom, says Turnbull', The Guardian (Online), 17 November 2017 <https://www.theguardian.com/australia-news/2017/nov/17/same-sex-marriage-bill-does-not-hinder-religious-freedom-says-turnbull>; Paul Karp, 'Religious protection fight looms over same-sex marriage bill', The Guardian (Online) 15 November 2017 <https://www.theguardian.com/australia-news/2017/nov/15/religious-protection-fight-looms-over-same-sex-marriage-bill>

[305] *Catch the Fire Ministries Inc v, Daniel Nalliah and Daniel Scot v Islamic Council of Victoria Inc and Attorney General for the State of Victoria* (2006) 206 FLR 56 (‘*Catch the Fire*’)

Catch the Fire Ministries Inc argued that the actions taken by the evangelical church were reasonable and undertaken in good faith and that the seminar and publications were conducted and published for a genuine religious purpose and in the public interest. The Victorian Civil and Administrative Tribunal upheld the ICV's complaint finding the pastors breached the Act and ordered them to publicly apologise for the beliefs expressed and promise not to repeat them. The Tribunal order which restricted the Religious Free Speech of the pastors can be considered a violation of Australia's obligations towards the protection of rights of conscience and freedom of expression as presented in the 2nd Chapter.

Catch the Fire Ministries Inc successfully appealed the decision to the Victorian Court of Appeal, where the Tribunal`s findings of vilification was overturned. The case was referred back to the Tribunal which set aside the original orders and remitted the decision to be heard by a different Tribunal member. The matter itself was eventually resolved by an out-of-court settlement. It should be noted that the determination of this case clearly evidenced that the limits of the Religious Free Speech in Australia remained blurred.

It is important to note that the final question of whether there was vilification in the case remained unanswered. This does not mean that the case is not relevant in the interpretation of the *Racial and Religious Tolerance Act*.[306] Its relevance is increased when considering that the Victorian Act is one of the few laws that specifically touch on the matter of religious vilification.

In the *Catch the Fire* case, it was made clear that incitement *includes both words and actions that encourage or intend to encourage others*.[307] The interpretation of the Victorian Act along the lines that it does not 'prohibit statements concerning the

[306] Evans, above n 1, 177.
[307] *Catch the Fire Ministries Case* (2006) 15 VR 207, 211–12 (Nettle JA), 254 (Neave JA).

religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons'[308] seems more adequate to the protection to Religious Free Speech upheld by Australia in its international commitments. Such an interpretation would be welcome when Religious Free Speech is in competition with other aspects of Anti-discrimination law. Application of this interpretation would mean that statements made pursuant to genuine religious beliefs which may offend or insult a person or group should not be the object of Anti-discrimination persecution. The open multicultural society[309] envisioned by the Commonwealth of Australia must be achieved not by homogenising different social and cultural groups and diluting the multiculturalism discussed in the 2nd chapter, but from ensuring tolerance towards each other.

Hatred is not to be taken lightly and speech or actions that convey hatred will be offensive. However, not all that is considered offensive is necessarily "hateful" and diversity is to be expected and tolerated.[310] In *Catch the Fire*, Nettle JA makes it clear that s 8 goes 'no further in restricting freedom to criticise the religious beliefs of others than to prohibit criticism so extreme as to incite hatred'.[311]

It is troubling that a preacher's misleading characterisation of works he had authored should somehow lead to the conclusion that his beliefs about a religion were not his real beliefs. Even more disquieting is a secular tribunal's determination that where a religious leader had misconstrued and

---

[308] Ibid 211–12 (Nettle JA), 212 (Neave JA).

[309] Ibid 211–12 (Nettle JA), 240-2 (Neave JA).

[310] In *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, 242 Neave JA noted: `They acknowledge that there will be differences in views about other peoples' religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though to some and perhaps to most in society such criticisms may appear ill-informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or misconceived or ignorant or so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.´

[311] Ibid 219

misrepresented another religion's sacred writings, this also indicated an absence of honest belief. Defining in court what a religious group really believes, rather than accepting that there might be competing interpretations and understandings, takes courts into a dangerous area.[312] An incorrect interpretation of scripture does not necessarily point to dishonest intent and the judiciary should not be trying to rule on what is a correct and honest representation of sacred writings.[313] It is conceivable that there may be multiple ways of understanding a religion and its requirements.

[312] See, *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 [94], [162], [178] and [212]–[214].

[313] See, eg, Rex T Ahdar 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 313; Evans, above n 1, 193

III. CONCLUSION

This chapter provided an overview of some cases in which Religious Free Speech clashed with Australian legal mechanisms. The cases canvassed targeted controversial areas, ones where it might be especially hard to accept that a group or religion may have different beliefs and opinions than what is common or `politically correct`. The protection of free-speech is an important aspect of a democratic society[314] and the current way that Australia is protecting this right is concerning.

The concern caused by cases like this for people of faith is that religious groups and individuals will not be able to speak out, identify other religions as false and their own as exclusively true for they will be in danger of having legal action taken against them. This is a complicated scenario that risks Religious Freedom and its expression.[315] Furthermore, speech proclaiming the truth or falsity of important philosophical, moral and social issues will be intimidated for the mentioned ´chilling effect´. Religions do tend to assert what is right and wrong, and believing that a particular religion is true naturally requires one to believe that all others are false. Therefore, restricting Religious Free Speech curtails the right of the believers of one faith to argue or warn against the beliefs of another faith.[316]

---

[314] See eg, David Flint and Jai Martinkovits, *Give us Back our Country* (Connor Court Publishing, 2013), 166; Joe Dolce, 'Free Speech and the Stokie Case' (2014) 53(7-8) *Quadrant* 32.

[315] Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' (2006) *Public Law* 520, 537. See also, Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Contest Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 82–8.; John L Perkins, 'Religion and Vilification' (2005) 17 *Dissent* 53.

[316] Amir Butler, 'Why I've Changed My Mind on Victoria's Anti-Vilification Laws' *The Age* (Online), 4 June 2004 <www.onlineopinion.com.au/view.asp?article=2274>. See also, Evans, above n 1, 191.

In cases where Religious Free Speech clashes with legal mechanisms in Australia, the result has not been positive for Religious Free Speech. Anti-discrimination legislation should not be used as a way of hidden censorship[317] over citizens who do not agree with the governmental agenda. Controversial opinions expressed, even when they have political roots, have been shut down more and more in the last few years and this should be attended to with extra care.[318]

[317] See, eg, Nicola Berkovic, 'Tongue-tied By The Thought Police', *The Weekend Australian*, 28-29 November 2015, 10.
[318] See, eg ,Zimmermann, above n 297, 6.

5TH CHAPTER: ANALYSIS OF THE CONFLICT

I. INTRODUCTION

The previous chapters approached the main points with which the discussion of this thesis is concerning, covering Religious Free Speech in its sources and justifications (2nd Chapter), the legal mechanisms that relate to the subject in discussion (3rd Chapter) and a few of the cases involving Anti-discrimination laws coming into conflict with Religious Free Speech in Australia (4th Chapter). The previous chapter indicated that the conflicts between Religious Free Speech and the legal mechanisms in Australia are real. However, the question that must now be answered in the present chapter is: ´Does the Anti-discrimination legislation limit Religious Free Speech? ´. This question leads to an examination of whether Anti-discrimination laws have decreased Religious Free Speech in Australia.

This chapter will investigate the problem and further demonstrate the current and future complications that arise when Anti-discrimination laws and Religious Free Speech in Australia are in conflict. In order to achieve this objective, this chapter is divided in three parts. The first part addresses the conflicts trough themes, explaining the issues involved and why they might be detrimental to Australian society. The second addresses the tangibility of such conflicts, in essence, it will be considered whether there are negative effects resulting from the reduction of Religious Free Speech in Australia. International examples will then be thematically used and analysed to determine if the problems emerging within the bodies of law surrounding Anti-discrimination are realistic and could exist in Australia. This will be followed by a short conclusion.

II. WHAT ARE THE CONFLICTS? DOES THE ANTI-DISCRIMINATION LEGISLATION LIMIT RELIGIOUS FREE SPEECH?

A. Introduction

Previous chapter have identified the concept of Religious Free Speech and how it comes into collision with other Anti-discrimination norms in contemporary Australia. In this sub-chapter, those conflicts will be further explored, in a way that identifies their negative impact negative impact on Australian society. This sub chapter draws from international cases. The universality of Human Dignity and of Human Rights makes these international examples of the relationship between Religious Free Speech and Anti-discrimination laws relevant in Australia, particularly where they contribute examples of potential solutions to the conflict.

B. Goods and Services: Artistic Manifestation and the Same Sex Wedding Dilemma

The manifestation of religious belief in the provision of goods and services, has caught the eye of the public in recent years. The loudest cases in the media and the public eye are related to instances involving conscientious refusal to provide services supporting the celebration of same-sex weddings. Internationally, cases such as *Lee v Ashers Bakery Co Ltd & Anor*[319] in the UK have raised questions regarding whether vendors providing goods and services in the market place should be required to use their artistic talents to promote a cause with which they do not agree and whether they should be allowed to decline to provide services at all.

In this particular case, a bakery refused to provide cakes with slogans supporting gay marriage[320] as it went against their Christian beliefs about what marriage should be. In *Lee v Ashers Bakery Co Ltd & Anor*, it was understood that the Anti-discrimination provision sanctioning Ashers Bakery was not compatible with Human Rights provisions which protect the manifestation of Religious Belief.[321]

It may be argued that in such cases involving deep beliefs, a deeper analysis may be required. For example, the philosophical reasons for this expression of Religious Freedom should have been identified and weighed against the

[319] [2015] NICity 2.

[320] The bakers lost the case, for it was considered that the refusal to provide such cakes was an act of discrimination against the plaintiff.

[321] Peter Tatchell, *Why I changed my mind on the Ashers gay cake row* (24 October 2016) Peter Tatchell Foundation <http://www.petertatchellfoundation.org/ashers-gay-cake-verdict-is-defeat-for-freedom-of-expression/>. Regarding *Lee v Ashers Bakery Co Ltd & Anor*, the Australian-born gay activist **Peter Tatchell** stated that `The equality laws are intended to protect people against discrimination. A business providing a public service has a legal duty to do so without discrimination based on race, gender, faith, sexuality and so on. However, the court erred by ruling that Gareth was discriminated against because of his sexual orientation and political opinions. His cake request was not refused because he was gay but because of the message he wanted on the cake. There is no evidence that his sexuality was the reason Ashers declined his order.'

philosophical reasons for the request that this baker create this cake. Without such analysis, the competition between the dignity of the baker and the customer were not examined and stayed in superficial parameters. This may be the reason for such failing in sustaining a protection to Religious Free Speech that is founded in the Religious sphere of the issue. If the importance of the baker's separate and legitimate conscience objections was taken into account and weighed against those of the customer who had the opportunity to engage another baker without these dignity concerns, it would not be surprising to have an outcome favouring the baker.

Recently, in *Department of Fair Employment and Housing v Cathy's Creations Inc,*[322] Kern County Superior Court of California Judge held against this trend, finding that a bakery cannot be required by discrimination law to make a same sex wedding cake, where the owner has a religious reason for declining to do so.[323] The decision was made on the basis of the Free Speech clause in the First

[322] *Department of Fair Employment and Housing v Cathy's Creations Inc* (Cal Sup Ct, Kern Cty; BCV-17-102855; Lampe J, 5 Feb 2018).

[323] Ibid 5. Judge Lampe ruled that the protection given to the engaged couple should not overcome the right to free-speech of others: ´Here, Miller's desire to express through her wedding cakes that marriage is a sacramental commitment between a man and a woman that should be celebrated, while she will not express the same sentiment toward same-sex unions, is not trivial, arbitrary, nonsensical, or outrageous. Miller is expressing a belief that is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism. That Miller's expression of her beliefs is entitled to protection is affirmed in the opinion of Justice Kennedy in *Obergefell v. Hodges* (2015) 135 S. Ct. 2584, 192 L. Ed. 2d 609 wherein the Court established that same—sex marriages are entitled to Equal Protection. Therein, the Court noted: "[f]inally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." (Id at 2607.) (from pp 5-6) Again, I think this discussion needs to be brought into the text of your thesis. It is core. I also observe that this issue of conflict between rights was explored by a full Federal Court case in Queensland – *Iliafi*. There the plaintiffs argued that they had a right to worship in the Mormon Church in their own language, but they could not point to any legal expression of that right. With Justice Kenny presiding, the Federal Court found in that case that the alleged right to worship in one's native tongue had to be balanced against the church's group right to worship according to the directions of the leaders they had chosen in ethnically unified congregations. And when that balancing was complete, the group autonomy right won in that case. The result is not as important for your discussion as the way those Federal Court judges reasoned to their conclusions. While I don't think they explicitly said they were balancing two competing rights against each other, that is what they did. And it may signal how a 'balancing' as opposed to an 'exemptions' approach would work in Australia if it were so legislated.

Amendment to the US Constitution. Interestingly in this case, Judge Lampe considered that forcing someone to bake a cake with a message that was contrary to that person's religious view is a form of `compelled speech'[324] which offends freedom of conscience. While the case was decided on the grounds of free speech generally, rather than Religious Free Speech, according to the argument sustained in the 2nd chapter of this thesis, Religious Free Speech is a subset of Religious Freedom and Freedom of Speech, and the understanding held by the Californian judge is appropriate to the protection of this human right. What raised questions here was that reasoning about Religious Freedom alone would not have solved this case favourably, such as happened in other cases.[325]

Other cases which show this same conflict include the refusal to print material supporting gay-marriage seen in the case of *Ontario (Human Rights Commission) v Brockie*.[326] In this case, the service provider made a complaint against the requirement to offer services that would promote values that he considered sinful, in particular, sexual relations between unmarried persons.[327] In the decision, the service provider was required to offer his services but not to print material which actively promoted a homosexual lifestyle and was dismissive of Christian beliefs.

This decision is more promising for service providers who hold religious belief than some of the other cases regarding this issue. If a refusal to provide particular

[324] *Department of Fair Employment and Housing v Cathy's Creations Inc* (Cal Sup Ct, Kern Cty; BCV-17-102855; Lampe J, 5 Feb 2018.
[325] See, eg, *Klein v. Oregon Bureau of Labor and Industries* (CA Or; Dec 28, 2017, — P.3d —-, 2017 WL 6613356; 289 Or App 507 (2017)); *Craig v. Masterpiece Cakeshop, Inc*.,370 P3d 272 (Colo App 2015), cert den, No. 15SC738, 2016 WL 1645027 (Colo Apr 25, 2016), cert granted sub nom Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 137 S Ct 2290 (2017).
[326] [2002] 22 DLR (4th) 174.
[327] A similar case regarding t-shirt printing was held in the *US Hands on Originals, Inc v Lexington-Fayette Urban County Human Rights Commission* (Fayette Circuit Court, Civil Branch, 3rd Div, Ky; Civil Action No 14-CI-04474; James D Ishmael Jr, J; 27 April 2015); *Mullins v. Masterpiece Cakeshop, Inc.* 2015 COA 115, ~~ 1-2, 370 P.3d 272 (2015)

services, which contravene a provider's religious beliefs, results in the provider not being able to offer any services, the result is a practical exclusion from society of those who hold strong religious values. *Ontario (Human Rights Commission) v Brockie*[328] signals a move away from this trend and offers grounds for service providers to have a work life that is compatible with their worldview.

In the appeal, it was understood that forcing Mr Brockie to print material against his religious beliefs went beyond encouraging equality of treatment in the marketplace.[329] In this decision the importance of balancing equality rights was acknowledged. It was expressed that the refusal to print brochures which included content against an individual's religious belief was based on an inherent characteristic of what had been requested and, as such, did not constitute discrimination against an individual. This can be further seen in graphs 4 and 5 below.

It is important that in Australia the Anti-discrimination body of law does not itself act as a source of discrimination. To do so would be to go against the very nature of Human Rights and its objectives while creating an undesirable orthodox secularism in which many would live as ´second class citizens' with no right to act or express their inner beliefs.

In another North-American case, *Elane Photography, LLC v Willock*,[330] Elane Photography refused to photograph a same sex wedding as doing so would contravene the religious views of its owners. Photography is undoubtedly an artistic expression, even though the Court surprisingly chose to 'decline to draw the line between 'creative' or 'expressive' professions and all other Courts cannot

[328] [2002] 22 DLR (4th) 174.
[329] *Brockie v. Brillinger (No. 2)* (2002) 222 DLR (4th) 174, para 50.
[330] 309 P 3d 53 (NM, 2013).

be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from Anti-discrimination laws.'[331] Following the trend seen in previous cases, the photographers lost the case.

The refusal of the Court to recognise photography as artistic expression was peculiar. The Court's refusal was based on the idea that an exemption 'would allow any business in a creative or expressive field to refuse service on any protected basis.'[332] Further, the Court not only declined to classify photography as artistic but held that it was not the place of the courts to determine whether a business was artistic in nature. The carte blanc given in this case to the restrictions of the Anti-discrimination is concerning for the protection of Free Speech, and more specifically Religious Free Speech, proving again that the concern that Anti-discrimination norms may trump first generational Human Rights is a reality.

The local and historical settings of racial discrimination in the South of the US may have negatively influenced the New Mexico Supreme Court's comparisons in Elane Photography's appeal. The most radical part of the judgment in *Elane Photography, LLC v Willock*[333] is not the refusal to protect businesses in the artistic sphere, as discussed above, but but the framing of religious beliefs as being of equal value to racist beliefs. The Court held that giving the exemption to Elane Photography would:

> allow a photographer who was a [Ku Klux] Klan member to refuse to photograph an African American customer's wedding, graduation, newborn child, or other event if the

[331] *Elane Photography, LLC v Willock*, 309 P 3d 53, 71 (NM, 2013).
[332] Ibid 71.
[333] Ibid.

> photographer felt that the photographs would cast African Americans in a positive light.[334]

The comparison drawn by the Court held above fails to give a fair expression to Religious Free Speech. This issue could have been avoided if the recognition of Religious Freedom was taken more seriously. To a certain extent, the concern of the court and its comparison to other beliefs that might be held is understandable but ignoring the full extent of this case and comparing Religious Freedom to racism is a disservice to the protection of Human Rights.

Racist expressions are not a first generation Human Right and the equivalence of that to the expression of Religious Free Speech shows that the Religious Freedom dimension of this right such as demonstrated in the 2nd chapter was not achieved. Instead, religious beliefs are consistently not given weight when in competition with other current popular values. The court held that to allow the photographers refusal to provide their services for the wedding would effectively "undermine all of the protections provided by Anti-discrimination laws."[335] Unlike the attempt to not overburden the Religious Free Speech observed in *Ontario (Human Rights Commission) v Brockie* or the declining to support compelled speech such as seen in *Department of Fair Employment and Housing v Cathy's Creations Inc*,[336] this American Court demonstrated that the protection of Religious Free Speech is not as important as the values framed in the Anti-discrimination body of law.

In another US case, *State of Washington v Arlene's Flowers Inc and Stutzman,*[337] it was decided that a florist could not decline to prepare floral arrangements for a

---

[334] Ibid 72.
[335] *Elane Photography, LLC v Willock*, 309 P 3d 53,72, 75-76 (NM, 2013). The court also held that the NMHRA was "a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment," and that Elane Photography had not adequately briefed a hybrid-rights claim.
[336] Above n 318
[337] (Wash SC, En Banc, No 91615-2, 16 Feb 2017).

