PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Interim Report

Legal Foundations of Religious Freedom in Australia

Joint Standing Committee on Foreign Affairs, Defence and Trade

November 2017
CANBERRA
Contents

Chair’s Foreword ..............................................................................................................................vii

Membership of the Committee ........................................................................................................ix

Membership of the Human Rights Sub-Committee...................................................................xiii

Terms of Reference ..........................................................................................................................xv

Abbreviations................................................................................................................................xvii

The Report

1 Background ...................................................................................................................................1

Scope of Interim Report ..................................................................................................................2

Previous work of the Committee...................................................................................................2

Structure of Interim Report ..........................................................................................................3

2 International Human Rights Law ..............................................................................................5

Universal Declaration of Human Rights .......................................................................................5

International Covenant on Civil and Political Rights .................................................................5

Adoption of ICCPR into Australian law .......................................................................................6

Reservation to Article 20 ..............................................................................................................7

Other relevant human rights instruments ....................................................................................8

Religion Declaration......................................................................................................................8

International Convention on the Elimination of All Forms of Racial Discrimination ..............9

UNESCO Principles .....................................................................................................................9

Siracusa Principles.......................................................................................................................10
3 Definition and Scope of the Right to Freedom of Religion or Belief

Definition of Religion
Phrasing
“Hold” and “manifest”
“Individually or in community with others”
The rights of parents
Legitimate limitations on the freedom of religion or belief
Sub-Committee Comment

4 Federal Protection of Freedom of Religion or Belief

Australian Constitution
Section 116
Case law
Krygger v Williams
Jehovah’s Witnesses case
Scientology case
Kruger v Commonwealth
Cheedy on behalf of the Yindjibarndi People v State of Western Australia
Implied right to freedom of political communication
Implied right to freedom of association
No implied right to freedom of religion
Federal Legislation
Anti-discrimination law
Anti-discrimination law: exemptions and exceptions
Common law protections .................................................................45

Principle of legality ........................................................................46

Parliamentary scrutiny ................................................................47

Australian Human Rights Commission ........................................48

Sub-Committee Comment ............................................................49

State and Territory Protections ......................................................51

Tasmanian Constitution Act ..........................................................51

Charter of Rights/Human Rights Act ............................................52

Support for State and Territory Instruments ...............................54

Criticism of State and Territory Instruments ..............................55

State and territory legislation .......................................................56

Anti-discrimination law ...............................................................56

Exceptions and exemptions .........................................................56

Religious vilification laws .............................................................57

Common law decisions .................................................................60

CYC v Cobaw ................................................................................60

Other state case law .................................................................62

State human rights commissions ..................................................64

Sub-Committee Comment ............................................................65

Implementing the ICCPR in Domestic Law .................................67

Implementing religious freedom into Australian law ..................67

Bill of Rights, Charter of Rights, or Human Rights Act ................68

Support for a federal rights instrument .......................................69

Opposition to a federal rights instrument ....................................70

Challenges to a federal rights instrument ....................................71

Religious Freedom Act .................................................................72

Protecting religious freedom in anti-discrimination law ..........73

Sub-Committee Comment ............................................................74

Balancing the Right to Freedom of Religion or Belief and Other Rights ...75
Freedom of Religion or Belief and the right to non-discrimination ..........................................................75

Same-sex marriage and non-discrimination ......................................................................................78

Exceptions and exemptions in anti-discrimination law .................................................................81

Genuine occupational requirement test .........................................................................................83

General Limitations Clause .............................................................................................................84

Freedom of Religion or Belief and access to abortion .................................................................87

Exclusion zones ................................................................................................................................87

Conscientious objection .................................................................................................................88

Sub-Committee Comment .................................................................................................................89

Appendix A. Bibliography ..................................................................................................................91

Appendix B. Submissions ..................................................................................................................97

Appendix C. Public hearings .............................................................................................................99
Chair's Foreword

Australia has a proud record as a modern, liberal democracy, one of the freest societies in history. Over the last hundred years Australia has also become one of history’s most culturally, ethnically, and religiously diverse societies. Australians from all backgrounds have long enjoyed liberty to live their lives as they see fit and pursue their goals as they wish. Many Australians or their ancestors have fled persecution or war seeking a better life for their families and have found it here.