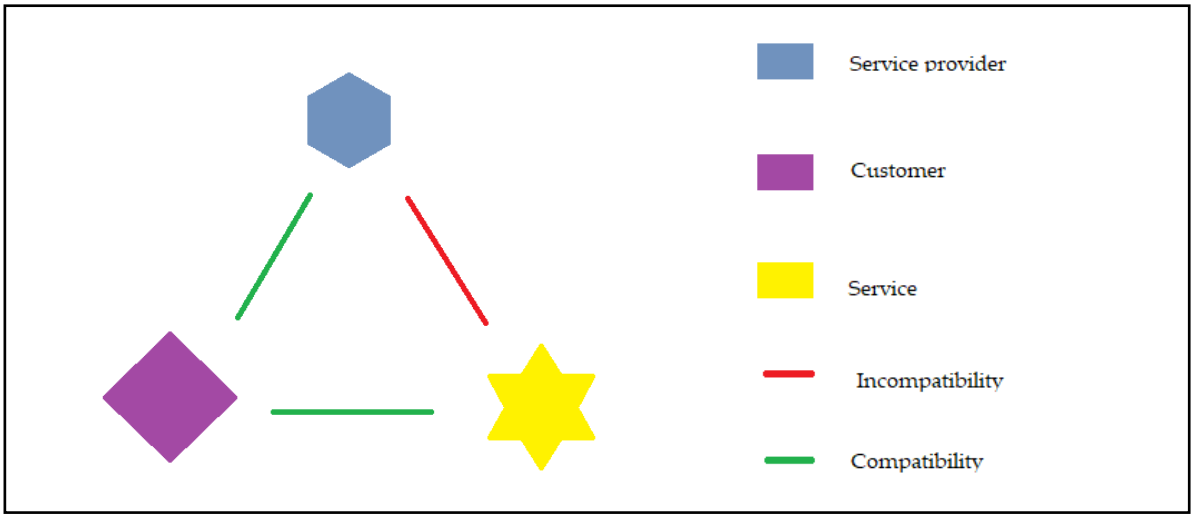
same-sex wedding. The florist had provided flowers to one of the members of the couple for many years and had been aware that her customer was gay throughout this time.[338] This shows that there was no denial of the service due to the person being homosexual. When requested to devote her artistic talents to providing flowers for the same-sex marriage, she politely declined as it went against her Christian faith. The florist was sued by the State of Washington (under the *Washington Law Against Discrimination*, WLAD, which includes 'sexual orientation' as a prohibited ground of discrimination) and, in separate proceedings, by the couple themselves.

Matters involving the wedding industry are particularly interesting because the celebration of a same-sex wedding itself is incompatible with religious beliefs of several world religions. The refusal of the provision of services is not based on the fact that a person is homosexual or is in a same-sex relationship, but is due to the nature of the service itself. The refusal, in legitimate cases, has nothing to do with a characteristic of the person who requires the service, but the fact that the service itself endorses something that is against a religious conviction. The analysis drawn specifically in *Department of Fair Employment and Housing v Cathy's Creations Inc* shows that the differentiation between the end to which the artistic service is provided and the person who is providing such service is possible. If there is discrimination in those cases, such as demonstrated bellow, it is not against the person, but against the service itself.

The two graphs bellow illustrate the difference. The graphs below show the deeper analysis and understanding that is enabled when the competing dignity interests are both recognized and weighed against each other. It is justifiable that a service provider can refuse to provide a service if the nature of the service itself

[338] Alliance Defending Freedom, *The BaronelleStutzman Story* (16 March 2014) Youtube <https://www.youtube.com/watch?v=MDETkcCw63c&feature=youtu.be>.

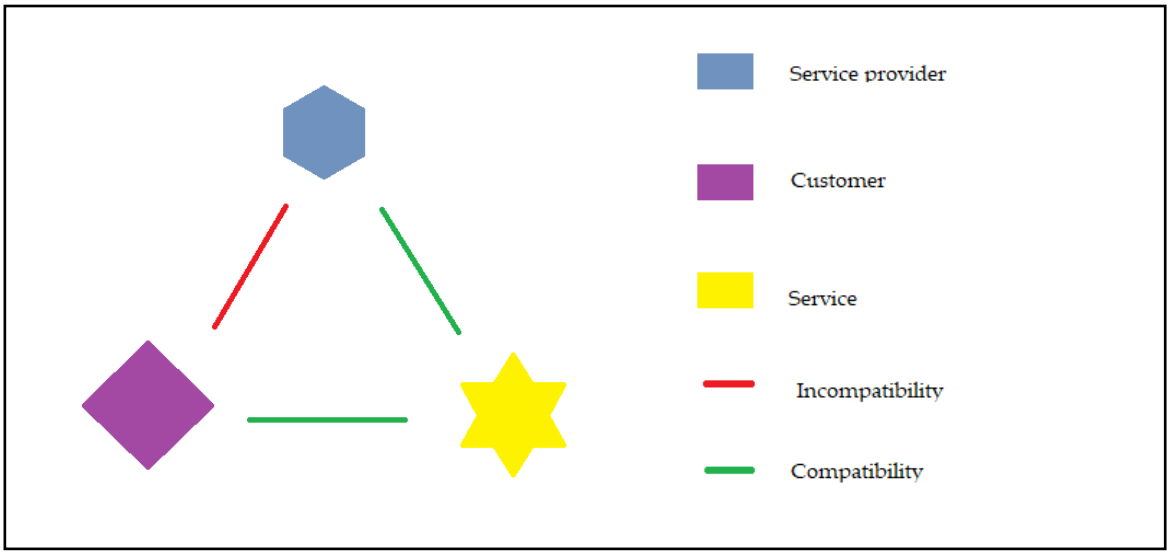
is incompatible with the values expressed in their belief system. In that case, the refusal has absolutely no connection with the person that desires the good or service, but with the provision of the good or service itself. It is incompatible to a free society to forbid restrictions based on the nature of the service provided itself.



Graph 4: Incompatibility with the Service

The graph above shows that the incompatibility (illustrated by the red line) is between the service provider (illustrated by the blue hexagon) and the service (represented by the yellow star). The line between the customer (represented by the violet diamond) and the service provider is just as compatible as the connection between the customer and the service that is requested.

What should not happen is the option showed below, in which the negative to provide the good or service is originated for a characteristic of the customer itself.



Graph 5: Incompatibility with the Customer

In contrast to Graph 4, the incompatibility shown in this graph is between the service provider and the customer which, in that case, represents a discrimination, for it is against the person themselves.

In *Gifford v McCarthy*[339] a same-sex couple tried to book their wedding at the Giffords' property. The denial of the hosts was immediate, explaining that they could not host and coordinate same-sex ceremonies because of their Christian faith teachings on marriage. However, they left open the invitation to visit the farm and to consider it as a potential reception site.

The engaged couple filed a complaint with the Division of Human Rights and the agency found the Giffords guilty of 'sexual orientation discrimination.' The Giffords were fined and ordered to undergo re-education training classes that, by their nature, contradicted the couple's religious beliefs about marriage.[340] The free exercise of religion claims made by the couple were rejected. The rejection was made on the basis of the accepted US Supreme Court orthodoxy

[339] (2016) NY Slip Op 00230.
[340] Alliance Defending Freedom, *Gifford v. Erwin* (23 February 2016) Alliance Defending Freedom <http://www.adfmedia.org/News/PRDetail/9681>.

in *Employment Div., Dept. of Human Resources of Ore. v Smith*[341] which holds that a generally applicable and otherwise valid enactment which is not intended to regulate religious conduct or beliefs, but may incidentally burden the free exercise of religion, is not in violation of the First Amendment. The New York court held that Giffords interests were not strong enough to overcome the wishes of the couple to hold their wedding ceremony at the Giffords' property.

A final and more sensitive case regarding same sex weddings is that of *Miller v Davis*.[342] Ms. Davis was a public servant in a registry office, who refused to issue same sex marriage documents with her signature on them. Ms. Miller sued Ms. Davis in the US Federal Court, claiming that pursuant to the provision of the Federal law 42 U.S.C. § 1983,[343] Ms. Davis was, in the position of an official, depriving Ms. Miller of her right to same sex marriage. Ms. Miller filed an injunction to require that Ms. Davis issue the same sex marriage licenses. Ms. Davis was jailed for her refusal.

In her defence, Ms. Davis gave legal reason for her actions, arguing that constitutional rights may be over-ridden in particular cases due to a sufficient compelling interest. Ms Davis argued that her own right of Freedom of Speech and freedom of religious exercise, granted by the First Amendment of the US Constitution held greater weight than the requests to have marriage licenses issued in that particular office. Furthermore, she argued that such rights were being unduly interfered with by the Governor of Kentucky's order that all clerks had to personally issue same sex marriage licenses. She maintained that her rights under Kentucky's *Religious Freedom Restoration Act* were being breached.

[341] 494 US 872, 879 (1990).
[342] 2015 WL 4866729 (E.D.Ky.) (12 Aug 2015).
[343] 'subject[ing].. [the plaintiffs to] the deprivation of any rights, privileges, or immunities secured by the Constitution'.

In his judgment, Judge Bunning stated that Ms. Davis was only required to sign if couples met the legal requirements to get married. Expressing misunderstanding of the very meaning and importance of Religious Freedom, the judge said that Ms. Davis was not restricted from her various religious activities. She remained free to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County Jail. This simplification of the meaning and scope of the religious aspect shows a disturbing restriction to Religious Freedom and Religious Free Speech. The comments made by the Judge try to define what it means and what is required to hold to and live out religious faith, restricting it to only certain aspects of life. In this judgment, Judge Bunning's comments show that he took it upon himself to decide if Ms. Davis' beliefs meant what she said they did.

Ms Davis´ religious beliefs and Ms Miller´s right to get married could possibly have been accommodated, without undermining Religious Free Speech. This could have been facilitated by Ms Miller simply going to a different registry office to obtain a marriage license, or by the administration providing another clerk to sign the license. The preference to have the marriage license issued in a specific town is not as relevant as a heavy and genuine conscientious objection of someone who would rather go to jail than participate in something that goes against their core religious beliefs. There was the need of a balancing regime that in the specific case could have repaired the unsatisfactory result.

In the Australian context, the case that has most closely touched on this issue is *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors.*[344] In this case, there was a refusal by the Christian Youth Camps Limited to provide the campsite services to an event that was to be held to provide support

[344] 308 ALR 615.

and suicide prevention services to same sex attracted young people. The majority of the Victorian Court of Appeal concluded that 'doctrines' of the Christian faith were to be confined to matters which dealt with in the historic Apostles' Creed and Nicene Creed, neither of which mention specifically sexual activity.[345]

The Australian Court also followed the trend of defining what the definitions of religious beliefs are or should be, adjudicating theological matters that are beyond their competence.[346] In so doing, this further demonstrates that the trends regarding the interpretation of Anti-discrimination mechanisms observed internationally may be followed in the Australian sphere. This trend could be answered by better analysis encouraged by more refined and focused legislation. This further signals the importance of the current international approach of this thesis.

Religious Freedom requires more than the freedom to simply believe, as this thesis has already discussed. However, as this chapter has argued, there is a growing trend in foreign jurisdictions of interpreting religious freedom in this narrow way when confronted with Anti-discrimination laws. The trends that can be observed in the interpretation of the body of Anti-discrimination law in various countries can be expected to occur in Australia also. This is due to the universality of Human Rights, for its essence is common to every human being, and therefore can be observed in democratic societies the zeal for the welfare of mankind. The conflicts and results that occur in the international community are likely to also arise here.

[345] See paras [276]-[277].
[346] There is a question whether it is desirable for secular judges and courts to be adjudicating theological matters that are beyond their competence. I think you can refer to that argument briefly with fns without fully engaging in an analysis that is beyond your purpose here. But I think you can then assume we don't want judges getting into areas where they are incompetent, but we don't need to if we pass laws that require analysis and then balancing of the competing human rights and dignity interests.

In view of the precedents arising internationally, it is to be expected that the Australian interpretation of religious free speech regarding same sex marriage, following the alterations made by *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) on 9 December 2017, will bring complications to Religious Free Speech in Australia, if no new protections to religious speech are granted. It is important to remember that Religious Freedom, including freedom of religious expression, informs every aspect of one's life and it is not desirable that this would be constrained to the private sphere or restricted to worship activities in a temple, church or mosque by a society that upholds dignitary standards.

C. Life expression and employment

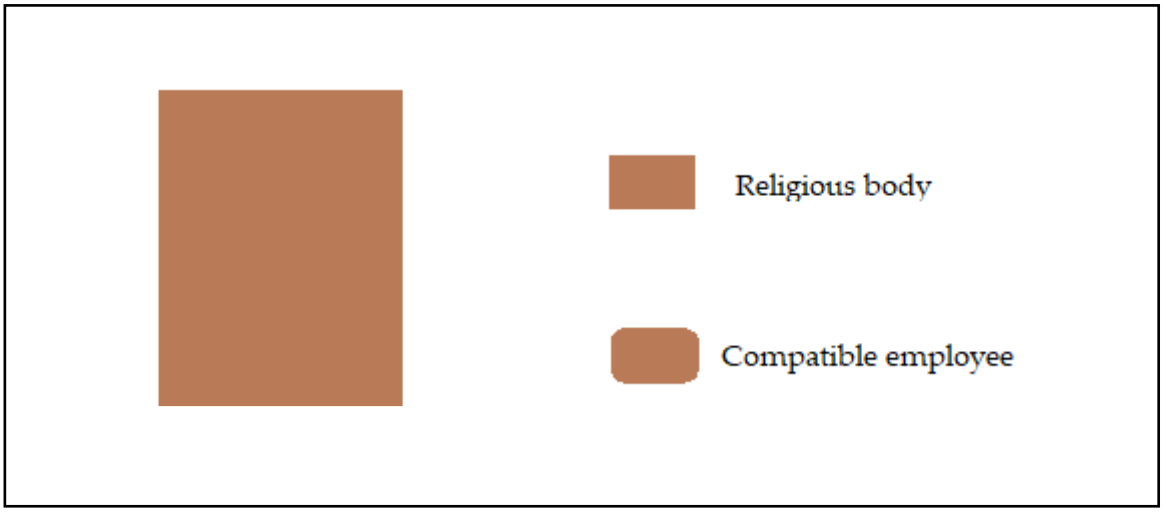
Trinity Western University ('TWU') in Canada has been involved in cases concerned with Religious Freedom and Anti-discrimination law. In the first case to be here addressed is *Trinity Western University v British Columbia College of Teachers*.[347] In such case, it was alleged that future graduate teachers were unfit to be employed in the public sector due to the inconsistency of the promises involving moral standards of the university, contained in the Community Covenant of Trinity.[348] British Columbia College of Teachers argued that students who undertook the covenant would be more inclined to acts of discrimination and bigotry in their professional careers. The Supreme Court of Canada held that such presuppositions about the teaching graduates of TWU were unfounded. The Court held that appropriate balancing of Charter of? Religious Freedom and "non-discrimination" rights had to allow those who chose to study in TWU to fulfil such moral requirements. The Court was not convinced that students who chose to study at the religious TWU would be more inclined to bigotry or discriminatory acts.

The second case involving Trinity Western University concerned three law societies, in Nova Scotia, Ontario and British Columbia. These law societies passed resolutions with the intent of declining accreditations to graduates from TWU based on the objection to same previously mentioned Covenant. In *Nova Scotia Barristers' Society v TWU,*[349] the restriction was overturned by a trial judge. The decision of the singular judge was upheld on appeal.

[347] [2001] SCR 772.
[348] See para 23.The document states that one must abstain from various activities, including 'sexual intimacy that violates the sacredness of marriage between a man and a woman'.
[349] (26 July 2016, NS Court of Appeal, CA438894).

In *Trinity Western University v. The Law Society of Upper Canada*,[350] the decision to maintain the restriction was upheld upon appeal. Finally, in *Trinity Western University v. The Law Society of British Columbia*,[351] the court of appeal considered the decision of the Law Society of British Columbia to refuse accreditation to practice law in the Province to the graduates of a new proposed TWU law school to be unlawful.

The difference between the cases previously discussed concerning the provision of goods and services, and the employment of religious bodies themselves is, as is shown in the images below, the compatibility or incompatibility of the employee as a part of the body.

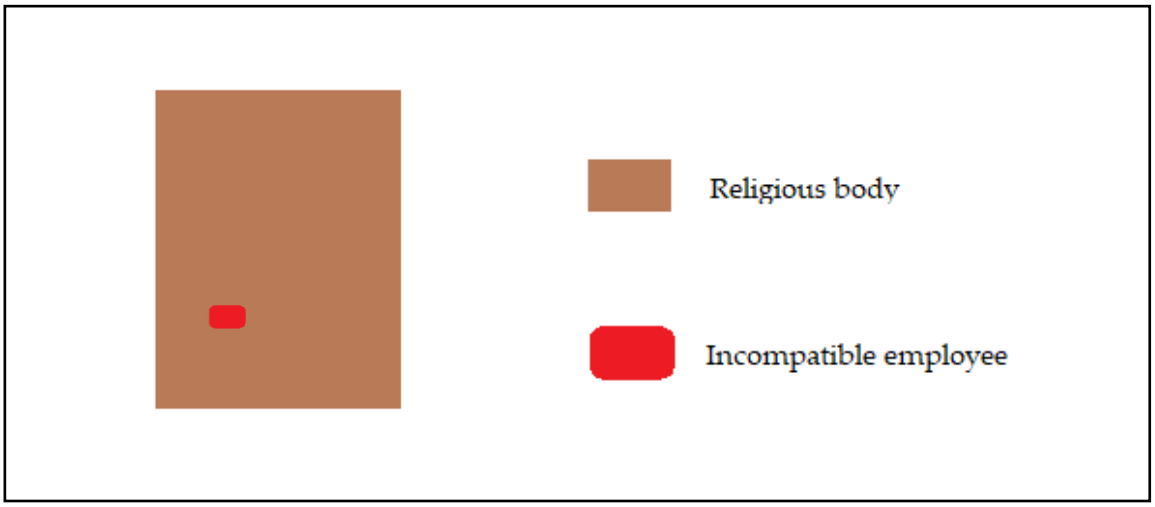


Graph 6: Employment compatibility

The employee (illustrated by the beige rectangle with rounded tips in the table above) when compatible to the teachings and doctrines exercised by religious body (illustrated by the beige rectangle in the table above) becomes a fundamental part of its structure, functioning harmoniously. The employee

[350] 2016 ONCA 518 (29 June 2016).
[351] 2016 BCCA 423 (1 Nov 2016).

represents and functions as part of the body and, just like biologically, there would be a requirement of compatibility for the sustainability of both, in the living religious body it is the same.



Graph 7: Employment incompatibility

The employee (illustrated by the red rectangle with rounded tips in the table above) when incompatible to the teachings and doctrines exercised by religious body (illustrated by the beige rectangle in the table above) becomes a structural problem for the spiritual integrity of the religious body. With this, the structure of the religious body is not solid and coherent with the mechanisms that the religion might consider fundamental.

In a note that concerns the personal way of life of people employed by religious institutions, in the Australian case *Kerry Anne Hozack v The Church of Jesus Christ of Latter-Day Saints [1997] FCA 1300 (27 November 1997)*,[352] the applicant, who was a member of and employed by the church as a receptionist, failed to obtain a "Temple recommend", which is a "commendation issued annually to each eligible

[352] [1997] FCA 1300 (27 November 1997).

member of the Church to certify that he or she has lived by the Church's doctrines and is considered by the Church to be worthy to worship at the 'sacred Temple'. When acquired, an individual is then considered to be 'Temple-worthy'. Although religious bodies do have exemptions and are allowed to maintain staff members, people who qualify based on their faith, the Church in the matter had other employees that did not fulfil such parameters. For this reason, the termination was considered unlawful. Ms Hozack was the lead receptionist for the Pacific headquarters and her observance was considered essential for the Church, but the judge used the non-conformity of two employees in less conspicuous roles, as a reason to decide that Hozack's conformity was not as essential as the Church had argued. In this case, as the receptionist was the only person who did not receive the temple permit to be fired, it seemed that there was indeed some sort of personal discrimination.

In South Africa, the case of *Strydom v Nederduitse Gereformeede Gemeente, Mooreletta Park*,[353] Mr. Strydom had his contract working for the Moreleta Park congregation of the Dutch Reformed Church (NGK) terminated because he was in a same-sex relationship. The Court found the termination to be unfair discrimination, unlawful under the Promotion of Equality and Prevention of Unfair Discrimination Act. In this case, unlike arguably *Hozack v Church of Jesus Christ of Latter-day Saints*,[354] the spiritual leadership position was something that was considered necessary for the exemption on base of religious grounds in the employment of the church.[355] Mr. Strydom was a contract worker[356] for the church but was nevertheless in a position of teaching. This seemed to be clearly a role of authority that demanded a role model that was compatible with the principles of

[353] (2009) 4 SA 510 (Equality Court , TPA, South Africa).
[354] *Kerry Anne Hozack v The Church of Jesus Christ of Latter-Day Saints* [1997] FCA 1300 (27 November 1997)
[355] *Strydom v Nederduitse Gereformeede Gemeente, Mooreletta Park* (2009) 4 SA 510 (Equality Court , TPA, South Africa) Par 17 case law
[356] And therefore should, in theory, be easier to let him go.

the institution. Again, it seems peculiar that a Court of law would decide the sincerity and the extent[357] to which religious beliefs are applicable.

The defence of the church in this case was based upon *Canadian Supreme Court case of Caldwell v The Catholic Schools of Vancouver Archdiocese and Attorney General of British* Columbia[358] in which a Roman Catholic teacher of a Roman Catholic school was not hired again after she married a divorced man in a civil ceremony. The case was based on discrimination on the grounds of religion and marital status. The court disagreed with the teacher, holding that the School was permitted to prefer hiring members of the Catholic community. Besides that, similarly to Ms Hozack case, the contract of employment of teachers did include the teaching of doctrine and the observance of standards by teachers. The requirement is to exhibit the "highest model for Christian behaviour".

It seems odd that a music teacher did not have to act in accordance with beliefs and doctrines of a church (considering the deep connection between music and worship in Christian denomination), while a secretary would have the burden of upholding the values of the church.

[357] This again points to a tendency, pointed in item C, of Courts judging the religious view itself instead of the balancing of conflicting Human Rights.
[358] *66 BCLR 398* [1984] 2 SCR 603.

D. Life Expressions and Speech

Religion should as a rule, be an ally to a good government.[359] Religion informs the worldview of many people[360] in the world and Religious Freedom is a fundamental Human Right that should be protected. The refusal to actively participate in something that a person finds wrong is another difficult situation that must be dealt with when analysing the Anti-discrimination laws and their conflict with Religious Free Speech.

In the case of *Wheaton College v Burwell*,[361] a nondenominational Illinois college which required students to sign a "Covenant" requiring them to "uphold the God-given worth of human beings, from conception to death", challenged the *Affordable Care Act* as violating the *Religious Freedom Restoration Act*[362] and the *First Amendment*. The reason for this is because the college believes, in accordance to multiple Christian denominations, that "emergency contraception" (such as the day after pill) is forbidden on religious grounds if it can destroy a fertilized ovum. Intrauterine devices (IUDs) that prevent implantation of a fertilized ovum are equally forbidden.

In 2018, the federal court ruled that the government was indeed violating civil rights law by forcing the college to provide contraceptive methods that went against its religious beliefs. This shows the possibility of excessive restrictive power of the Anti-discrimination body of law. In the theme of abortion there, are

[359] Jennifer A Marshall, 'Why Does Religious Freedom Matter?' (Working Paper, The Heritage Foundation, 20 December 2010) 8. 'In a free society, religion is an ally of good government as it forms the moral character of individuals and communities.'
[360] See Augusto Zimmermann, *Christian Foundations of the Common Law - Volume 3: Australia* (Connor Court, 2018), forthcoming.There are religious influences in the foundations of common law in Australia.
[361] 791 F. 3d 792 (7th Circuit 2015).
[362] *Religious Freedom Restoration Act*, 42 U.S.C. 2000bb-1 (1993).

a few cases regarding the manifestation and expression in outward forms such as seen on part D of the previous chapter.

Religious manifestation through speech, signs and figures is the most obvious expression of free speech. In the case *Pastor Ake Green* Case,[363] Green was persecuted for a controversial sermon on homosexuality. The Supreme Court of Sweden analysed the necessity of restrictions on Religious Free Speech in light of Swedish legislation and European Court jurisprudence.[364] Freedom of Speech may be limited when necessary,[365] in order to achieve a purpose that may be acceptable in a democratic society.

The Court held that a comprehensive assessment of the circumstances of the sermon of Åke Green's case, interpreted in harmony with the case law of the European Court showed that there even the most extreme statements made by the pastor could be protected in light of Religious Free Speech[366], and that the Courts are not to engage in theological interpretations regarding systems of belief:

> 'sexual abnormalities are a cancerous growth, as that statement, viewed in light of what he said in connection with this in his sermon, is not something that can be deemed to encourage or justify hatred of homosexuals. […] Whether the belief approach on which he has based his statements is legitimate should not be considered in the determination

[363] B 1050 05 (29 November 2005).
[364] Ibid 16. 'Under these circumstances, it is likely that the European Court, in a determination of the restriction of Åke Green's right to preach his Biblicallybased opinion that a judgment of conviction would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention on Human Rights.'
[365] Ibid. 'may never exceed that which is necessary in light of the purpose for which it is created, and may not go so far as to constitute a threat against the free exchange of opinions, which is one of the foundations of democracy, and may not be done only on the grounds of political, religious, cultural or other such philosophy'
[366] Ibid 9. 'The issue, however, is whether consideration to freedom of religion and freedom of expression should favour giving the word "contempt" a more restrictive interpretation than what a direct reading of the statutory text and its legislative history would.'

> of the case (European Court's judgment of 26 September 1996 in the case of Manoussakis et al v. Greece, p. 47).'[367]

In the previously discussed Australian case, *Catch the Fires Ministry Inc v Islamic Council of Victoria*,[368] an appeal of findings of vilification were overturned. However, the case itself never came to a final conclusion in the courts, being settled out-of-court. The Victorian case did not result in a precedent that signals a reassuring future regarding Religious Free Speech. This is unlike the Green case, in which the Supreme Court of Sweden gave a very clear and sharp answer that shows an optimistic approach to the Religious Free Speech even when this carries in its content controversial and harsh material.

[367] Ibid 15-16.
[368] [2006] VSCA 284.

E. What are the Consequences of Anti-Discrimination Legislation and Religious Free Speech Conflicting?

Religious Freedom is not only an individual right,[369] and its defence, as seen in the 2nd chapter is important for the maintenance of a desirable multicultural society. The protection given to Religious Free Speech should have a broad extension once the religious belief informs all the areas of a persons´ worldview, as it necessarily is associated or even forms their political view. Australia is the only country in the world that has the Implied Freedom of Political Communication, and though this shows early promise, it is a pretty small freedom and is only a thin shadow of international Freedom of Speech. Therefore, even if this protection adequately expresses itself when the Religious Speech is political, it would still be unsatisfactory protection.

There is currently no provision in the Australian Anti-discrimination body of law that recognises the primacy of Religious Free. If the subjective sphere of offending becomes the ground of discrimination, preaching against sin becomes discriminatory, for doing so will always be offensive to someone.[370] The inability to freely preach and express one's religious views can develop a ´chilling effect'.[371] The attempt to narrow exemptions in the Anti-discrimination legislation is not a solution to the compatible defence of Religious Free Speech.

---

[369] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 317-8.

[370] See also Amir Butler, *Why I've Changed My Mind on Victoria's Anti-Vilification Law* (4 June 2004) The Age <www.onlineopinion.com.au/view.asp?article=2274>.

[371] Chilling effect is the factual discouragement of the exercise of a natural or legal right for fearing a legal sanction. In the Canadian case 1991-3 SCR 263 Judge L´Heureus X-Dube addresses the so-called effect in the context of confessional privileges. See also Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] *Public Law* 520, 537. See also Joel Harrison, 'Truth, Civility, and Religious Battlegrounds:The Contest Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, 82–8.; John L Perkins, 'Religion and Vilification' (2005) 17 *Dissent* 53.

Some suggest that a special protection for religion is likely to have harmful impacts on non-religious people.[372] Suggesting silencing the religious voices in public life is not compatible to democratic principles and the most foundational requirements of international Human Rights law.[373]

The law should not be used as an instrument of intolerance and the excessive curtailing of free-speech is a sign of undemocratic political views. The rise, recognition and protection of minorities should not develop tools to create new minorities.[374] The use of legal tools which aim to establish equality by targeting certain groups in order to protect others is an incompatible means to the end desired. It is ironic when Anti-discrimination law is used as a tool for persecuting new minorities that arguably take the place of old minorities granted orthodox status by Anti-discrimination law itself.

Offending, as a subjective sphere, is not harassing for even impetuous and polemic speech, even like that seen in the Green case, is not the same as hate speech. The common law has to stand in sufficiently objective standards to be a source of law in a free and democratic society. For that reason, taking personal subjective feelings and using them as a cause for restriction to fundamental Human Rights, such as Religious Free Speech, that do not infringe criminal law (e.g. defamation) and do not incite violence and hatred is not in the necessary

---

[372] Carolyn Evans, *Religious Freedom: One Right Among Many* (8 March 2018) Pursuit <https://pursuit.unimelb.edu.au/articles/religious-freedom-one-right-among-many>.

[373] Secularism is also enshrined in some national constitutions — albeit with a great variety of meanings. See András Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 International Journal of Constitutional Law 605. In *Refah Partisi (The Welfare Party) v Turkey* (application nos 41340/98, 41342/98 and 41344/98) ECHR 3003-II, the European Court of Human Rights did uphold the right of the government of Turkey to dismantle a party which was established to promote sharia law. Even this controversial decision cannot support an attack on individual freedom of speech.

[374] See Keith Thompson, 'Should 'Public Reason' Developed Under U.S. Establishment Clause Jurisprudence Apply to Australia?' (2015) 17 *The University of Notre Dame Australia Law Review* 107, 109. 'When the … establishment clause ideology is extracted from Rawls' idea of public reason, public reason can be identified as an anti-democratic Trojan horse with the potential to neuter the views of up to 4/5th of the world's population in favour of a non-believing elite. As the anti-democratic nature of Rawls' idea of public reason is exposed, its respectability and convincing power should fade'

sphere of what should be targeted by the Australian legal system. In that sense, a restrictive interpretation of Religious Free Speech in Australia would not be compatible with the application of the Human Rights in a free democratic society.

Australian values include freedom of religion and of speech[375] and the religious influences in the formation or the ethos of western society and the rights and freedoms which are the foundations of the Anti-discrimination instruments themselves cannot be overlooked and lost. An Anti-discrimination instrument that, by targeting free speech, does not protect and respect the diversity and multiculturalism in which the Australian society stands.

Furthermore, undermining religious values and speech introduces an extreme secularism which is not compatible with the democratic standards characteristic of post Second World War western civilization. A state that does such things is vested in an orthodox secularism, working as an intolerant and unsuitable religion, not recognising nor accepting the differences inside its own society.

[375] Section 116 of the Constitution bars the Commonwealth from making any law prohibiting the free exercise of any religion.' *Evans v NSW* [2008] FCAFC 130 [79]. '[…]it is necessary to acknowledge that another important freedom generally accepted in Australian society is freedom of religious belief and expression.

III. CONCLUSION

This chapter addresses the major concerns regarding the expanding Anti-discrimination bodies of law in Australia and the narrowing of exemptions to the Religious Free Speech, showing the trend of other western jurisdictions that adopted similar legal mechanisms. By addressing major controversial themes, it points out the real concerns to the restriction of Religious Free Speech in Australia.

The reasoning in *Elane Photography* saw only a relationship between customer and service provider and sought to achieve the law's objective by regulating that relationship. The *Cathy's Creation* logic in the other hand recognised the laws interest in an additional relationship which was ignored or at least obscured in the *Elane Photography* analysis. That is, the reasoning present in *Elane Photography* was one dimensional by comparison to *Cathy's Creation.* A Religious Freedom Act or any other solution that may be adopted in Australia requires a three-dimensional analysis to better address the relationship between Religious Free Speech and the Anti-discrimination laws

In keeping with the aforementioned, Australia has the normative authority in the federal sphere to protect Religious Freedom and its ramifications through its external affairs power.[376] There are a few avenues that Australia can explore to mitigate the conflicts between Religious Free Speech and the Anti-discrimination laws. Those measures will be the theme of next chapter.

[376] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (the 'Religion Declaration') Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); reaffirmed by the United Nations by resolution 48/128 in 1993, and declared "an international instrument relating to human rights and freedoms for the purposes of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

6TH CHAPTER: RECOMMENDATIONS

I. INTRODUCTION:

The previous chapters framed the conflict between Religious Free Speech and Anti-discrimination law. The previous chapters approached Religious Free Speech in its sources and justifications (2nd Chapter), the legal mechanisms that relate to the subject in discussion (3rd Chapter), some of the Australian cases involving Anti-discrimination laws in conflict with Religious Free Speech (4th Chapter) and the analysis of the conflict between Religious Free Speech and Anti-discrimination law, showing how the problem has been shaped in other jurisdictions and using it as a reference for the analysis of the development of such conflict (5th Chapter). After analysing the problems addressed earlier in this thesis, the next question to be considered is: ´how can the conflicts between Religious Free Speech and Anti-discrimination law be minimised?

The present chapter will present some of the possible solutions to the conflict (II), identifying possible advantages and disadvantages in the adoption of each option. In order to achieve this objective, the second subsection of this chapter is divided by a short introduction (A) followed by each possible solution: making s 116 of the Australian Constitution binding for the states (B); extinguishing the Anti-discrimination laws (C); passing Federal legislation to implement the seven core international Human Rights instruments ratified by Australia, in a way that would trump inconsistent law (D); passing a national bill or charter of rights (E), or a detailed Religious Freedom Act (F).

II. POSSIBLE SOLUTIONS

A. *Introduction*

The increasing conflicts involving Religious Free Speech observed globally and internally point to the need for complete solutions, or remedies to minimize the problems. As was pointed out in the *Concluding Observations of the Sixth Periodic Report of Australia*,[377] Australia has not shown sufficient protections to the rights and freedoms that it has internationally committed itself to protect.

Currently there is an expert panel, called the Ruddock Religious Freedom Review (the Ruddock Committee), which received over 16,000 submissions from across Australia. The submissions were sent from experts, groups, and concerned citizens voicing their opinion on the examination of whether Australian law adequately protects the human right to freedom of religion. The Ruddock Committee was called to consider the intersection between the enjoyment of the freedom of religion and other Human Rights, having regard to any previous or ongoing reviews or inquiries that it considered relevant, and consult as widely as it considered necessary.

There is no way of saying for sure what result will come from such a panel in the next few months. All analysis of what may or may not be suggested would be

---

[377] Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia* 121st sess, UN Doc CCPR/C/AUS/CO/6 (16 October–10 November 2017), 17 – 18 said: "17 The Committee is concerned about the lack of direct protection against discrimination on the basis of religion at the federal level, although it notes that a parliamentary inquiry is under way on the status of the human right to freedom of religion or belief. […] 18. The State party should take measures, including considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and intersectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination."

only a supposition, since the panel is consultative in nature. Furthermore, there is no telling what course of action the current Federal Parliament will take after considering the panel's recommendations.

The existence of the panel itself is the result of a substantial concern regarding the lack of provisions that protect Religious Freedom and Religious Free Speech in practice within Australia. As pointed out in the submission of George Williams, Dean of University of NSW Law, freedom of religion received "inadequate protection under Australian law" and, in contrast to other nations, "protection of these rights is weak or even non-existent".[378] Other submissions warned that religious institutions were at risk of being driven from public life.[379] Some may think that this eventuality is beneficial to Australia.[380] However, a more intolerant society results in a higher persecution of free speech.

As mentioned in the 2nd chapter, faith covers almost every aspect of a devout religious believer's life. As also addressed in previous chapters, religion has a broader relevance than being just about rituals behind closed doors, but instead informs the worldview of its members. If society society kept all religious aspects behind closed doors, this could result in marginalization of religion and of religious believers. Its contributions will not be valued in the public sphere. Accordingly, some Australian legal judgments have shown a poor understanding of Religious Freedom and little sympathy with it.[381]

---

[378] Joe Kelly, 'Ruddock Inquiry into Freedom of Religion Puts Bill of Rights Back on the Agenda', *The Australian* (online), 31 March 2018, <https://www.theaustralian.com.au/national-affairs/ruddock-inquiry-into-freedom-of-religion-puts-bill-of-rights-back-on-the-agenda/news-story/b3254dc18f37d361c7303a15b18b3800>.

[379] Ibid.

[380] Ibid.

[381] Carolyn Evans, *Religious Freedom: One Right Among Many* (8 March 2018), Pursuit <https://pursuit.unimelb.edu.au/articles/religious-freedom-one-right-among-many>.

Taking into consideration all that has been addressed in the present thesis, there are several options available which could solve the conflict between Religious Free Speech and Anti-discrimination laws, which will be addressed in the following subchapters.

B. *Making s 116 of the Australian Constitution binding on the States*

Placing s 116 of the Constitution in Chapter V, concerning the States, seems to suggest that the original intention was that the section would also apply to the States.[382] Nevertheless, this understanding has not been adopted. Section 116 of the Constitution, as seen in chapter 2, does not give significant protection to 'freedom of religion'. Section 116 only forbids the Commonwealth from making a 'law' establishing a religion or prohibiting the free exercise of religion.[383]

S 116 of the Constitution provides a sparse protection, since it only constrains theFederal Legislature, and does not extend to the Executive. Furthermore, it does not provide an individual right, as evidenced by the lack of ramifications for any violation.[384] Section 116 falls short of creating a positive obligation for the Federal Parliament to protect Religious Freedom. The section simply prohibits the Federal Parliament from enacting certain laws and does not apply to the States.[385]

Several attempts to extend s 116 of the Constitution to bind the States as well have failed. Previously, a 1944 proposal to deal with Religious Freedom failed,[386] and again a 1978 motion at the annual Constitutional Convention to make s 116

---

[382] In fact, Mr Higgins original proposal was that his clause should apply to the states. It was intended to protect both states and Commonwealth from the possibility that reference to God in the preamble (inserted at the instance of Patrick Glynn from South Australia that the Commonwealth was established under Almighty God) would lead to the establishment of a national religion. Mr Higgins modified his proposal (so that the clause did not apply to the states) so as to preserve the right of the states to regulate religion within their jurisdiction even though the Commonwealth would not be able to do so.

[383] S 116 has two other subclauses. One forbids compelling any religious observance and the other forbids the imposition of any religious test, but these are inconsequential for the purposes of this discussion.

[384] Cf. Gaudron J's comments in *Kruger v Commonwealth* (1997) 190 CLR 1.

[385] Above n 1 71– 72

[386] See Constitutional Alteration (Post-war Reconstruction and Democratic Rights) Bill 1944 (Cth).

binding on the States and Territories was rejected. In 1988 a referendum was proposed[387] which proposed extending s 116 to the States and Territories,[388] and also extending the constitutional provision to all governmental acts, rather than just the legislative process. This referendum also failed.

Later, HREOC's 1998 Report, Article 18: Freedom of Religion and Belief came to the conclusion that the protection given to Freedom of Religion and Belief under Commonwealth, State, and Territory laws was 'relatively weak compared to many other countries'[389] and that Australia fails to satisfy the international standard, as seen on the 3rd chapter of this thesis. Although the extension of s 116 to the states would be a good start, this action alone would not be enough to adequately change the structure of the protection given to Religious Free Speech in Australia in practical terms. This is because there is "virtually no guarantee of Religious Freedom or equality to the churches" Regarding s 116.[390] Religious Freedom holds relevance to the Constitution if "the practice of such freedom does not offend against the accustomed community rights of other Australians. "[391] Considering such, the extension of s 116 to the states would be insufficient to solve the issues raised in this thesis.