Australia’s record is not perfect, and like any nation it has sometimes failed to live up to the high standards of human rights and freedoms that we have come to expect in the Western world. Nevertheless, despite this, most Australians have enjoyed, and continue to enjoy, a quality of life and a degree of freedom that is remarkable in a historical context.

The right to freedom of religion, thought, conscience or belief is one of the pillars of this liberty. Many Australians are descended from people who fled persecution for their faith. Early European settlers came from Catholic, protestant, and Lutheran traditions. Orthodox Christians, Muslims, Hindus, Jews, Buddhists, and many others have found freedom here too. Aboriginal people continue to practice their indigenous faith traditions. And people with no religious adherence, including atheists, live free from coercion or persecution by religious authorities.

Australia’s strong record of religious freedom should not be taken for granted, however. The Committee’s previous report into religious freedom, Conviction with Compassion, was tabled seventeen years ago and reflects a markedly different time in Australia’s social and political past. In 2000 Australia was celebrating the new millennium and in the hosting of the Sydney Olympics was proudly showcasing a culturally diverse and tolerant Australia to the world. Events since then have heightened Australian society’s awareness of religious issues and impacted how many Australians perceive religious difference.
This inquiry, and the Interim Report’s focus on the legal framework of religious protection in Australia, has brought many issues to the attention of the Subcommittee.

Among these issues there are two broad points which stand out most prominently. Firstly, legal protection of religious freedom in Australia is limited. Australia is unusual among modern Western democracies in that it lacks a codified bill or charter of rights. While a culture of religious freedom has thrived, and the common law has respected religious freedom to a large extent, the legislative framework to ensure this continues is vulnerable.

Most significantly, there is almost no explicit protection for religious freedom at the Commonwealth level. The Constitution does place “fetters” on the Commonwealth government, preventing it from restricting religious practice to some extent. But this is a fairly narrow protection, and it does not provide a positive protection of the right, nor does it prevent the States and Territories from restricting religion.

Secondly, the threats to religious freedom in the 21st century are arising not from the dominance of one religion over others, or from the State sanctioning an official religion, or from other ways in which religious freedom has often been restricted throughout history. Rather, the threats are more subtle and often arise in the context of protecting other, conflicting rights. An imbalance between competing rights and the lack of an appropriate way to resolve the ensuing conflicts is the greatest challenge to the right to freedom of religion.

This is most apparent with the advent of non-discrimination laws which do not allow for lawful differentiation of treatment by religious individuals and organisations. It is also manifested in a decreasing threshold for when religious freedom may be limited. For example, the Victorian Charter of Rights and Responsibilities allows “reasonably necessary” limitations while the ACT Human Rights Act has the even lower threshold of “reasonable” limitations, compared to the ICCPR’s requirement that limitations be “necessary”. While religious exemptions within non-discrimination laws provide some protection, these place religious freedom in a vulnerable position with respect to the right to non-discrimination, and do not acknowledge the fundamental position that freedom of religion has in international human rights law.

This inquiry has been met with enthusiasm from all different areas in society. Submissions have been thoughtful, thorough, and for the most part respectful. Public hearings have been attended by witnesses of a very high calibre and of varying points of view. The spirit in which these hearings have been conducted has allowed robust, energetic, deeply considered, and respectful conversation.
Membership of the Committee