---

[387] Constitutional Alteration (Rights and Freedoms) Bill 1988 (Cth) cl 4.
[388] Scott Bennett and Sean Brennan, 'Constitutional Referenda in Australia' (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1999) table 1 discuss the reasons given for the failure of constitutional proposals and the lack of empirical research in this area.
[389] Submissions, p. 575. HREOC's role and powers, and its Report on Article 18, are considered in more detail in the next section of this Chapter.
[390] Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution,' (1981) 53(2) *The Australian Quarterly* 214, 226– 277.
[391] Ibid.

C. *Extinguish all the Anti-Discrimination laws*

The extinction of Anti-discrimination laws in Australia is the less realistic option of those considered in the present thesis. The concern is that an over production of norms is not only non-characteristic of a common law regime but is also negative in the process of legislating for specific groups and, overtime, could create new inequalities. The positive effect that such measures would have in the Australian legal system would be in the original sources of common law: that the legality can be extracted by rationality.

Negatively there is the unlikelihood of the repeal of this body of law that has taken place across Australia, although it has not been neatly consolidated. It also would not be politically wise as it would be a sign of stepping back in the defence of Human Rights by the Australian government. Legislating for the specific issue of Religious Freedom including Religious Free Speech might appear as a way of solving the issues but improving the application of existing legislation should be the first step.

The uncoordinated legislative process regarding the Anti-discrimination norms all over the country does not adequately defend all Human Rights which need to be protected. What happens is that preference has been given to those that are currently in the spot light and, therefore, are politically interesting. This is *contra sensus* to the protection of minorities that the Anti-discrimination body of law initially intended.

In regard to repealing the Anti-discrimination laws, the second option would be to extinguish the Anti-discrimination laws in the states and leave the matter for the federal sphere or to harmonize the legislation across the States. The logic behind those suppositions provides that Human Rights should not be differently

protected inside the same country. However, this option is impeded by the lack of legislative power, since there would have to be an agreement among the Federal government and States that is virtually impossible to achieve. [392] Given the independent nature of the States in Australia, it is also unlikely that the Federal government and the States would be able to reach the required agreement.

Extinguishing the State Anti-discrimination laws is also problematic because, generally, the States have gone further than the Commonwealth in the Anti-discrimination body of law. The Federal Parliament so far has not enacted the totality of the provisions within the ICCPR and the UDHR as seen on 2nd chapter. Furthermore, the states have greater power to legislate than the Commonwealth if a specific ground is not cover by an international treaty.[393] Nevertheless, if the problem is solved federally, then the States would not need to do so.

The challenge to face an unbalanced ground of protection in different States remains, and the balancing of such with both an overriding constitutional provision seems impossible. The most viable solutions to this issue appears to be the passing of Federal legislation that implements the seven-core international Human Rights instruments, which were ratified by Australia, in a manner that would trump inconsistent law; alternatively, passing a Bill or Charter of Rights, or a detailed Religious Freedom act.

[392] It can only be done if the state laws continue, and by using the Federal power that already exists under s 51 (xxix) of the Constitution.
[393] For instance, there is no treaty that covers the ground of HIV positive.

D. Pass Federal legislation implementing the international Human Rights instruments ratified by Australia in a way that would trump inconsistent law.

The external affairs power in the Constitution, as seen on the 2nd chapter, provides the Commonwealth with the power to pass any domestic law that is required to comply with international treaties that Australia has ratified. Based on the external affairs power and the international Human Rights agreements Australia has entered, the Commonwealth has the power to legislate for the protection of fundamental rights. This includes Religious Freedom and free speech, and therefore Religious Free Speech.

For this solution to resolve the conflicts concerning Religious Free Speech, legislation must be passed in a manner that would trump inconsistent law. This would have the effect of adding Religious Free Speech rights to those currently protected by Federal legislation. Alternatively, a comprehensive charter or bill or rights could be passed. Since the protection of Human Rights in Australia has been called inadequate, and that the Commonwealth has constitutional power to pass such laws, the legislative silence is alarming.

E. Pass a Bill or Charter of Rights

It is not a new idea to suggest the implementation of a bill of rights in Australia to address this issue. Such implementation is one of the possibilities for solving the conflict between Religious Free Speech and the Anti-discrimination laws considering the absence of national mechanisms that properly balance such a conflict.[394] The implementation of a Bill of Rights would give an application to the totality of the rights addressed in the ICCPR in national territory.

Currently, Australia is the only democratic society that does not have a Bill or Charter of Rights.[395] As seen in the 2nd chapter the Commonwealth has not fully applied any of the Human Rights instruments. A few attempts were made over the last century to introduce a bill of rights or similar provisions into the Australian Constitution. Some of the provisions in the Australian Constitution are somewhat similar to bill of rights provisions, such as s 92,[396] s 51 (xxxi),[397] s 80,[398] s 116 and s 117.[399] However, nothing sufficiently corresponds to the integral protection of the rights that a bill or charter of rights would provide.

The first obstacle to a Human Rights Act legitimated by the people is the impracticality of the process in Australia.[400] The approval of constitutional

---

[394] Evans, above n 372.

[395] And such data still prevails. On his submission to the Ruddock´s 2018 Religious Freedom Review Committee NSW Law Dean George Williams stated that freedom of religion received "inadequate protection under Australian law" and, in contrast to other nations, "protection of these rights is weak or even non-existent". H Professor Williams noted Australia was the lone democracy without "some form of national human rights act or bill of rights incorporating protection of freedom of religion".

[396] Of the constitution that trade, commerce and intercourse would be free.

[397] The requirement that acquisition of property for the purposes of the Commonwealth, must be on just terms.

[398] Concerning trial by jury.

[399] Non-discrimination amongst Australians in different States.

[400] M D Kirby, 'A Bill of Rights for Australia—but Do We Need It?' (1995) 21(1) *Commonwealth Law Bulletin* 276.

changes by referendum in the country are not common. According to Kirby J, a judicial Bill of Rights is being created by the courts in Australia.[401] Whether or not this corresponds to reality, such jurisprudential creation is not necessarily positive to Religious Free Speech for there is no balancing measurement between the rights presented to the courts. If there is an ambiguity in a statute, or a gap in the common law a judge may use international jurisprudence of Human Rights if such is not contrary to a clear statute enacted by the Parliament.[402]

Whether or not the enactment of a charter or bill of rights in Australia is supported, neither the instrument alone, nor the majority in Parliament would be sufficient to protect the rights of the people. [403] The decision regarding the introduction of a bill of rights in the national territory rests ultimately on the decision of the electorate. There is no precedent to demonstrate an agreement that has been made to this effect. This reason alone should indicate that the wait for a National protection of Human Rights is not the way to protect Religious Free Speech from potential harm.

The Hon Mr. Justice M D Kirby AC CMG says that the need for a bill of rights arises from the fact that democracy works imperfectly. [404] The imperfection of democracy can generate a lack of attention given to fundamental principles, and consequently raises the need for basic rights to be 'enacted and spelt out' in constitutional text for its protection. The over enactment of statutes and over delegation of legislation by the Parliaments makes it easier to overlook fundamental rights. For this reason, the constitutional statement on specific

---

[401] Kirby, above n 391, 276.

[402] In his Byers Memorial Lecture, former HC Justice Dyson Heydon said that of 20+ HC judges who had considered whether we should take international laws into account when we make Australian decisions, Kirby J was the only one who said yes. < https://www.samuelgriffith.org.au/papers/html/volume18/v18dinner.html>.

[403] Kirby, above n 391, 276.

[404] Ibid.

matters is necessary. This would put the protection of Human Rights in the constitutional sphere and protect the Australian citizens against political turbulences in their fundamental rights.

The question is not if Human Rights should be protected, [405] but rather if the law, and specifically a Human Rights Act, is the most appropriate mechanism to achieve it. The assumption that a Bill of Rights or enacted constitutional provisions would educate the people and the legal society is at least naïve. Other experiences have shown that a bill of rights or constitutional provisions by itself is not enough for the protection of Religious Free Speech.

In 1944 there was the attempt to pass a broader protection of Human Rights through a referendum.[406] This did not address a bill of rights *per se*, but instead an enhancement of the Federal Parliament's powers in the post war context. The proposition was that the Commonwealth would be given four extra powers in the post war. Inserted into the propositions were the guarantees of free speech and expression, and extension to the states of the provision on s 116 of the Constitution.[407] The referendum lost even though the provisions would be limited to five years. [408]

In 1973 an attempt was made to introduce a general bill of rights in the form of a non-constitutional statutory enactment. [409] This called for a Human Rights bill that would have implemented the provisions of the ICCPR. The government did

---

[405] David Kinley, 'Human Rights Fundamentalisms' (2007) 29 *Sydney Law Review* 545, 562–3.Kinley cites rights sceptics such as Jim Allen, Tom Campbell, Marie-Bénédicte Dembour, Keith Ewing, Mark Tushnet and Jeremy Waldron.

[406] Constitution Alteration (Post-War Reconstruction and Democratic Rights) 1944 Bill (Cth).

[407] George Williams, *A Charter of Rights for Australia* (University of New South Wales Press, 3rd ed, 2007), 57.

[408] Ibid.

[409] Human Rights Bill 1973 (Cth), introduced by the Attorney-General Lionel Murphy

not press for the incorporation of the ICCPR and at the time had not yet received a number of ratifications necessary to come into force.[410] A decade later, in 1983 another attempt was made to pass a bill of rights for Australia.[411] The model was considered weaker than the 1973 predecessor and would only be applicable to governmental action. This same bill was latter redrafted, and its provisions weakened further. Although the proposition passed the House of Representatives it was withdrawn in 1986.[412]

Another attempt was in 1988 with the constitutional commission and referendum. The Constitutional Commission established at the time of the Bicentenary of European, proposed the adoption of a Charter of Human Rights. A referendum was held to try and follow the recommendations made by this Commission, whereby four categories were put to vote. It seems that the referendum held with the electorate the impression of centralistic approach of the Commonwealth government trying to appropriate more political power to itself, which was perceived with great suspicion.[413] It failed to be approved by the population.

Later in 2008 the Government commissioned a National Human Rights Consultation[414] that recommended the adoption of a Human Rights Act by Australia. Religious groups[415] expressed concern that a Human Rights Act would

---

[410] Williams, above n 399, 59-60.

[411] Australian Bill of Rights Bill 1984 (Cth), introduced by Attorney-General Gareth Evans.

[412] Williams, above n 399, 60.

[413] Scott Bennett, 'Constitutional referenda in Australia' (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1999 – 2000)

[414] National Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation Report* (2009), chaired byJesuit priest and human rights lawyer Father Frank Brennan..

[415] The ACL presented a petition to government with 21,000 signatures in November 2009: Nicola Berkovic, 'Clergy unite over charter', *The Australian* (Sydney), 23 October 2009. The author accompanied the delegation. Dissident: Anglicans General Synod Standing Committee of the Anglican Church of Australia, *Submission to the National Human Rights Consultation* (2009) 1.

ultimately sacrifice Religious Freedom in deference to other rights, particularly to rights of a non-discriminatory nature.[416] The suspicions were justified in the lack of positive protection of Religious Freedom offered under the proposed legislation, which combined to lead to the shortening of exemptions to religious expression under the Anti-discrimination laws, seen in the last few years.

The idea of a national Human Rights act is not positively exemplified by the Victorian and ACT charter, as mentioned in the 3rd chapter. For instance, the limitations seen in s 7 of the Victorian *Charter* are far from what is prescribed by the article 18(3) of the ICCPR in their practical and legal effect.[417] The Victorian Charter does not provide the same limitations as the ICCPR, affirming that Religious Freedom should only be limited in cases which such is necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others",[418] instead what was made was a general balancing provision unfit to the parameters of necessity present in Article 18(3) of the ICCPR.[419]

The restrictions under the Victorian charter, as seen in the 3rd chapter subchapter IV merely require that the limits imposed on the Religious Freedom to be reasonable, not necessary. As seen before the ground of reasonableness is less protective than necessity. In the experience seen inside Australia such as the mentioned Victorian Charter the only requirement is that the restrictions may be reasonable and possible to be ´justified in a free and democratic society based on human dignity, equality and freedom'.

Something that can be reasonably justified is attached to subjective parameters that makes an important right able to be restricted through malleable justifications. That

[416] Babie and Rochow above n 235, 117.
[417] Presbyterian Church of Australia, *Submission to the National Human Rights Consultation* (11 June 2009) 50.
[418] *ICCPR* Article 18(3).
[419] Parkinson, above n 78, 98-101.

is, Religious Freedom is undervalued when it is too easy to change. The necessity standard obliges lawmakers to weigh the importance to society of new social measures before they decide to marginalize Religious Freedom and possibly create the new inequalities. Thus, the examples provided nationally in Australia do not provide a positive example for Religious Freedom.

The ICCPR offers a high value to freedom of religion and belief. Freedom of Speech and Religious Freedom are fundamental enough that they should not be abrogated or even partially set aside because a 'new' Human Right comes in conflict with them. When that happens a real weighing of objective necessity must occur. It is not prudent to establish a hierarchy of Human Rights in which Anti-discriminatory provisions would be above Religious Freedoms. The Victorian example causes extreme concern to the future of Religious Free Speech in Australia if a Bill of Rights like such is made nationally. Furthermore, in the Victorian model there is no attachment to the interpretation model. The Victorian Charter requires other Victorian legislation to be interpreted in a way compatible with Human Rights when possible[420] but judges have an unconstrained discretion to take or not international law into account when making such interpretation.[421] As pointed out by Parkinson "[i]f international human rights law is not the body of law that should guide judges, what should inform and constrain their interpretation of what ´human rights´require?"[422] The Victorian and ACT Bill of Rights give too much discretion to the decision-maker to define what precisely is required of Human Rights.

A Human Rights Act drafted strictly, like the ICCPR, would give Human Rights much greater protection. This is not only unlikely to happen in Australia when

[420] *Charters of Rights and Responsabilities Act* 2006 (Vic) s 32 (1)
[421] Application No. 44774/98, 29 June 2004
[422] Patrick Parkinson, *Christian Concearns about an Australian Charter of Rights* (University of Adelaide Press, 2012) 99.

observing its national examples of Human Rights legislation, but also would not be enough to address the concerns expressed by people who mistrust the idea of such charter. This is because in the current Australian context in which intellectual fashions disregard Religious Freedom even a literal application of the text of the ICCPR and its article 18 would still be subject to an inadequate interpretation.[423] The recommendations drafted in 2008 by the National Human Rights Consultation say that freedom from coercion or restraint in relation to religion and belief should be non-derogable,[424] but freedom to manifest one's religion or beliefs – the Religious Free Speech addressed in this thesis – should be subject to a limitation clause modelled upon the Victorian and ACT charter provisions,[425] and a federal bill would most likely be based on the form of the Victorian and ACT Charter of Human Rights.[426] This shows that a charter of Human Rights alone may not be the ideal solution that could be applied to the conflict between Religious Free Speech and Anti-discrimination laws.

Respecting the provisions of the ICCPR would mean that the protection of Religious Freedom presented in its Article 18 is one of the few that cannot be derogated from even in time of public emergency which threatens the life of the nation.[427] Note that some authors[428] have doubted that the ICCPR's theoretical line between the *forum internum* and the *forum externum* really exists. There are many religious acts or manifestations that are so closely connected with conscience that it is not really possible to separate them. Nevertheless, the antipathy of secular liberals to the exemptions given to faith-based organizations in the Anti-discrimination

[423] It is expressed in Babie and Rochow above n 235,,136 that in communist countries of the old Soviet bloc, the same amount of respect for freedom of religion was given as well
[424] Brennan Committee 2009, 367.
[425] Brennan Committee 2009, 372; Babieand Rochowabove n 407, 136
[426] National Human Rights Consultation Commitee, *National Human Rights Consultation Report* (2009) xxxiv (Recommendation 18), 377.
[427] *ICCPR* article 4(2). Babieand Rochow, above n 407, 135 – 136
[428] Carolyn Evans and others, including Paul Taylor.

legislation[429] points that having a comprehensive bill of rights now and not having an Anti-discrimination legislation specific for religion might lead to unbalanced interpretations regarding the Human Rights.[430] As seen in the previous chapters there are many possibilities in which freedom of religion might be disregarded in favour of other Human Rights. Exemption laws do not contribute to society in the long term because they mire us in two-dimensional thinking about competing Human Rights.

As observed in the previous chapter the protection of Religious Free Speech in other jurisdictions that do have a charter or bill of rights has not proven to be an adequate response for isolating religion to the private sphere. In the US for instance, as pointed by Mary Ann Glendon:[431]

> The current [US Supreme] Court majority has pressed forward with a six-decadelong trend of cabining religion in the private sphere while eroding protections of the associations and institutions where religious beliefs and practices are generated, regenerated, nurtured, and transmitted from one generation to the next. [432]

Similarly, in Canada, Margaret Ogilvie points that Canadian courts protect Religious Freedom by isolating it from the public sphere, which effectively

---

[429] Nicholas Aroney, 'The constitutional (in)validity of religious vilification laws: implications for their interpretation' (2006) 34 *Federal Law Review* 287; Patrick Parkinson, 'The freedom to be different: religious vilification, anti-discrimination laws and religious minorities in Australia' (2007) 81 *Australian Law Journal* 954; Rex Ahdar, 'Religious vilification: confused policy, unsound principle and unfortunate law' (2007) 26 *University of Queensland Law Journal* 293; Babie and Rochow above n 235, 120

[430] Babie and Rochow above n 235, 138

[431] Mary Ann Glendon, 'The Naked Public Square Now: A Symposium' (2004) 147 *First Things* 12, 13.

[432] Ibid.

restricts protection of religion in Canada.[433] As Paul Babie and Neville Rochow point out, these examples do not plead in favour of a charter of rights. [434]

Of course, there are optimistic interpretations around the world towards freedom of religion[435] but the dominant approach under a bill or charter of rights is to narrow Religious Freedom. [436] As seen in the last chapter, it is not uncommon that cases that deal with Religious Free Speech when positive are defended through free speech instead of Religious Free Speech or even the broader Religious Freedom.[437]

Religious Free Speech is often seen as a `poor cousin` among the family of Human Rights.[438] In other countries, as evidenced in the previous chapter, the existence of a bill or charter of rights has not stopped the conflict between Religious Free Speech and the Anti-discrimination laws and are one example of society's reduced assessment of the importance of Religious Freedom generally. The existence of a bill of rights, while Religious Freedom is not seen as an important human right, does not fix the current lack of protection.

According to Patrick Parkinson,[439] groups in 2008 that were against a national Charter of rights would possibly now support some sort of legal provision that

---

[433] M H Ogilvie, 'Between Liberté and Egalité: Religion and the State in Canada', in Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion: God, the State and the Common Law* (2005) 134, 160.

[434] Babie and Rochow above n 235, 138

[435] See, eg, *Kokkinakis v Greece* [1993] ECHR 20.

[436] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005); Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecclesiastical Law Journal* 24.

[437] See also Mark Evans (2009), 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 *Religion and Human Rights* 197; Robin Hopkins and Can Yeginsu, 'Religious Liberty in British Courts: A Critique and Some Guidance' (2008) 49 *Harvard International Law Journal Online* 28.

[438] Evans, above n 372.

[439] Sydney University Professor of Law

protects the right to Religious Freedom.[440] This change occurred for Religious Freedom being undermined when confronted with Anti-discrimination rights.[441] The possible support would be a result of the perception, especially on the part of religious groups, that their Religious Freedom in the current state of affairs is being reduced rather than on the belief on the benefits an specific Religious Freedom legislation or on a bill of rights itself.

Carolyn Evans, who supports the idea of a Bill of Rights for Australia, addresses the notion that some Australian decisions have dealt with religious matters on a poor understanding of religion matters.[442] The argument in favour of a specific Religious Freedom Act could show that some legal ground would at least be raised in favour of Religious Freedom that at present are ignored or swept under the carpet. It must be pointed out though that raising them by an act would eventually create momentum towards the overall Bill of Rights that Carolyn Evans wants to see, or if one waits until enough support for a full Bill of Rights, considering the Australian history, it may be that nothing will ever properly protect Religious Freedom.

Evans also addresses the complexity of the conflict, pointing out that specific legislation that would provide for the detailed protection of Religious Freedom would raise the same issue that the Anti-discrimination laws have with the Religious Freedom.[443] This points to another justification for the introduction of a bill of rights without being accompanied by specific legislation protecting Religious Freedom would be inadequate. Since the Anti-discrimination laws presenting issues with Religious Freedom already has a place in Australia,

---

[440] such as the Australian Christian Lobby, Presbyterian Church of Australia, Baptist Union, and Sydney Anglicans.
[441] Babie and Rochow above n 235, 121
[442] Evans, above n 372.
[443] Ibid.

having these laws and a bill of rights without also providing specific protections to Religious Freedom would make this right less protected when compared to other Human Rights.

As seen in the previous chapter freedom of religion has been disregarded by statutory bodies responsible for protecting Human Rights because, in the absence of other statutory direction telling tribunals to take Religious Freedom into account when they adjudicate other Human Rights, they have no practical option but to ignore Religious Freedom when they are weighing rights. This disregard is shared and extended to other Human Rights advocates.[444] Current secular liberal interpretations of Human Rights charters tend to undermine Religious Freedom, as happens even in countries that have Religious Freedom protection, for the legislation that protects Religious Freedom must be clear, unambiguous and either emphatic or insistent that it be properly and fully taken into account, otherwise the Religious Free Speech is put it in the lowest place in an implicit hierarchy of Human Rights to be protected.[445] There are even interpretations suggesting that religion should be submitted to the full scope of discrimination laws, even core religious practices[446] should be regulated in the name of equality rights.[447] It must be mentioned that such a hierarchy of Human Rights as fashioned in the cases seen in previous chapters is not drawn from international law itself but by current intellectual fashions.

A great concern with the enactment of a Human Rights Act refers to the neutrality of its provisions and interpretation. The concern regarding the protection of Religious Free Speech in a bill of rights is justified by the political

[444] Babie and Rochow above n 235, 120-121.
[445] Ibid, 121
[446] Such as the ordination of clergy
[447] Carolyn Evans and Beth Gaze, 'Between religious freedom and equality: complexity and context' (2008) 49 *Harvard International Law Journal Online* 40, 41.

interpretation of courts that do not seem to grasp the importance of such concept. There is a fear that the adoption of such legal mechanism may be used against Religious Free Speech such as the United Kingdom case with the *Human Rights Act 1998* that led to diminution of Religious Freedom.[448]

Ultimately the creation of a Bill or Rights by itself on the shape that has been seen in Australia so far is not the solution for the conflict addressed in this thesis. Although the protection of Human Rights in Australia is fragmented, and a bill would give some sort of coherence for their protections the fact is that the Anti-discrimination body of law has shown that the interpretation and understanding of Religious Free Speech is far from ideal.[449] As mentioned before religion informs all aspects of life and it is important for Religious Free Speech to enable believers to disagree and preach their beliefs peacefully. The understanding of the relevance of Religious Freedom, and therefore Religious Free Speech as well as its importance for the democratic society, indicates that, at this stage, the implementation of a bill of rights will likely not be beneficial for Religious Free Speech in Australia.

[448] Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecclesiastical Law Journal* 52: Churches and religious associations find themselves boxed in by its obligations, benefiting only from narrowly drafted exceptions narrowly interpreted by an unsympathetic judiciary

[449] As said in Stanley Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' (1990) 57 *University of Chicago Law Review* 1447, 1466: "tolerance is exercised in an inverse proportion to there being anything at stake."

F. Detailed Religious Freedom Act

The last possible solution to be discussed in this thesis is the implementation of a detailed Religious Freedom act. There have been previous attempts in Australia for the enactment of specific legislation that would focus on the protection of Religious Freedom as a positive right.[450] Many religious bodies would currently agree that this is the best viable solution to diminish the conflicts,[451] as can be extracted from current submissions to Ruddock´s Religious Freedom Review Committee in 2018.

There are obvious complications to the solution of the conflict between Religious Free Speech and the Anti-discrimination laws. As pointed out by Carolyn Evans '[e]very right has its core cases and the grey areas, but that is even more so the case with Religious Freedom. '[452] The rights addressed in the Anti-discrimination laws are generally sensitive in nature and the clash of those with religion, which informs the worldview of many people and its representative of their identity, is a difficult balance to achieve.

According to the last census Australia is becoming a less religious country. This by itself already suggests that religious speech is losing its place in the public sphere. It also suggests that Religious Free Speech will not be important in the future for is not a concern of the majority. When considered in addition to the advancement of concepts and laws that conflict with religious beliefs, it is to be expected that religious opinions and expressions will be considered as less valuable and unworthy of protection.

[450] Evans, above n 372.
[451] Ibid.
[452] Ibid.

The adoption of a broader and detailed Religious Freedom act ought to consider the numerous conflicts rising from Anti-discrimination legislation and the religious sphere, and the perception that such laws interfere with Religious Freedom. This would be a substantial step to show and recognize that Religious Freedom stands in its suitable place as a Human Right worthy of protection in the Australian legal system. The enactment of specific legislation is a better way of protecting basic rights such as Religious Freedom since it can express the protection with greater detail and specificity.[453] The specific legislation can deal with ways of affecting the Religious Free Speech in Australia instead of leaving it to the courts' discernment of the importance of such Human Rights.

A detailed Religious Freedom Act was before seen with great suspicion by religious groups themselves. However, since 1988 some of the opponents to specific legislation protecting Religious Freedom in Australia started to change their position with regards to the legislation considering the increasing conflicts with the national legislation. As mentioned in the introduction of this subchapter, the debate surrounding the postal vote regarding the same sex marriage pushed for the discussion.

Many of the old opponents are now calling for a specific law to protect Religious Freedom based on *ICCPR* article 18. There is the need for a specific protection for Religious Free Speech to make such protection exclusively through an instrument such as a Bill of rights.

A Human Rights Act by itself brings the fear that Religious Freedom would be sacrificed when competing with non-discrimination rights and that people who hold religious beliefs would be charged for expressing them.[454] As mentioned

[453] See also Kirby, above n 392, 276.
[454] Evans, above n 372.

before, leaving Religious Freedom to stand protected in a bill of rights only, especially considering the wording of existing bills in Australia, would not solve the problem. Rather, a specific Religious Freedom act that balances the importance of Religious Free Speech when competing with other rights would be more appropriate.

Freedom of religious belief and expression is generally accepted in Australian society as an important freedom.[455] Considering all the concerns expressed in this thesis with the concerns of curtailing Religious Free Speech in Australia a Religious Freedom Act seems to be the best of the viable solutions. A detailed Religious Freedom Act based, on those international instruments, would trump inconsistent state law and require that existing Anti-discrimination law be interpreted in a manner consistent with it.

[455] *Evans v NSW* [2008] FCAFC 130, 79

III. CONCLUSION:

The reasoning in *Elane Photography* saw only a relationship between customer and service provider and sought to achieve the law's objective by regulating that relationship. The logic in *Cathy's Creation* on the other hand recognised the law's interest in an additional relationship which was ignored or at least obscured in the *Elane Photography* analysis. That is, the reasoning present in *Elane Photography* was one-dimensional by comparison to *Cathy's Creation.* A Religious Freedom Act or any other solution that may be adopted in Australia requires a three-dimensional analysis to better address the relationship between Religious Free Speech and the Anti-discrimination laws

As addressed in this chapter, there are a few possibilities to solve the conflict between Religious Free Speech and Anti-discrimination laws. Regardless of whether the solution chosen would be more adequate to solve the conflict, a solution must be adopted. It is relevant that in the attempt to solve one problem the Australian Parliament ought not to create another. Religious Free Speech is a relevant factor for the life of many Australians and is a core element to the defence of free speech and Religious Freedom that must not be overlooked. After examining all the elements of this thesis, the next chapter addresses the conclusion of the thesis.

7TH CHAPTER: CONCLUSION

I. RESEARCH QUESTIONS

This thesis aimed to identify and consider the conflicts between Religious Free Speech and the Anti-discrimination norms. It identified two main subjects of this relation: ´Religious Free Speech´ and ´ Anti-discrimination laws´ in its nature developing the work to answer the main research question: ´Does the Anti-discrimination legislation limit Religious Free Speech? ´

In seeking answers to this question, it was necessary to address some other specific questions: ´Why is it important to protect Religious Free Speech? ` and `Why is it important to protect Religious Free Speech in Australia? ` were understood as relevant to lay the foundational ground of this thesis. The question ´How to minimize the conflicts between Religious Free Speech and the Anti-discrimination body of law? ´ was also considered relevant and answered in this work, for it's a consequential result of the main question being made and makes itself necessary in order of a complete analysis with tangible applications.

This thesis was designed so that addressing those more specific inquires would assist to answer the main research question ´Does the Anti-discrimination legislation limit Religious Free Speech? ´. It was also considered that this layout would be useful for once the answers to the detailed inquiries were developed the analysis laid on later chapters, in the Case Studies and proposed solutions.

This thesis found that the Anti-discrimination legislation does limit Religious Free Speech. Although the laws aim at providing equality through legislation, the existing laws operate in a manner that do not allow courts and tribunals to balance and resolve conflicts in ways that respect Religious Free Speech. As is

demonstrated by a survey of Australian case law surrounding Religious Free Speech, it can be seen that Religious Free Speech has been limited by the Anti-discrimination legislation, and the courts are unable or unwilling to protect Religious Free Speech when a conflict arises under the Anti-discrimination legislation.

Below there is set out the findings in each of the individual chapters that helped to reach the conclusion on the analysis of each research question.

II. RESEARCH FINDINGS

A. *Chapter 2: Religious Free Speech in Australia.*

The 2nd Chapter investigated the first key element of the thesis, 'Religious Free Speech' in answering the specific questions of `why is it important to protect Religious Free Speech? ` and `why is it important to protect religious free-speech in Australia? `

In this chapter, it was seen that even though Religious Freedom can be considered to be 'the bedrock for every [H]uman [R]ight' and that 'it provides a sturdy foundation for limited government'[456] many now doubt that religion is a human good. [457] As a result, Religious Free Speech is not seen as serving a good human purpose and consequently should not be protected. Equality among people is an important common ground upon which western society rests. Human Rights, as explained in the 2nd chapter are founded on Human Dignity, which, for the purpose of the current thesis, has two justifications: religious and historical. The first can be traced to the Judaeo-Christian concept that all men were made equal by God.[458] The second justification is the practical experience of the 20th century where the conflicts of the I and II World Wars demonstrated the relevance of such a concept in order that the atrocities committed during this period would never be repeated.

---

[456] Jennifer A. Marshall, 'Why Does Religious Freedom Matter?', *The Heritage Foundation* (Washington DC) 20 December 2010, 8.

[457] Lori G Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford University Press, 2017), 29-30; Eliyabeth Shakman Hurd, 'The International Politics of Religious Freedom' (Pt Tavinder Datta for india International Centre) (2013) *India Internationaö Center Quarterly* 225.

[458] Augusto Zimmermann, *Christian Foundations of the Common Law - Volume 3: Australia* (Connor Court, 2018), forthcoming.

Religious Free Speech is a fundamental Human Right, going further than the national experience being a right to all human beings. Such universality, as described in the 2nd chapter, justifies the incorporation of international law and the experiences of other jurisdictions in this thesis.[459] The expression of religious beliefs is part of the essential human identity, without which, freedom of expression would be sterile and meaningless.

Australia has international commitments to protect the Human Rights present in the instruments that is has agreed to be bound by. However, the provisions of those instruments must be internalised by the sovereign legislative process of Australia before becoming domestically binding. Consequentially some of the protections in the Anti-discrimination laws derived from international instruments that aim for the protection of Human Rights. Australia does not protect Freedom of Speech though a specific statute, even though such protection is possible under the external affairs clause in the Constitution. The absence of an express protection of Religious Free Speech in Australia today is concerning. This right can be diminished or abrogated by an unambiguous law passed by the legislature, such as the Anti-discrimination laws.

[459] The concrete existence of human rights does not form a consensus in political-philosophical discussions: see eg, Robert Alexy, 'Law, Morality, and the Existence of Human Rights' (2012) 25(1) *Ratio Juris* 2.

B. *Chapter 3: The nature of the Anti-Discrimination body of law.*

Anti-discrimination laws are the body of law which prohibit certain conduct that is considered discriminatory. Complementary to the research question of 'why it is important to protect Religious Free Speech in Australia', the 3rd chapter identifies the nature of the Anti-discrimination laws, putting in perspective why this body of law comes into conflict with Religious Free Speech in Australia. Laws that aim for equal treatment can be a source of unequal opportunity in seeking to solve this, Australia's state and federal Anti-discrimination laws have been passed to mediate unequal treatment which has become socially unacceptable. The choice of what grounds are relevant, and therefore the focus of Anti-discriminatory laws, is based on the focus of policy reform agendas.

This part of the thesis lays out how the internal experiences in Australia fall short in implementing the parameters seen in the ICCPR, specifically in regard to Religious Freedom and, consequentially, Religious Free Speech. Instead of affirming that Religious Freedom should only be limited in cases in which it is necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others",[460] what is in place is a general balancing provision that basically destroys the necessity provision in Article 18(3).[461] A less protective ground is taken in the national examples of an equivalent to a Bill of Rights, that allows limitations which are 'justified in a free and democratic society based on human dignity, equality and freedom' subjected to the discernment of the person appointed to make such a judgment.

[460] *ICCPR* Article 18(3).

[461] Patrick Parkinson, *Christian Concearns about an Australian Charter of Rights*, (University of Adelaide Press, 2012), 98-101.

The Anti-discrimination body of law is not as effective in Australia as it could be for it fails to provide adequate protection of some fundamental Human Rights, such as Religious Free Speech. The equality intended by such, body cannot be adequately achieved through means that overlook this important Human Right. Existing Anti-discrimination laws in Australia do not provide frameworks that allow tribunals and courts to balance and resolve conflicts in ways that adequately respect Religious Freedom and its subset, Religious Free Speech.[462] An assurance that a human being is able and entitled to express and manifest their inner beliefs, without being persecuted, is essential.

[462] See Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

C. *Chapter 4: Religious Free Speech in practice and what the cases have said about it*

The 4th Chapter advances the discussion by approaching the research question ´does the Anti-discrimination legislation limit Religious Free Speech´. This is done by examining some of the cases in which Religious Free Speech and the legal approach to the Anti-discrimination law in Australia clashed. This demonstrates the relevance of addressing the conflict between the Anti-discrimination laws and the Religious Free Speech for it further demonstrated that this Anti-discriminatory mechanism does not necessarily present itself as a protection to Religious Free Speech.

In the area of goods and services the case discussed was the Victorian case *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*.[463]

The majority of the Victorian Court of Appeal concluded that "doctrines" of the Christian faith were to be confined to matters dealt with in the historic Apostles' Creed and Nicene Creed, neither of which mention specifically sexual activity.[464]. The Australian Court in this example demarcated what the definitions of religious beliefs are or should be, adjudicating theological matters that are beyond their competence.[465]

In the employment sphere the Australian case addressed was *Chief of the Defence Force v Gaynor*.[466] While the initial decision indicated a strong protection to

[463] [2014] VSCA 75 (16 April 2014)

[464] *Chief of the Defence Force v Gaynor* [2017] FCAFC 41; 246 FCR 298 [276]-[277].

[465] There is a question whether it is desirable for secular judges and courts to be adjudicating theological matters that are beyond their competence. I think you can refer to that argument briefly with fns without fully engaging in an analysis that is beyond your purpose here. But I think you can then assume we don't want judges getting into areas where they are incompetent, but we don't need to if we pass laws that require analysis and then balancing of the competing human rights and dignity interests.

[466] *[*2017] FCAFC 41; 246 FCR 298

Freedom of Speech and the free exercise of religion in Australia when this speech would involve political factors the Full Court of the Federal Court (Perram, Mortimer & Gleeson JJ) overturned that previous decision and upheld in 2017 understanding that his Honour wrongly treated the "implied freedom" as a personal right enjoyed by citizens. It was pointed that, the High Court required that this freedom should be a limit on *legislative power*.[467] The conclusion is that a reserve member of the Armed Forces that makes controversial, religiously motivated, political comments on a private website contrary to Defence Force policy will have service terminated.

Life expressions and speech was the item with most cases presented for is the one that more cases can be observed in the Australian scenario. The first case is *Fraser v Walker*,[468] where Michelle Fraser, a pro-life woman protested outside an abortion clinic. The view held in this case results in a restriction to religious and political manifestation in the controversial area of abortion. The case has an Anti-discriminatory nature by its contents and for the implication of the Victorian Charter of Rights.[469]

Another case related to abortion clinics was addressed in *Police v Preston*.[470] This public order analysis reasonableness follows a political understanding trend of the moment instead of a neatly justification on the limitations on Freedom of Religion. It should be mentioned that restrictions to manifestations in exclusion

---

[467] *Chief of the Defence Force v Gaynor [2017] FCAFC 41; 246 FCR 298* [47]-[52]

[468] [2015] VCC 1911 (19 November 2015)

[469] *Fraser v Walker* [2015] VCC 1911, 37: "The appellant next argues that the *Charter of Human Rights and Responsibilities Act* 2006 ("the Charter") protects and promotes human rights, including civil and political rights which are derived from the International Covenant on Civil and Political Rights. Section 32(1) of the Charter provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. If the words of a statute are capable of more than one meaning, the Court should give them whichever of those meanings best accords with the human right in question."

[470] [2016] TASMC (27 July 2016, Mag C J Rheinberger)

zones have been put in place in several states in Australia to restrict protests close to abortion clinics.

The case *Burns v Corbett*[471] also addressed in this chapter is one of over 200 cases regards Anti-discrimination legislation lodged by Mr Burns. This shows that the Human Rights protection legislation of the Anti-discrimination laws are being used as a sword rather than a shield to restrict speech.

The last case is the *Catch the Fire Ministries Inc v Daniel Nalliah* and *Daniel Scot v Islamic Council of Victoria Inc and Attorney General for the State of Victoria*[472] The tribunal order that restricted the Religious Free Speech of the pastors can be considered a violation of Australia's obligations towards the protection of rights of conscience discussed in this thesis. Catch the Fire successfully appealed the decision and the case was referred back to the tribunal which set aside the original orders and remitted the decision to be heard by a different Tribunal member. The dispute was eventually resolved by an out-of-court settlement and the controversy on this case of the limits and protection of the Religious Free Speech in Australia remained blurred.

In the Catch the Fire case, it was made clear that incitement *includes both words and actions that encourage or intend to encourage others*.[473] The interpretation of the Victorian Act that it does not 'prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons'[474] is seems more adequate to the protection to

[471] [2017] NSWCA 3 (3 Feb 2017)
[472] *Catch the Fire Ministries Inc v, Daniel Nalliah and Daniel Scot v Islamic Council of Victoria Inc and Attorney General for the State of Victoria* (2006) 206 FLR 56 ('*Catch the Fire Ministries Case*').
[473] *Catch the Fire Ministries Case* (2006) 15 VR 207, 211–12 (Nettle JA), 254 (Neave JA).
[474]Ibid, 211–12 (Nettle JA), 212 (Neave JA).

Religious Free Speech upheld by Australia is its international commitments. Such an interpretation would be welcome when Religious Free Speech is in competition with other aspects Anti-discrimination law. Application of this interpretation would mean that statements made in genuine religious belief which may offend or insult a person or group should not be object of Anti-discrimination persecution. The open multicultural society[475] envisioned by the Commonwealth of Australia must be achieved not by homogenising different social and cultural groups and attempting against the multiculturalism seen on the 2nd chapter but from the management of tolerance towards each other.