Joint Standing Committee on Foreign Affairs, Defence and Trade

Chair
Senator David Fawcett LP, SA

Deputy Chair
Mr Nick Champion MP Wakefield, SA

Members
Dr Anne Aly MP Cowan, WA
Hon Kevin Andrews MP Menzies, VIC
Ms Sharon Claydon MP Newcastle, NSW
Mr Chris Crewther MP Dunkley, VIC
Hon Damian Drum MP Murray, VIC
Hon David Feeney MP Batman, VIC
Senator Alex Gallacher ALP, SA
Mr Andrew Hastie MP Canning, WA
Mr Craig Kelly MP Hughes, NSW
Ms Madeleine King MP Brand, WA
Mr David Littleproud MP Maranoa, QLD
Senator the Hon Ian Macdonald LP, QLD
Senator Malarndirri McCarthy (from 10.8.17) ALP, NT
Senator Bridget McKenzie NATS, VIC
Dr John McVeigh MP Groom, QLD
Senator Claire Moore ALP, QLD
Senator Deborah O’Neill ALP, NSW
Mr Graham Perrett MP Moreton, QLD
Ms Melissa Price MP Durack, WA
Mr Rowan Ramsey MP Grey, SA
Senator Linda Reynolds CSC LP, WA
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Senator Dean Smith (from 22.6.17) LP, WA
Hon Warren Snowdon MP Lingiari, NT
Mrs Ann Sudmalis MP Gilmore, NSW
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Mr Jason Wood MP La Trobe, VIC
Mr Trent Zimmerman MP North Sydney, NSW
Former members

Senator Chris Back (12.9.16 – 22.6.17) LP, WA
Senator Anthony Chisholm (14.9.16 – 10.8.17) ALP QLD
Senator Chris Ketter (8.11.16 – 9.2.17) ALP, QLD
Senator Scott Ludlam (12.9.16 – 14.7.17) AG, WA
Senator Nick Xenophon (12.9.16 – 1.12.16) NXT, SA
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Deputy Chair
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Terms of Reference

The Committee shall examine the status of the freedom of religion or belief (as recognised in Article 18 of the International Covenant on Civil and Political Rights) around the world, including in Australia. The Committee shall have particular regard to:

1. The enjoyment of freedom of religion or belief globally, the nature and extent of violations and abuses of this right and the causes of those violations or abuses;

2. Action taken by governments, international organisations, national human rights institutions, and non-government organisations to protect the freedom of religion or belief, promote religious tolerance, and prevent violations or abuses of this right;

3. The relationship between the freedom of religion or belief and other human rights, and the implications of constraints on the freedom of religion or belief for the enjoyment of other universal human rights;

4. Australian efforts, including those of Federal, State and Territory governments and non-government organisations, to protect and promote the freedom of religion or belief in Australia and around the world, including in the Indo-Pacific region.

The inquiry should have regard to developments since the Committee last reported on Australia’s efforts to promote and protect freedom of religion or belief in November 2000.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADA</td>
<td>Age Discrimination Act 2004 (Cth)</td>
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<tr>
<td>ACL</td>
<td>Australian Christian Lobby</td>
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<td>AHRC</td>
<td>Australian Human Rights Commission</td>
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<td>ALHR</td>
<td>Australian Lawyers for Human Rights</td>
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<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<tr>
<td>CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>HRA</td>
<td>Human Rights Act 2004 (ACT)</td>
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<td>HRLA</td>
<td>Human Rights Law Alliance</td>
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<td>HRLC</td>
<td>Human Rights Law Centre</td>
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<td>ICCPR or Covenant</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>JSCFADT</td>
<td>Joint Standing Committee on Foreign Affairs, Defence and Trade</td>
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<td>PCQ</td>
<td>Presbyterian Church of Queensland</td>
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<td>Religion Declaration</td>
<td>Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief</td>
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<td>SDA</td>
<td>Sex Discrimination Act 1984 (Cth)</td>
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<td>Siracusa Principles</td>
<td>Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights</td>
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<tr>
<td>Sub-Committee</td>
<td>Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNESCO</td>
<td>The United Nations Educational, Scientific and Cultural Organization</td>
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1. Background

1.1 On 29 November 2016 the Minister for Foreign Affairs and Trade, the Hon. Ms Julie Bishop MP, wrote to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) to refer an inquiry into the “status of the freedom of religion or belief (as recognised in Article 18 of the International Covenant on Civil and Political Rights) around the world, including in Australia”. The Committee was requested to have particular regard to:

The enjoyment of freedom of religion or belief globally, the nature and extent of violations and abuses of this right and the causes of those violations or abuses;

Action taken by governments, international organisations, national human rights institutions, and non-government organisations to protect the freedom of religion or belief, promote religious tolerance, and prevent violations or abuses of this right;

The relationship between the freedom of religion or belief and other human rights, and the implications of constraints on the freedom of religion or belief for the enjoyment of other universal human rights;

Australian efforts, including those of Federal, State and Territory governments and non-government organisations, to protect and promote the freedom of religion or belief in Australia and around the world, including in the Indo-Pacific region.