Hatred is not to be taken lightly and speech or actions that consist of hatred will be offensive. However, not all that is considered offensive is necessarily hatred and diversity is to be expected and tolerated.[476] In this case Nettle JA makes it clear that section 8 goes 'no further in restricting freedom to criticise the religious beliefs of others than to prohibit criticism so extreme as to incite hatred'.[477]

It is troubling that a preacher's misleading characterisation of works he had authored should somehow lead to the conclusion that his beliefs about a religion were not his real beliefs. Even more disquieting is a secular tribunal's determination that where a religious leader had misconstrued and misrepresented another religion's sacred writings, this also indicated an absence of honest belief. Defining in court what a religious group' 'really believe' rather

---

[475] Ibid, 211–12 (Nettle JA), 240-2 (Neave JA).

[476] In *Catch the Fire Ministries Case* (2006) 15 VR 207, 211–12 (Nettle JA), 242 (Neave JA).` They acknowledge that there will be differences in views about other peoples' religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though to some and perhaps to most in society such criticisms may appear ill- informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or misconceived or ignorant or so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.`

[477] *Catch the Fire Ministries Case* (2006) 15 VR 207, 211–12 (Nettle JA), 219 (Neave JA).

than accepting that there might be competing interpretations and understandings takes courts into a dangerous area.[478] A wrong interpretation of scripture does not necessarily point to dishonest intent and the jurisdictional body should not to be trying to rule on what are correct and honest representations of sacred writings.[479] It is conceivable that there may be multiple ways of understanding a religion and its requirements.

In the search for the answer to if Anti-discrimination legislation does limit Religious Free Speech the cases shown in the Australian ground point to a yes. The protection of free-speech is an important aspect of a democratic society[480] and the current way that Australia is reason for concern. This points to the necessity of a clearer balancing mechanisms to protect Religious Free Speech when such is conflicting with the Anti-discrimination laws.

[478] Ibid.

[479] R T Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293.313; Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) vol 1, 193.

[480] See eg, David Flint and Jai Martinkovits, *Give us Back our Country* (Ballarat/Vic: Connor Court Publishing, 2013), 166; Joe Dolce, 'Free Speech and the Stokie Case' (2014) 53(7-8) 32, 32.

D. Chapter 5: Analysis of the conflict.

The research question that was answered in the 5th chapter was: ´Does the Anti-discrimination legislation limit Religious Free Speech? ´. Through this question, this chapter discussed whether Anti-discrimination laws have shown the general characteristic of limiting Religious Free Speech, and if this should be a bigger concern. The aim of the 5th Chapter was to more deeply investigate the problem and further demonstrate the current and future complications in the conflict of Anti-discrimination laws and Religious Free Speech in Australia by looking at the general aspects and cases as seen internationally.

In the subsection titled ´Goods and services: artistic manifestation and the same-sex wedding dilemma´ a few international cases were addressed which had been in the public eye in recent years for some aspect of religious conscientious refusal to provide services which supported the celebration of same-sex weddings. This had raised questions of whether or not people can refuse to provide goods and services, even when to do so would go against their religious belief. The difference between a refusal on the grounds of the nature of the service requested and the refusal based on the person who has requested was argued, showing the differences from both and explaining why a refusal that is based on the nature of the service requested might not necessarily be discrimination.

Cases in which the decisions support both perspectives were presented, addressing the conflicts of Anti-discrimination norms and Religious Free Speech. It was noted that the defences of Religious Free Speech based on the ground of Religious Freedom have shown less effectiveness when compared to defences based on Freedom of Speech. This is the case especially when a person is compelled to provide a service, this is the previously identified compelled speech.

It is important to point out that if a refusal to provide particular services, which contravene a provider's religious beliefs, results in the provider not being able to offer any services, the result is a practical exclusion from society of those who hold strong religious values. It is important that in Australia the Anti-discrimination body of law does not become source of discrimination, for this would be incompatible with the nature of Human Rights. It is undesirable that people of faith would become a sort of ´second class citizens' with no right to act or express their inner beliefs or being systematically punished for doing so. The general trend observed in the cases discussed in this section showed that the concern of Anti-discrimination norms trumping first generational Human Rights is a reality. This is especially the case when the protection of Religious Free Speech is not as important as the values framed in the Anti-discrimination body of law.

It was pointed out that as seen on the 4th Chapter the Australian Courts have shown signs of following the trend of international interpretation of Anti-discrimination mechanisms, which further signals the importance of the current international approach of this thesis. Religious Freedom requires more than the freedom to simply believe. Nevertheless, there is a growing trend in foreign jurisdictions to interpret Religious Freedom in this narrow way when in conflict with Anti-discrimination laws.

As Religious Freedom is not only an individual right, and its defence is important for the sustain of a desirable multicultural society, the protection given to Religious Free Speech should have a broad extension. Nevertheless, Australia still presents unsatisfactory protection. There is currently no provision in the Australian Anti-discrimination body of law that recognises the primacy of Religious Free Speech. The law should not be used as an instrument of

intolerance and the excessive curtailing of free-speech is a sign of undemocratic political views and, in that sense, a restrictive interpretation of Religious Free Speech in Australia would not be compatible with the application of the Human Rights in a free democratic society.

E. Chapter 6: Recommendations.

The 6th chapter finalises the reflection on problems addressed in this thesis, answering the last question to be considered: ´how can the conflicts between Religious Free Speech and the Anti-discrimination body of law be minimised? ´

The first solution would be to extend s 116 of the Australian Constitution to the states. It is seen that, as discussed in the 2nd chapter, s 116 does not give a large protection to 'freedom of religion.' Restrictive in function, it only forbids the Commonwealth from making a 'law' establishing a religion or prohibiting the free exercise of religion. The provision seen in the Constitution does not stand as an individual right, but rather as a limitation on the federal legislative power. In addition, ramifications are not provided for the violation of this section. It was also mentioned that attempts to extend this section to the states have previously failed. While the extension of s 116 to the states would be a good beginning, this solution alone would not be enough to protect Religious Free Speech in Australia in a satisfactory level.

Another solution presented in the 6th chapter is the extinction of the Anti-discrimination body of law in Australia, which in practical terms is a less realistic option. This solution could be interpreted by critics as a sign of a step backwards in the defence of Human Rights by the country. Nevertheless, the uncoordinated legislative process regarding the Anti-discrimination norms, which do not follow all the Human Rights that need to be protected, is a source of problems to those rights not yet protected.

Following the repeal idea, a subsidiary solution would be to extinguish the Anti-discrimination laws in the states and leave the matter for the federal sphere. Alternatively, the body of law could be harmonized among the states. Human

Rights should not be differently protected within the same country. However, this option is impeded by the lack of legislative power and the improbability that the federal government and the states would be able to reach the required agreement. Another negative aspect of this idea comes from the fact that the state Anti-discrimination laws have, in some cases, gone further than the Commonwealth in the Anti-discrimination body of law.

The next solution would be utilising the external affairs power to pass federal legislation implementing Human Rights instruments, that have been ratified by Australia, in a way that would trump inconsistent law. This could include protections of Religious Freedom and Freedom of Speech and, consequentially, Religious Free Speech.

Another solution presented is the implementation of a Bill or Charter of Rights by the Commonwealth. This would give application to the totality of the rights addressed in the ICCPR. Australia is the only democratic society that does not have a Bill or Charter of Rights. The attempts to accomplish such a task in Australia have, so far failed. The relevant discussion is not whether Human Rights should be protected but rather if a Human Rights Act is the most appropriate mechanism to achieve this. The subsection also addresses that the experiences of a Charter of Rights seen inside Australia of the ACT *Human Rights Act* (2004) and the *Victoria`s Charter of Human Rights and Responsibilities* (2006). In both acts the limits imposed on Religious Freedom merely had to be reasonable rather than ´necessary´ which does not provide a positive example for the protection of the Religious Free Speech.

The ICCPR offers a high value to freedom of religion and belief. However, the Australian experience does not seem to support such understanding. Freedom of Speech and Religious Freedom are fundamental and should not be abrogated or

even partially set aside because a 'new' Human Right comes into conflict with them. A Human Rights act that is drafted strictly as the ICCPR and its article 18, would still be subject to an inadequate interpretation, judging by precedential examples. This can be illustrated by the recommendations drafted in 2008 by Brennan Committee, which said that freedom from coercion or restraint in relation to religion and belief should be non-derogable, but freedom to manifest one's religion or beliefs (the Religious Free Speech) should be subject to a limitation clause modelled upon the Victorian and ACT charters. This outlined the fact that a charter of Human Rights alone may not be the ideal solution to the conflict of Religious Free Speech and the Anti-discrimination laws.

Religious Free Speech is often seen as a `poor cousin` among the family of Human Rights. In other countries, as evidenced in the 5th Chapter the existence of a Bill or Charter of Rights has not stopped the conflict between Religious Free Speech and Anti-discrimination law and reduced the assessment of the importance of Religious Freedom generally. While Religious Freedom is not seen as an important Human Right, the existence of a Bill of Rights would not fix the current lack of protection.

The legislation that protects Religious Freedom must be clear, unambiguous and either emphatic or insistent in order for it to be properly and fully taken into account. Without this, Religious Free Speech is vulnerable to being put in the lowest place, in an implicit hierarchy of Human Rights, to be protected. Although the protection of Human Rights in Australia is fragmented, and a Bill would give some sort of coherence for their protections, the creation of a Bill of Rights by itself (as the kinds that have been seen in Australia so far) is not the solution for the conflict addressed in this thesis.

The last possible solution to be discussed in this thesis is the implementation of a detailed Religious Freedom act. The adoption of a broad and detailed Religious Freedom act would consider the substantial number of conflicts arising between Anti-discrimination legislation and the religious sphere as well as the perception that such laws interfere with Religious Freedom. Importantly, it would be a step to substantially show and recognize that Religious Freedom stands in its suitable place as a Human Right worthy of protection in the Australian legal system. The improbability of an enactment of a Bill of Rights in Australia makes the call for the enactment of specific legislation even louder, as a better way of protecting basic rights such as Religious Freedom for it can express the protection with great detail and specificity, instead of leaving the question of the protection of such an important Human Right to the courts discernment.

A Human Rights act, by itself, brings with it the fear that Religious Freedom would be sacrificed when in competition with non-discrimination rights, and that people who hold religious beliefs could be prosecuted for expressing them. Leaving Religious Freedom to stand protected only by a Bill of Rights, especially considering the bills currently in existence in Australia, would not solve the problem. Rather, a specific Religious Freedom act that balances the importance of Religious Free Speech, when competing with other rights, would be more appropriate. Freedom of religious belief and expression is generally accepted in Australian society as an important freedom, and considering the concerns expressed in this thesis of the curtailing of Religious Free Speech in Australia, a detailed Religious Freedom act, based on the relevant international instruments, which trumps inconsistent state law and requires that existing Anti-discrimination law be interpreted in a manner consistent with it, seems to be the best solution.

III. FINAL CONSIDERATIONS

Religion should, as a rule, be an ally to a good government.[481] Religion informs the worldview of many people[482] and Religious Freedom is a fundamental Human Rights that should be protected. To curtail Religious Free Speech in the defence of ´new´ Human Rights points to a suppression of thought and opinion does not bring positive results in the advancement of knowledge. It is beneficial to add new perspectives on issues with an analysis and solutions rather than to forbid discussion.

To suggest ideal ways in which laws should respect freedom of conscience, it is important to identify how religion is a core element of human identity and dignity and why it should not be compromised. In order to minimise the negative impact of Anti-discrimination laws on religious free speech, one must be prepared to change them.

---

[481] 'In a free society, religion is an ally of good government as it forms the moral character of individuals and communities. ' Jennifer A. Marshall, 'Why Does Religious Freedom Matter?', *The Heritage Foundation* (Washington DC) 20 December 2010,8.

[482] There are religious influences in the foundations of common law in Australia. See Augusto Zimmermann, *Christian Foundations of the Common Law - Volume 3: Australia* (Connor Court, 2018), forthcoming.

BIBLIOGRAPHY

A. ARTICLES/BOOKS/REPORTS/THESIS/PAPERS/NEWSPAPER ARTICLES

- Aber, Katie, 'When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law' (2017) 59 *Columbia Journal of Law and Social Problems* 299
- Addison, Neil, *Religious Discrimination and Hatred Law* (Routledge-Cavendish, 2007)
- Ahdar, Rex J and I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013)
- Ahdar, Rex Tauati, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *The University of Queensland Law Journal* 293
- Alexy, Robert, 'Law, Morality, and the Existence of Human Rights' (2012) *Ratio Juris* 2
- Amarasingam, Amarnath, *Religion and the New Atheism: A Critical Appraisal* (Brill, 1st ed, 2010)
- Amos, Gary, 'The Philosophical and Biblical Perspectives that Shaped the Declaration of Independence' in H.W. House (ed), *The Christian and American Law* (Kregel Publications, 1998)
- 'A Point of View: Do human rights really exist?', *BBC news* (online), 27 April 2012 <http://www.bbc.com/news/magazine-17866473>
- Aroney, Nicholas, 'The constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation (2006) 34 *Federal Law Review* 288
- Aroney, Nicholas et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015)
- Bailey, Adam D, 'Anti-Discrimination Law, Religious Organizations, and Justice: Anti-Discrimination Law & Justice' (2014) 95 *New Blackfriars* 727

- Babie, Paul and Neville Rochow, *Freedom of Religion Under Bills of Rights* (The University of Adelaide Press, 2012)
- Babie, Paul and Neville Rochow, *Freedom of Religion Under Bills of Rights* (Cambridge University Press, 2013)
- Bailey, P H, *Human Rights Law* (Thomson Reuters (Professional) Australia, 2012)
- Barendt, Eric, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007)
- Beaman, Lori G, *Defining Harm: Religious Freedom and the Limits of the Law* (UBC Press, 2008)
- Beaman, Lori G, *Deep Equality in an Era of Religious Diversity* (Oxford University Press, 1st ed, 2017)
- Beck, Luke, 'Dead DOGS? Towards a Less Restrictive Interpretation of the Establishment Clause: Hoxton Park Residents Action Group Inc v Liverpool City Council (no 2)' (2014) 37 *University of Western Australia Law Review* 59
- Beck, Luke, 'The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study' (2014) 35 *The Adelaide Law Review* 225
- Bennington, Lynne and Ruth Wein, 'Anti-Discrimination Legislation in Australia: Fair, Effective, Efficient or Irrelevant?' (2000) 21 *International Journal of Manpower* 21
- Benson, Ian, ´Do "Values" Mean Anything at All? ´ (Paper for the Education at the Crossroads Conference, Faculty of Education, University of Calgary, May 11, 2002)
- Berman, Bruce and Colin Leys, *African capitalists in African development* (L Rienner Publishers, 1994)
- Berman, Bruce and Piotr Dutkiewicz, *Africa and Eastern Europe: Crises and Transformations edited by Bruce Berman and Piotr Dutkiewicz (*Queen's University, Centre for International Relations, 1993)
- Berman, David R and John C Bollens, *American government: ideas and issues* (Palisades Publishers, 1981)

- Berman, Gerald and University of Waterloo Department of Combinatorics and Optimization, *Applied graph theory bibliography: with forward citations* (Computer Lab, Dept of Combinatorics and Optimization, University of Waterloo, 1978)
- Berman, Harold J, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983)
- Berman, Larry, *Approaching democracy* (Pearson Prentice Hall, 5th ed, 2007)
- Berman, Ruth Aronson, *Acquisition and development of Hebrew: from infancy to adolescence* (John Benjamins Publishing Company, 2016)
- Berkovic, Nicola, 'Clergy unite over charter', *The Australian* (Sydney), 23 October 2009
- Berkovic, Nicola, 'Tongue-tied by The Thought Police', *The Weekend Australian*, 28-29 November 2015
- Bevans, Stephen B and Jeffrey Gros, *Evangelization and Religious Freedom: Ad Gentes, Dignitatis Humanae* (Paulist Press, 2009)
- Bita, Natasha, ´Scientology criminal, says senator ick Xenophon´, *The Australian* (online), 18 November 2009 <http://www.theaustralian.com.au/news/nation/scientology-criminal-says-senator-nick-xenophon/story-e6frg6nf-1225799077820>
- Blackshield, A R et al, *Blackshield and Williams Australian constitutional law and theory: commentary and materials* (Federation Press, 6th ed, 2014)
- Bloul, Rachel A D, 'Anti-discrimination Laws, Islamophobia, and Ethnicization of Muslim Identities in Europe and Australia' (2008) 28(1) *Journal of Muslim Minority Affairs* 7
- Boyle, Joseph, 'The Place of Religion in the Practical Reasoning of Individuals and Groups' (Pt University of Notre Dame) (1998) 43(1) *American Journal of Jurisprudence* 1
- Bradley, Gerard V, *Challenges to religious liberty in the twenty-first century* (Cambridge University Press, 2012)

- Brennan, Frank, *Acting on Conscience: How Can We Responsibly Mix Law, Religion and Politics?* (University of Queensland Press, 2007)
- Bronitt, Simon `Two Visios of the Human Rights Act 2004 (ACT): A ´Claytons´ Bill of Rights or the New Magna Carta? ´ (Paper presented at the Forum on the National Implications of the ACT Human Rights Act, Australuan National University, 1 July 2004)
- Brown, Andrew, 'Do human rights exist?' *The Guardian* (online), 20 October 2010 <https://www.theguardian.com/commentisfree/andrewbrown/2010/oct/20/human-rights-exist>
- Brownlie, Ian, *Principles of public international law* (Oxford University Press, 7th ed, 2008)
- Bruce, Dickson D, *Earnestly contending: religious freedom and pluralism in antebellum America* (University of Virginia Press, 2013)
- Buckingham, Janet Epp, *Fighting over God: A legal and political history of religious freedom in Canada* (McGill-Queen's University Press, 2014) vol 68.
- Burns, Garry, <https://garryburnsantidiscriminationactivist.com/>
- Butler, Amir, 'Why I've Changed My Mind on Victoria's Anti-Vilification Laws', *The Age* (online), 4 June 2004 <www.onlineopinion.com.au/view.asp?article=2274>
- Campbell, Enid and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 2nd completely revised, 1973)
- Cane, Peter, Carolyn Evans and Zoë Robinson, *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, first paperback ed, 2011)
- Carney, Gerard, *The constitutional systems of the Australian states and territories* (Cambridge University Press, 2006)
- Carter, Stephen L, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Anchor Books, 1st Anchor Books ed, 1994)

- Catholic Communications, Sydney Archdioceses, ´Discrimination Case Against Bishops Withdrawn´, *Sydney Catholic* (online), 06 May 2016 <https://www.sydneycatholic.org/news/latest_news/2016/201656_413.shtml>
- Clarke, Jennifer et al, *Hanks Australian constitutional law: materials and commentary* (LexisNexis Butterworths, 9th ed, 2013)
- Colanges, Fustel de, *The Ancient City: A Study of the Religion, Laws and Institutions of Greece and Rome* (Dover Publications, 2006)
- ´Complaint over Catholic Church marriage booklet dropped´ *The Australian* (online) 05 May 2016 <http://www.theaustralian.com.au/news/nation/complaint-over-catholic-church-marriage-booklet-dropped/news-story/3dcbf7200c6a3c7ae85a60689a72a904>
- Cooray, L J M, P V Brassil and Acfr Community Education Project, *Human rights in Australia* (ACFR Community Education Project, 1985) vol A4
- Countouris, Nicola, 'Remoulding The Scope of Application of Anti-Discrimination Law' (2012) 71(1) *Cambridge Law Journal* 47
- Creighton, W B and Andrew Stewart, *Labour law* (The Federation Press, 5th ed, 2010)
- Cross, Frank B, *Constitutions and religious freedom* (Cambridge University Press, 2015)
- Cushing, Bonnie Berman, *Accountability and White Anti-racist Organizing: Stories from our Work* (Crandall, Dostie & Douglass Books, 2010)
- Danelius, Hans, *Mänskliga rättigheter i europeisk praxis* (2nd edition, 2015)
- Davidson, Joanna, 'Incorporation of human rights in administrative decision-making: the impact of human rights instruments in Victoria and the Act' (2012) 68 *AIAL Forum* 43
- Dawson, D, 'Southey Memorial Lecture 1983: The Constitution - Major Overhaul or Simple Tune-Up?' (1983) 14 *Melbourne University Law Review* 353
- DeGirolami, Marc O, *The Tragedy of Religious Freedom* (Harvard University Press, 2013)

- Devereux, Annemarie, *Australia and the Birth of the International Bill of Human Rights 1946-1966* (Federation Press, 2005)
- Dingemans, James, *The Protections for Religious Rights: Law and Practice* (Oxford University Press, 1st ed, 2013) vol 1
- Dolce, Joe, 'Free Speech and the Stokie Case' *Quadrant* (online), 25 July 2014 <http://quadrant.org.au/magazine/2014/07-08/free-speech-skokie-case/>.
- Donlevy, J K et al, 'Freedom of Conscience and Catholic Schools' (2013) 44(3-4) *Interchange* 241
- Donnelly, Jack, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 39
- Donnelly, Jack, *International Human Rights* (Westview Press, 2nd ed, 1998)
- Donnelly, Jack, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281
- Doogue, Michelle Grattan; Edmund, ' "Bishops to deal blow on referendum', *The Age*, 15 August 1988 <https://news.google.com.au/newspapers?id=U1kpAAAAIBAJ&sjid=gZYDAAAAIBAJ&pg=3303,3701810&dq=referendum+religion+australia&hl=en>
- Doumit, Monica, 'A practical lesson in the irony of exclusion zones', *The Catholic Weekly* (online) 6 April 2017 < https://www.catholicweekly.com.au/monica-doumit-a-practical-lesson-in-the-irony-of-abortion-advocates-exclusion-zones/>
- Doumit, Monica, 'My opinion is not a criminal act, and neither is supporting women under pressure', *The Catholic Weekly*, 14 May 2017 <https://www.catholicweekly.com.au/monica-doumit-my-opinion-is-not-a-criminal-act-and-neither-is-supporting-women-under-pressure/>
- Dunan, Marcel, *Larousse Encyclopedia of Modern History: From 1500 to the Present Day* (Hamlyn, 1964)
- Dunleavy, Patrick, *Authoring a PhD: how to plan, draft, write and finish a doctoral thesis or dissertation* (Palgrave Macmillan, 2003)

- Durham, W. Cole and Brett G. Scharffs, *Law and religion: national, international, and comparative perspectives* (Aspen Publishers, 2010)
- D'Souza, Dinesh, *What's so Great About Christianity* (Regnery Pub, 2007)
- Eburn, Michael, 'Religion and the Constitution–an illusory freedom' (1995) 8(2) *Australian Religion Studies Review* 77
- Edge, Peter W, *Religion and Law: An Introduction* (Ashgate Publishing, 2006)
- Edwards, Gregory, *Religious Freedom* (2013)
- Epstein, Lee and Gary King, 'The Rules of Inference' (2002) 69 *The University of Chicago Law Review* 1
- Esbeck, Carl, 'The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Services Programs' (2008) 9(2) 1
- Evans, Carolyn Maree and Beth Gaze, 'Between religious freedom and equality: complexity and context' (2008) 49 *Harvard International Law Journal Online* 40
- Evans, Carolyn Maree, Legal Protection of Religious Freedom in Australia. (Federation Press, 2012)
- Evans, Carolyn Maree, ´Religious Freedom: one rights among many´, *Pursuit* (online), 08 March 2018, <https://pursuit.unimelb.edu.au/articles/religious-freedom-one-right-among-many>
- Evans, Carolyn Maree, 'Responsibility for rights: the ACT Human Rights Act' (2004) 32(2) *Federal Law Review* 291
- Evans, Malcolm, 'The Freedom of Religion or Belief and the Freedom of Expression' (2009) 4 *Religion & Human Rights* 197
- Ferrari, Silvio et al, *Law, religion, constitution: freedom of religion, equal treatment, and the law* (Ashgate, New ed, 2013)
- Fish, Stanley, *Almost Pragmatism: Richard Posner's Jurisprudence* (University of Chicago Law School, 1990) vol 57
- Fiss, Owen M, *The Irony of Free Speech* (Harvard University Press, 1996)

- Flint, David and Jai Martinkovits, *Give us Back our Country* (Ballarat/Vic: Connor Court Publishing, 2013)
- Forrester, Joshua, Lorraine Finlay and Augusto Zimmermann, *Law and Society: QUT Discrimination Case Exposes Human Rights Commission Failings* (2016)
- Forrester, Joshua, Lorraine Finlay and Augusto Zimmermann, *No offence intended: why 18c is wrong* (Connor Court Publishing, 2016)
- Forsyth, Robert, *Religious freedom is a tricky thing* (3 March 2017) The Centre For Independent Studies <https://www.cis.org.au/commentary/articles/religious-freedom-is-a-tricky-thing/>
- Foster, Neil, '"Religious Freedom in Australia"' (Paper presented at the 2015 Asia Pacific JRCLS Conference, University of Notre Dame Broadway Campus, 31/05/2015)
- Foster, Neil, 'Law and religion in the Victorian Court of Appeal' (2014) 88(12) *Australian Law Journal* 860
- Foster, Neil J, ´Protection of religious free speech in Australia´ (Paper presented at *The Australasian Christian Legal Convention 2016* (2016)
- Foster, Neil J, 'Religious Freedom in Australia overview 2017 update' (2017) *Human Rights Law Alliance (2017)*
- Frame, Tom and Inc ebrary, *Losing my Religion: Unbelief in Australia* (UNSW Press, 2009)
- Frazer, Andrew, 'Anti-Discrimination Law at Mid-Life Crisis: [Book Review: Rees, Neil; Lindsay, Katherine and Rice, Simon. Australian Anti-Discrimination Law: Text, Cases and Materials (2008)]' (2011) 24 *Australian Journal of Labour Law* 75
- *French, Peter A.*, Howard K Wettstein, *The New Atheism and Its Critics* (Wiley, 2013)
- Fustel de Colanges, Numa Denis and Willard Small, *The Ancient City: A Study of the Religion, Laws and Institutions of Greece and Rome* (Lothrop, Lee and Shepard, 12th ed, 1901)

- Galston, William A, 'Public Morality and Religion in the Liberal State' (1986) 19 *PS* 807
- Garvey, John H, 'Two Aspects of Liberty' (2016) 91 *Notre Dame Law Review* 1287
- Gelber, Katharine and Adrienne Stone, *Hate speech and freedom of speech in Australia* (Federation Press, 2007)
- George, Robert P, *Making men moral: civil liberties and public morality* (Clarendon Press, 1993)
- Glendon, Mary Ann, 'The Naked Public Square Now: A Symposium' (2004) 147 *First Things* 12
- Goldford, Dennis J, *The constitution of religious freedom: God, politics, and the First Amendment* (Baylor University Press, 2012) vol 1
- Gonçalves, Gabriela, News, 'Estudante muçulmana é interrompida durante o Exame da OAB por usar véu', *G1* (online), 17 March. 2015 <http://g1.globo.com/educacao/oab/noticia/2015/03/estudante-muculmana-e-interrompida-durante-o-exame-da-oab-por-usar-veu.html>
- Gottry, James M, 'Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech' (2011) 64 *Vanderbilt Law Review* 961
- Gray, Anthony, 'The reconciliation of freedom of religion with anti-discrimination rights' (2016) 42 *Monash University Law Review* 72
- Grim, Brian J, 'Religious Freedom: Good for what Ails Us?' (2008) 6 *The Review of Faith & International Affairs* 3
- Grim, Brian J, 'Rising Restrictions on Religion: A Global Overview' (2012) 2012 *Brigham Young University Law Review* 835
- Grim, Brian J, 'Growing Religion and Growing Religious Restrictions: A Global Overview' (2014) 17 *International Area Studies Review* 134
- Grim, Brian J and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century* (Cambridge University Press, 2011)

- Grim, Brian J, Greg Clark and Robert E Snyder, "*Is Religious Freedom Good for Business*? A *Conceptual and Empirical Analysis*," (2014) 10, *Interdisciplinary Journal of Research on Religion*
- Groves, Matthew, 'Treaties and Legitimate Expectations - The Rise and Fall of Teoh in Australia' (2010) 15 *Judicial Review* 323
- Guinness, Os, *The Global Public Square: Religious Freedom and the Making of a World Safe for Diversity* (InterVarsity Press, 2013)
- Habermas, Jürgen, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464
- Hall, Stephen, *Principles of International Law* (LexisNexis Butterworths, 4th ed, 2014)
- Hare, Ivan, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' (2006) *Public Law* 521
- Harrison, Joel, 'Truth, Civility, and Religious Battlegrounds: The Contest between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Te Mata Koi : Auckland University Law Review* 71
- Healey, Justin, *Religious Freedom and Discrimination* (The Spinney Press, 2015)
- Hiini, Robert, 'Anti-discrimination commissioner reportedly finds Archbishop Julian Porteous in possible breach of act', *Catholic Weekly* (online), 13 November 2015, <https://www.catholicweekly.com.au/anti-discrimination-commissioner-reportedly-finds-archbishop-julian-porteous-in-possible-breach-of-act/>
- Hiini, Robert, 'Anti-discrimination proceedings dropped but archbishop Porteous disappointed', Catholic Weekly (online), 7 March 2016, <https://www.catholicweekly.com.au/anti-discrimination-proceedings-dropped-but-archbishop-porteous-disappointed/>
- *Hogan, Michael, 'Separation* of *Church* and *State: Section 116* of the *Australian Constitution'* (1981) 53 *Australian Quarterly*, *2*
- Hopkins, Robin and Can Yeginsu, 'Religious Liberty in British Courts: A Critique and Some Guidance' (2008) 49 *Harvard International Law Journal Online* 28

- Horwitz, Paul, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford University Press, 2011)
- Hunter, Fergus, ´At Least I´m not a homophobe´, *Sydney Morning Herald* (online) 24 February 2016 <https://www.smh.com.au/politics/federal/at-least-im-not-a-homophobe-bill-shorten-in-tense-exchange-with-cory-bernardi-20160224-gn1xdl.html>
- Hurd, Elizabeth Shakman, ´The International Politics of Religious Freedom´ (2013) 40 *India international Center Quarterly* 225
- Hurd, Elizabeth Shakman, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press, 2015)
- Janssens, Louis, *Freedom of conscience and religious freedom* (Alba House, 1966)
- Jayasuriya, Laksiri, David Walker and Jan Gothard, *Legacies of white Australia: race, culture, and nation* (University of Western Australia Press, 2003)
- Judd, Bridget, ´Former KAP candidate Tess Corbett faces contempt of court over comments vilifying homosexuals´, ABC News (online), 19 January 2019 <http://www.abc.net.au/news/2016-01-19/former-kap-candidate-tess-corbett-faces-contempt-court/7098838>
- Kant, Immanuel, *Lectures on ethics* (Harper & Row, 1963)
- Karp, Paul, ´Religious protection fight looms over same-sex marriage bill´, *The guardian* (online), 15 November 2017 <https://www.theguardian.com/australia-news/2017/nov/15/religious-protection-fight-looms-over-same-sex-marriage-bill>
- Karp, Paul, ´Same-sex marriage bill does not hinder religious freedom says turnbull´, *The Guardian* (online), 17 November 2017 <https://www.theguardian.com/australia-news/2017/nov/17/same-sex-marriage-bill-does-not-hinder-religious-freedom-says-turnbull>
- Kateb, George, *Human dignity* (Belknap Press of Harvard University Press, 2011)
- Kinley, David, 'Human Rights Fundamentalisms' (2007) 29 *Sydney Law Review* 545

- Kirby, M D, 'A Bill of Rights for Australia: But do we Need it?' (1995) 21 *Commonwealth Law Bulletin* 272
- Kirby, M D and Hamlyn Trust, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, 2004) vol 55th series
- Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1st paper-back ed)
- La Nauze, J A, *The making of the Australian constitution* (Melbourne University Press, 1972)
- Landrigan, Mitchell, 'Can the Implied Freedom of Political Discourse Apply to Speech by or about Religious Leaders?' (2013) 34 *The Adelaide Law Review* 427
- Leeser, Julian and Ryan Haddrick, *Don't leave us with the Bill: the case against an Australian Bill of Rights* (Menzies Research Centre, 2009)
- Landrigan, Mitchell, *Can the Australian Constitution Protect Speech About Religion or by Religious Leaders?* (PhD Thesis, University of New South Wales Australia, 2014)
- Leite, Fábio Carvalho, *Estado e Religião no Brasil: a liberdade religiosa na Constituição de 1988 (*Doctor of Laws, Universidade do Estado do Rio de Janeiro, 2008)
- Leiter, Brian, *Why tolerate religion?* (Princeton University Press, 2013)
- Lindholm, Tore, *Facilitating Freedom of Religion Or Belief: A Deskbook* (Ringgold, Inc, 2004) vol 19
- Lubet, Steven, *Modern Trial Advocacy Analysis and Practice* (Nita Editorial Board Third ed, 2004)
- Luchenitser, Alex J, 'A New Era of Inequality? Hobby Lobby from Anti-Discrimination Laws' (2015) 9 *Harvard Law & Policy Review* 63
- Ludlow, Amy, 'Engineering Equality: An Essay on European Anti-Discrimination Law - by A Somek: Book Reviews' (2012) 50 *JCMS: Journal of Common Market Studies* 534
- Maclure, Jocelyn and Charles Taylor, *Secularism and freedom of conscience* (Harvard University Press, 2011)

- Mansour, Julia, 'Consolidation of Australian anti-discrimination laws: an intersectional perspective' (2012) 21(1) *Griffith Law Review* 533
- Marnell, William H, *The First amendment: The History of Religious Freedom in America* (Doubleday, 1st ed, 1964)
- Marshall, Jennifer A, *Why Does Religious Freedom Matter?* (The Heritage Foundation, 2010) <https://www.heritage.org/religious-liberty/report/why-does-religious-freedom-matter>
- McConville, Michael, Wing Hong Chui and Inc ebrary, *Research Methods for Law* (Edinburgh University Press, 2007)
- McConnell, Michael W, 'Religious Freedom at a Crossroads' (1992) 59 *The University of Chicago Law Review* 115
- Meier, Luke, 'Using agency law to determine the boundaries of the free speech and establishment clauses' (2007) 40(3) *Indiana Law Review* 519
- Meyerson, Denise, 'Why Religion Belongs in the Private Sphere, Not the Public Square' in Peter Cane, Carolyn Evans and Zoe Robinson (eds), Law and Religion in Theoretical and Historical Context (Cambridge University Press, 2008)
- Meyerson, Denise, 'The protection of religious rights under Australian law' (2009) 2009 *Brigham Young University Law Review* 529
- Moens, Gabriel A., 'The menace of neutrality in religion' (2004) 2004(2) *Brigham Young University Law Review* 535
- Moreland, Michael P, 'Religious free exercise and anti-discrimination law' (2007) 70(4) *Albany Law Review* 1417
- Mortensen, Reid, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167
- Murray, John Courtney, *We Hold These Truths: Catholic Reflections on the American Proposition* (Rowman & Littlefield Publishers, 2005)
- Newman, Jay, *On Religious Freedom* (University of Ottawa Press, 1991)

- O'Cinneide, Colm, 'The uncertain foundations of contemporary anti-discrimination law' (2011) 11(1-2) *International Journal of Discrimination and the Law* 7
- O'Neill, Ben, 'Anti-discrimination law and the attack on freedom of conscience' (2011) 27(2) *Policy: A Journal of Public Policy and Ideas* 3
- Ogilvie, M H, 'Between Liberté and Egalité: Religion and the State in Canada', in Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion: God, the State and the Common Law* (2005)
- Okin, Susan Moller, 'Is Multiculturalism Bad for Women?' (1997) 22 *Boston Review* 8 (First publication)
- Okin, Susan Moller et al, *Is Multiculturalism Bad for Women?* (Princeton University Press, 1999)
- Owen Mhango, Mtendeweka, 'The Constitutional Protection of Minority Religious Rights in Malawi: The Case of Rastafari Students' (2008) 52 *Journal of African Law* 218
- Parkinson, Patrick, 'The freedom to be different: religious vilification, anti-discrimination laws and religious minorities in Australia' (2007) 81 *Australian Law Journal* 954
- Parkinson, Patrick, *Christian Concearns about an Australian Charter of Rights*, (University of Adelaide Press, 2012)
- Pell, George, *Is There Only Secular Democracy?* (13 October 2004) Acton Institute < https://acton.org/node/3585 >.
- Perkins, John L, 'Religion and Vilification' (2005) 17 *Dissent* 53
- Peters, Denis, *High Court challenge over controversial candidate Corbett* (25 August 2017) Garry Burns anti-discriminations activist, <https://garryburnsantidiscriminationactivist.com/2017/08/25/high-court-challenge-over-controversial-candidate-corbett/>
- Peterson, Gregory R., '11. Ethics, Out-Group Altruism, And the New Atheism' in Anonymous (2010) 157

- Portillo, Javier and Walter E Block, 'Anti-Discrimination Laws: Undermining Our Rights' (2012) 109(2) *Journal of Business Ethics* 209
- Press, Australian Associated, ´Catholic anti-marriage booklet condemned as immeasurably harmful´ *The Guardian* (online) 28 September 2015 <https://www.theguardian.com/australia-news/2015/sep/28/catholic-anti-gay-marriage-booklet-condemned-as-immeasurably-harmful>
- Radan, Peter, Denise Meyerson and Croucher, Rosalind F (Rosalind Frances), *Law and Religion: God, the State and the Common Law* (Routledge, 2005) vol 9
- Rawls, John, *Political Liberalism* (Columbia University Press, Expand ed, 2005)
- Rees, Neil, Simon Rice, 'Causing fear through hate speech is conduct that crosses the line', *The Australian* (Australia), 19 April 2013, 26
- Rees, Neil, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014)
- Rees, Neil, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (The Federation Press, 2008)
- Rivers, Julian, 'Law, Religion and Gender Equality' (2007) 9 *Ecclesiastical Law Journal* 24
- Rivers, Julian, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)
- Ronalds, Chris and Elizabeth Raper, *Discrimination Law and Practice* (The Federation Press, 4th ed, 2012) vol 4
- ´Ruddock inquiry into Freedom of Religion puts Bill of Rights back on the agenda´, *The Australian* (online), 31 March 2018, <https://www.theaustralian.com.au/national-affairs/ruddock-inquiry-into-freedom-of-religion-puts-bill-of-rights-back-on-the-agenda/news-story/b3254dc18f37d361c7303a15b18b3800>

- Ruse, Michael, 'Making Room for Faith: Does Science Exclude Religion?' (2013) 37 *Midwest Studies in Philosophy* 11
- Sainty, Lane, ´Its bullshit: woman behind Tasmanian Archbishop Case slams Religious Freedom Claims´, *Buzzfeed* (online), 19 September 2017, <https://www.buzzfeed.com/lanesainty/its-bullshit-basically?utm_term=.ufzLwM4ew#.omoDP5QXP>
- Sajo, Andràs, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 *International Journal of Constitutional Law* 605
- Sandeman, John, ´Anti-discrimination case against preacher dropped´, Eternity news (online), 07 March 2018, <https://www.eternitynews.com.au/australia/anti-discrimination-case-against-preacher-dropped/>
- Sandeman, John, 'Religious Freedom Panel Gets a Diverse Response', Eternity News (online), 04 April 2018 <https://www.eternitynews.com.au/australia/religious-freedom-panel-gets-a-diverse-response/>.
- Scharffs, Brett G, 'Religious Majorities and Restrictions on Religion' (2016) 91 *Notre Dame Law Review* 1419
- Schmidt, Alvin J, *How Christianity changed the world* (Zondervan, 2009)
- Sehat, David, *The myth of American religious freedom* (Oxford University Press, 2011)
- Seccombe, Mike, 'Bowen assurance to schools on 'yes' vote', *Sydney Morning Herald* (Sydney) 16 August 1988
- Shah, Timothy Samuel et al, *Religious freedom: why now?: defending an embattled human right* (Witherspoon Institute, 2012)
- Smith, Steven D, *Discourse in the Dusk: The Twilight of Religious Freedom?* (Harvard Law Review Association, 2009) vol 122
- Smith, Steven D, ´The Constitution and the Goods of Religion´ (2011) 10-059 *University of San Diego School of Law Research*, 131