The inquiry should have regard to developments since the Committee last reported on Australia’s efforts to promote and protect freedom of religion or belief in November 2000.
1.2 The Inquiry was referred by the JSCFADT to the Human Rights Sub-Committee (the Sub-Committee) on 30 November 2016.

1.3 As at 2 November 2017, the Inquiry has received nearly 700 submissions and held three public hearings. The public hearings focused on the legal foundation of religious freedom protections in Australia, with leading legal and constitutional academics, human rights groups, and government agencies appearing. Many of these witnesses also contributed submissions.

**Scope of Interim Report**

1.4 This Interim Report focuses on the legal framework in Australia and its effectiveness in protecting religious freedom, drawing on the evidence received in the public hearings and in relevant submissions. The Sub-Committee takes the view that it would be most appropriate to review and report on religious freedom in our own country before turning to the wider world.

1.5 Primarily, the submissions used for this Interim Report are from legal scholars and organisations and from governments and government bodies. There is much further evidence from religious and secular groups, community organisations and members of the public which is relevant to the questions raised in this Interim Report, but for the purposes of the report only a smaller number of submissions that directly address the specific legal issues will primarily be used.

**Previous work of the Committee**

1.6 In 1999-2000 the JSCFADT conducted an inquiry into Australia’s efforts to promote and protect freedom of religion or belief. The JSCFADT’s report, entitled “Conviction with Compassion: A Report into Freedom of Religion and Belief”,¹ was tabled in November 2000. The report made nine recommendations with a subsequent Government Response, tabled in November 2002, accepting or accepting in principle four of those recommendations.

1.7 The Conviction with Compassion report noted the frequency with which the issue of freedom of religion or belief was addressed indirectly in previous

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reports on human rights, including, for example, in the report entitled, “Improving But...: Australia’s Dialogue on Human Rights”,\(^2\) tabled in June 1998.

## Structure of Interim Report

1.8 This Interim Report seeks to review Australian law on the freedom of religion or belief as it is, identify strengths and shortcomings, and canvass the range of opinions on how to strengthen religious protection. It does not seek to make recommendations at this early stage of the Inquiry.

1.9 Chapter Two sets the broader context of the right to freedom of religion or belief, discussing the major international human rights instruments and commentary. The primary focus is the *International Covenant on Civil and Political Rights (ICCPR)*\(^3\), as well as the United Nations Human Rights Committee’s commentary on this document.

1.10 Chapter Three addresses some important definitional and phrasing issues, defining the scope of the right and some key details of the right as it is found within the ICCPR and within Australian jurisprudence. It also discusses the legitimate limitations to the right.

1.11 Chapter Four canvasses the laws protecting freedom of religion or belief at the Australian Commonwealth level. This includes an examination of some key High Court cases dealing with the Constitution, existing Commonwealth anti-discrimination legislation, and the extent of religious protection in the common law. The roles of Parliament and the Australian Human Rights Commission in protecting this right are also discussed.

1.12 Chapter Five canvasses the law in the States and Territories, highlighting some key legislation, including the human rights instruments found in Victoria and the ACT. Anti-discrimination law has an important part in the structure of rights protection at the State level. State level case law is also examined.

1.13 Chapter Six considers some of the various suggestions and possibilities for strengthening legal religious protection, including ways to formally

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implement the ICCPR rights into Australian law and fulfil Australia’s obligations under the ICCPR.

1.14 Finally, Chapter Seven discusses the balance between the right to freedom of religion or belief and other rights, especially the right to non-discrimination. The balance within both Commonwealth and State level legislation is examined, and the effect that some legal trends may have on the right is discussed. Different approaches to how best to balance rights, and the possible avenues for resolving conflicts, are examined.
2. International Human Rights Law

2.1 The two most important international human rights instruments relevant to religious freedom are the *Universal Declaration of Human Rights* (UDHR)\(^1\) and the *International Covenant on Civil and Political Rights* (ICCPR).\(^2\)

**Universal Declaration of Human Rights**

2.2 The UDHR was adopted by the United Nations (UN) General Assembly in 1948, with Australia voting in favour. It affirms fundamental human rights, but is not a binding treaty. Article 18 states:

> 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.