- Smyth, Russell, 'Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis' (2008) 22 *Temple International and Comparative Law Journal* 409
- Sousa, Isabel Regina Rocha de, *A circulação e intercâmbio jurisprudencial no direito comparado: as State Supreme Courts Australianas*. (Monography, Universidade Federal Fluminense, 2014)
- Stark, Barbara and Louis Henkin, 'The Age of Rights' (1991) 85 *The American Journal of International Law* 733
- Stark, Rodney, *The victory of reason: how Christianity led to freedom, capitalism, and Western success* (Random House,1st ed, 2005)
- Sweetman, Brendan, *Why Politics Needs Religion: The Place of Religious Arguments in the Public Sphere* (InterVarsity Press, 2006)
- Sword, Helen, *Stylish Academic Writing* (Harvard University Press, 2012)
- Tahmindjis, Phillip, 'Sexual Harassment and Australian Anti-Discrimination Law' (2005) 7(1-4) *International Journal of Discrimination and the Law* 87
- Talmon, Stefan, *Recognition of governments in international law: with particular reference to governments in exile* (Oxford University Press, 1998)
- Tatchell, Peter, *Why I changed my mind on the Ashers gay cake row* Peter Tatchell Foundation, <http://www.petertatchellfoundation.org/ashers-gay-cake-verdict-is-defeat-for-freedom-of-expression/>
- Taylor, Paul M., *Freedom of religion: UN and European human rights law and practice* (Cambridge University Press, 2005)
- Thompson, Keith, ´Accommodating rights? Religion, speech and equality in Australia´ (Speech at ALRC Freedoms Symposium, Adelaide, 21 September 2015) <https://www.alrc.gov.au/accommodating-rights-religion-speech-equality-keith-thompson>
- Thompson, Keith, 'Should 'Public Reason' Developed Under US Establishment Clause Jurisprudence Apply to Australia?' (2015) 17 *University of Notre Dame Australia Law Review* 107

- Thompson, Keith, 'Religious voices in the Public Square: How fundamental are our freedoms of conscience and speech?' (2016)
- Thornton, Margaret, *The liberal promise: anti-discrimination legislation in Australia* (Oxford University Press, 1990)
- Thunder, David, 'The Limits of Finnis's Nontheistic Account of Human Dignity and Rights' (2012) 3(1) *Jurisprudence (Oxford, England)* 267
- Vatican II, Declaration on Religious Freedom: Dignitatis Humanae – On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious (7 December 1965) <www.vatican.va/archive/hist_councils/ii_vatican_council/ documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>
- Vazquez, Melisa, ´Abortion Inside Swedish Democracy: the case of Ellinor Grimmark´, *Rivista di Diritti Comparati* (online), 22 June 2015 <http://www.diritticomparati.it/abortion-inside-swedish-democracy-the-case-of-ellinor-grimmark/>
- Voltaire, 'A Philosophical Dictionary' <https://ebooks.adelaide.edu.au/v/voltaire/dictionary/chapter380.html>
- ´Xenophon won´t give up on Scientologists´, *SBS News* (online) 24 February 2015 <http://www.sbs.com.au/news/article/2010/05/12/xenophon-wont-give-scientologists>
- Walsh, Greg, ´Educational Institutions and the Prohibition on Disability Discrimination´ (2014) *LSJ: Law Society of New South Wales Journal* 76
- Walsh, Greg, ´The Right to Equality and the Employment Decisions of Religious Schools´ (2014) 16 *University of Notre Dame Law Review* 107
- Walsh, Greg Bede, *Religious schools and discrimination law* (Central Press, 2015)
- Williams, George, *A Charter of Rights for Australia* (University of New South Wales Press, 3rd ed, 2007)
- Williams, George, 'Writing was on the wall for political donation laws', *The Sydney Morning Herald* (online), 18 December 2013,

<https://www.smh.com.au/opinion/writing-was-on-the-wall-for-political-donations-law-20131218-2zkk0.html>

- Williams, George, 'Protecting freedom of speech in Australia' (2014) 39(4) *Alternative Law Journal* 217
- Williams, George and David Hume, *Human Rights Under the Australian Constitution* (Oxford University Press, 2nd, 2013)
- Willsher, Kim, News, 'France's burqa ban upheld by human rights court ', *The Guardian* (online), 01 July 2014 <http://www.theguardian.com/world/2014/jul/01/france-burqa-ban-upheld-human-rights-court>
- Wintemute, Robert, 'Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?' (2016) 27(3) *King's Law Journal* 387
- Witte, John and M Christian Green, *Religion and human rights: an introduction* (Oxford University Press, 2012)
- Zimmermann, Augusto, Christian Foundations of the Common Law - Volume 3: Australia (Connor Court, 2018), forthcoming
- Zimmermann, Augusto, 'Farewell, religious liberty, farewell, conscience', *News Weekly* (online), 13 February 2016 <http://newsweekly.com.au/article.php?id=57194>
- Zimmermann, Augusto, 'Same-Sex Marriage, Freedom of Speech and Religious Liberty in Australia – A Critical Appraisal' (2017)
- Zimmermann, Augusto, 'The Postmodern Underpinnings of Religious Vilification Laws: Implications For Democracy And Freedom Of Speech' (2013) 4 *The Western Australian Jurist* 85

B. CASES

- *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116
- *Al-Kateb v Godwin* (2004) 219 CLR 562
- *Aldridge v Booth* (1988) 80 ALR 1
- *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* [1920] HCA 54; 28 CLR 129
- *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1
- *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559
- *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* 177 CLR 106
- *Bradley v The Commonwealth* (1973) 128 CLR 557
- *Brandy v HR&EOC* (1995) 183 CLR 245
- *Burns v Corbett* [2015] NSWCATAD 188
- *Burns v Corbett* [2016] NSWSC 459
- *Burns v Gaynor* [2015] NSWCATAD 211
- *Buzzacott v R* [2005] ACTCA 7
- *Chow Hung Ching v The King* (1948) 77 CLR 449
- *Catch the Fire Ministries Case* (2006) 15 VR 207
- *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284
- *Catch the Fire Ministries Inc v Daniel Nalliah and Daniel Scot v Islamic Council of Victoria Inc and Attorney General for the State of Victoria* (2006) 206 FLR 56
- *Chow Hung Ching v The King* (1948) 77 CLR 449
- *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors - [2014] VSCA 75*
- *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120
- *Commonwealth v Tasmania* (1983) 158 CLR 1
- *Corbett v Burns* [2014] NSWCATAP 42

- *Corbett v Burns* [2015] NSWCATAP 172
- *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe* [2010] VCAT 1613
- *Crittenden v Anderson* (1977) 51 ALJ 171
- *Dental Practitioners Board of Victoria v Gardner (Occupational and Business Regulation)* [2008] VCAT 908
- *Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251
- *Dietrich v The Queen* (1992) 177 CLR 292
- *Evans v State of New South Wales* [2008] 168 FCR 576
- *Fraser v Walker* [2015] VCC 1911
- *Gaynor v Chief of the Defence Force (No 3) [*2015] FCA 1370
- *Gerhardy v Brown* (1985) 159 CLR 70
- *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217
- *Halliday v The Commonwealth of Australia* [2000] FCA 950
- *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510
- *J H Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418
- *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309
- *Kerry Anne Hozack v The Church of Jesus Christ of Latter-Day Saints* [1997] FCA 1300
- *Kiao v West* (1985) 159 CLR 550
- *Kokkinakis v Greece* [1993] ECHR 20
- *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 [1985] HCA 81
- *Krygger v Williams* [1912] 15 CLR 366
- *Kruger v Commonwealth* [1997] HCA 27
- *Lee v New South Wales Crime Commission* (2013) 302 ALR 363
- *Levy v Victoria* (1997) 189 CLR 579
- *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] 221 FCR 86
- *Mabo v Queensland [No 2]* (1992) 175 CLR 1
- *Minister for Immigration and Ethnic Affairs v Teoh* (1995) HCA 20 (1995) 183 CLR 273

- *Momcilovic v The Queen* (2011) 245 CLR 1
- *Monis v The Queen* (2013) 249 CLR 92
- *Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525
- *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
- *Polyukhovich v Commonwealth* (1991) 172 CLR 501
- *Queensland v Commonwealth* (1989) 167 CLR 232
- *R v AM* [2010] ACTSC 149
- *R (Williamson) v Secretary of State for Education and Employment, ex parte Williamson* [2005] 2 AC 246
- *Simsek v Macphee* (1982) 148 CLR 636 [1982] HCA 7
- Soulitopoulos v La Trobe University Liberal Club (2002) 120 FCR 584
- Tajjour v New South Wales [2014] HCA 35
- *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104
- *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council* (Administrative Review) [2012] ACAT 81
- *University of Wollongong v Metwally* (1984) 158 CLR 447
- *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130
- *Victoria v Commonwealth* (1996) 187 CLR 416
- *Viskauskas v Niland* (1983) 153 CLR 280
- *X v Commonwealth* (1999) 200 CLR 177

C. INTERNATIONAL CASES

Canada:

- *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC)
- *Caldwell et al v Stuart et al* [1984] 2 SCR 603.
- Ontario Human Rights Commission v Brockie [2002] 22 DLR (4th) 174.
- *R v Gruenke [1991] 3 S.C.R. 263*
- *The Nova Scotia Barristers' Society v Trinity Western University* [2016] NSCA 59
- *Trinity Western University v. The Law Society of British Columbia* [2016] BCCA 423
- *Trinity Western University v. The Law Society of Upper Canada* [2016] ONCA 518

Human Rights:

- *Refah Partisi (The Welfare Party) v Turkey* (application nos 41340/98, 41342/98 and 41344/98) ECHR 3003-II,
- *Handyside v the United Kingdom* (1976) Eur Court HR (ser A) 737
- *Kokkinakis v Greece* 1993 ECHR 20
- *The US Hands on Originals, Inc v Lexington-Fayette Urban County Human Rights Commission* (Fayette Circuit Court, Civil Branch, 3rd Div, Ky; Civil Action No 14-CI-04474)

South Africa:

- *Strydom v Nederduitse Gereformeede Gemeente, Mooreletta Park* (2009) 4 SA 510 (Equality Court , TPA, South Africa)

Sweden:

- *Pastor Ake Green* Case B 1050 05

U.K.:

- *Lee v Ashers Baking Co Ltd & Anor* [2015] NICty 2

U.S.A:

- *Craig v Masterpiece Cakeshop, Inc*., 370 P3d 272 (Colo App 2015), cert den, No. 15SC738, 2016 WL 1645027 (Colo Apr 25, 2016), cert granted sub nom Masterpiece Cakeshop, Ltd v Colorado Civil Rights Comm'n, 137 S Ct 2290 (2017)
- *Department of Fair Employment and Housing v Cathy's Creations Inc* Cal Sup Ct, Kern Cty; BCV-17-102855
- *Elane Photography, LLC v Willock*, 309 P 3d 53 (NM, 2013)
- *Employment Div v Smith,* 494 U.S. 872 (1990)
- *Gifford v Mccarthy 2016 NY Slip Op 00230*
- *Klein v. Oregon Bureau of Labor and Industries* (CA Or; Dec 28, 2017, — P3d —-, 2017 WL 6613356; 289 Or App 507 (2017)
- *Miller v. Davis* 123 F.Supp.3d 924, 2015 WL 4866729
- *Mullins v Masterpiece Cakeshop Inc,* 2015 COA 115, ~~ 1-2, 370 P.3d 272 (2015)
- *Obergefell v Hodges* (2015) 135 S. Ct. 2584, 192 L. Ed. 2d 609
- *People v Brown* (2016 NY Slip Op 08482)
- *State of Washington v Arlene's Flowers Inc and Stutzman, (Wash SC, En Banc, No 91615-2; 16 Feb 2017)*

- *Trinity Western University v British Columbia College of Teachers,* [*2001*] 1 *S.C.R. 772, 2001* SCC 31

D. LEGISLATION

- *Age Discrimination Act 2004* (Cth)
- *Anti-Discrimination Act 1977* (NSW)
- *Anti-Discrimination Act 1991* (Qld)
- *Anti-Discrimination Act 1992* (NT)
- *Anti-Discrimination Act 1998* (Tas)
- *Anti-Discrimination Amendment Act 2001* (Qld)
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- Constitution Act 1934 (Tas)
- Constitutional Alteration (Post-war Reconstruction and Democratic Rights) Bill 1944 (Cth)
- Constitutional Alteration (Rights and Freedoms) Bill 1988 (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Discrimination Act 1991* **(ACT)**
- *Equal Opportunity Act 1977* (Vic)
- *Equal Opportunity Act 1984* (WA)
- *Equal Opportunity Act 1984* (SA)
- *Equal Opportunity Act 2010* (Vic)
- *Fair Work Act 2007* (Cth)
- *Fair Work Act 2009* (Cth)
- *Payroll Tax Act 1971* (Vic)
- *Racial Discrimination Act 1975* (Cth)
- Racial and Religious Tolerance Act 2001 (Vic)
- *Sexual Discrimination Act 1984* (Cth)
- *Summary Offences Act* 1966 (Vic)
- The *Human Rights Act 2004* (ACT)

E. TREATIES

- *Convention against Torture and Other Cruel, Inhuman or Degrading. Treatment or Punishment*, opened for signature 10 December 1984
- *Convention on the Rights of a Child,* opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990)
- *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981
- *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008)
- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, (the *'Religion Declaration'*) Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); reaffirmed by the United Nations by resolution 48/128 in 1993, and declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993
- *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
- *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)
- *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)
- United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/ CN.4/1984/4 (1984)

- *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948)
- Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

F. OTHER

ABC TV, 'Kevin Rudd: The God Factor', Compass, 8 May 2005 (John Howard) <www.abc.net.au/compass/s1362997.htm>

ABC TV, 'Evangelist Christian Vote Wanted', Lateline, 9 July 2004 (Peter Costello, address to the Hillsong Church) <www.abc.net.au/lateline/content/2004/s1150747.htm>

ACT Bill of Rights Cosultative Committee, Towards an ACT Human Rights Act (2003)

Alliance Defending Freedom, *The Barronelle Stutzman Sto*ry (16 March 2014), Youtube, <https://www.youtube.com/watch?v=MDETkcCw63c&feature=youtu.be>.

American Splendor (Directed by Shari Springer Berman and Robert Pulcini, Good Machine and Dark Horse Entertainment, 2003)

Americans in Rome music by fellows of the American Academy in Rome (Directed by Bridge, 2008)

Anti-discrimination Board of NSW, History of the Anti-discrimination laws <http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_antidisclaw_history.aspx>.

Anti-discrimination Commission Queensland, <https://www.adcq.qld.gov.au/complaints/discrimination>

Anglicans General Synod Standing Committee of the Anglican Church of Australia, *Submission to the National Human Rights Consultation* (2009) 1

Australian Government, Australia´s Human Rights Framework (2010)

Attorney-General's Department, International human rights system <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx>

Attorney-General's Department, *United Nations human rights reporting* <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/default.aspx>

Australian Government Department of Home Affairs, Fact Sheet- Life in Australia: Australian values, <http://www.border.gov.au/about/corporate/information/fact-sheets/07values>

Australian Human Rights Commission, A quick guide to Australian discrimination laws, <http://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/quick-guide-australian-discrimination-laws>

Australian Human Rights Commission, *Human Rights Explained: Fact sheet 7:Australia and Human Rights Treaties* <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties>

Australian Human Rights Comission, ´UN Human Rights Committee report on Australia´s Human Rights Records, 10 November 2017 <https://www.humanrights.gov.au/news/stories/un-human-rights-committee-report-australia-s-human-rights-record>

Australian Law Reform Commission Report 129

Bennett, Scott and Sean Brennan, *Constitutional referenda in Australia* (24 August 1999) Parliament of Australia <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP02>

Brennan Committee 2009.

Commission, Australian Human Rights, *What is the Universal Declaration of Human Rights?* <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights>

Commission, Australian Human Rights, *Australia and the Universal Declaration on Human Rights* <https://www.humanrights.gov.au/publications/australia-and-universal-declaration-human-rights>

Commission, Australian Human Rights, *What is the Universal Declaration of Human Rights?* <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights>

Commonwealth Attorney-General Michael John Duffy on February 8, 1993. *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998.

Department, Attorney-General's, International human rights system <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx>

Religious Freedom and Business Foundation *Brian J Grim, PHD* (2014) *President* <https://religiousfreedomandbusiness.org/brian-j-grim>.

History of the Anti-Discrimination Act 1977 (NSW), Anti-Discrimination Board of NSW, <http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_antidisclaw_history.aspx>

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) [2] ('General Comment 22')

Chief Justice Gibbs: Defending the Rule of Law in a Federal System, Inagural Sir Harry Gibbs Memorial Oration, Hon Justice Dyson Heydon, AC, < https://www.samuelgriffith.org.au/papers/html/volume18/v18dinner.html>.

Into the Unknown with Josh Bernstein (Directed by Priya Ramasubban, IMG, 2008)

National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009).

Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) 8

Presbyterian Church of Australia, *Submission to the National Human Rights Consultation* (11 June 2009) 50

Protection, Department of immigration and boarder, *Australian values statement* <https://www.border.gov.au/Trav/Life/Aust/living-in-australia-values-statement-long>

Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1

SA, *Parliamentary Debates*, Prohibition of Discrimination Act)

Scatena, Silvia et al, *Vatican II* (SCM Press, 2012) vol 2012/3;2012/

The ACL presented a petition to government with 21,000 signatures in November 2009

The Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, Report No 129 (2015)

The Equal Opportunity Act WA: A short history, Equal Opportunity Commission <http://www.eoc.wa.gov.au/about-us/the-equal-opportunity-commission-wa>

US Department of State, International Religious Freedom Report for 2015 (2015), 31 May 2018 <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>

Vatican II, 'Declaration on Religious Freedom: Dignitatis Humanae – On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious' (7 December 1965) <www.vatican.va/archive/hist_councils/ii_vatican_council/ documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>

Victorian Equal Opportunity and Human Rights Commission (VEOHRC), Submission No 90 to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006 (2015), Recommendation I

II, Vatican, *Declaration on Religious Freedom: Dignitatis Humanae – On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* <www.vatican.va/archive/hist_councils/ii_vatican_council/ documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>

G. RESEARCH INSTRUMENTS

- AGIS Plus Text
- Australia/New Zealand Reference Centre
- AustlII
- Australian Bureau of Statistics
- Cambridge Books Online
- Cambridge Journals Online
- ComplaintLine
- EBL (eBook Library)
- http://endnote.com/
- Google Scholar
- Informit APAFT (Australian Public Affairs Full Text)
- HeinOnline
- Humanities International Complete
- ICLR Online
- Index to Foreign Legal Periodicals
- Indigenous Collection
- Informit Law
- JustCite
- Kluwer Law International Journal Library
- LexisNexisAU
- Lexis.com
- Max Planck Encyclopaedia of Public International Law
- Oxford Journal Collection Law
- Oxford Reports on International Law
- Parliamentary Library Commonwealth
- Parliamentary Library publications
- Parliament of Australia

- Parliament of NSW
- Contains Hansard (2nd reading speeches)
- Parliament of Western Australia
- Philosphers' Index
- Social Science Research Network
- United Nations Documents Centre
- United Nations Treaty Database
- Westlaw Next
- Wolters Kluwer CCH IntelliConnect
- WestlawAU
- University of Notre Dame library resource