2.3 Also relevant is Article 2, which entitles everyone to the rights and freedoms within the UDHR “without distinction of any kind”, including on the basis of religion.

**International Covenant on Civil and Political Rights**

2.4 The rights and freedoms set out in the UDHR have been elaborated in a range of binding international instruments, including, most importantly for this Inquiry, the ICCPR. Religious freedom is again located in Article 18, which states in full:

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1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

2.5 As in the UDHR, the ICCPR contains non-discrimination provisions, including on grounds of religion, in Article 2, as well as in Article 26, which states in full:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Adoption of ICCPR into Australian law

2.6 Despite signing the ICCPR in 1972 and ratifying it in 1980, Australia has never adopted it into domestic law. This fact was a major topic of discussion at public hearings\(^3\) and in the submissions\(^4\), and it is worth highlighting this as a key feature of the legal situation in Australia. A number of approaches to implementing the ICCPR in domestic legislation were suggested. This will be addressed in greater detail in Chapter Six.

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\(^3\) See, eg, discussion between Sub-Committee Members and Professor George Williams, Dr Paul Taylor, and Dr Luke Beck in Committee Hansard, Sydney, 6 June 2017.

\(^4\) See, eg, Associate Professor Neil Foster, Submission 7, p. 7; Dr Paul Taylor, Submission 140, pp. 3-5; see also Attorney-General’s Department, Submission 193, pp. 6-7.
Reservation to Article 20

2.7 In ratifying the ICCPR, Australia made several reservations. One of these reservations is to Article 20, which is relevant to religious freedom.

2.8 Article 20 states in full:

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

2.9 Australia’s reservation states:

Australia interprets the rights provided for by articles 19 [freedom of expression], 21 [freedom of assembly] and 22 [freedom of association] as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.\(^5\)

2.10 The Australian Human Rights Commission (AHRC) noted this reservation in its submission, reiterating the view it put forward in its 1998 report\(^6\) that the Commonwealth should expand “the circumstances in which anti-discrimination law protects against discrimination and vilification on the basis of religion”.\(^7\) The AHRC’s 1998 recommendations included Australia withdrawing its reservation and proscribing the advocacy of religious hatred in accordance with Article 20.\(^8\)

2.11 Human rights lawyer Dr Paul Taylor noted that Australia’s reservation was based on a concern about restricting freedom of speech. Dr Taylor argued that there is no free speech reason to maintain this reservation, and that it is an:

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\(^6\) Human Rights and Equal Opportunity Commission, *Article 18: Freedom of religion or belief*, 1998. This report made a number of other recommendations, including, most significantly, the enactment of a Human Rights Act.

\(^7\) Australian Human Rights Commission (AHRC), *Submission 12*, p. 13.

\(^8\) AHRC, *Submission 12*, p. 13.
important component in the scheme of Covenant protection, which achieves a careful ordering of interests across the Covenant’s constituent rights, limitations, obligations and prohibitions.\textsuperscript{9}

**Other relevant human rights instruments**

2.12 Although having a more minor role in the discussion of religious freedom in Australia, several other international human rights instruments were raised in evidence.

**Religion Declaration**

2.13 The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Religion Declaration)\textsuperscript{10} was proclaimed by the UN General Assembly in 1981. The *Religion Declaration* is a non-binding declaration, but it elaborates on Article 18 of the ICCPR by creating a positive obligation on States Parties to “take effective measures to prevent and eliminate” religious discrimination.\textsuperscript{11} It also enumerates a list of freedoms to be included within the right to freedom of religion.\textsuperscript{12}

2.14 The relevance of the *Religion Declaration* was raised by several submissions,\textsuperscript{13} with the Human Rights Law Centre noting that the *Religion Declaration* has “normative value” in interpreting Article 18(1) of the ICCPR.\textsuperscript{14}

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\textsuperscript{9} Dr Taylor, *Submission 140*, p. 12.

\textsuperscript{10} *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, adopted 25 November 1981, UNGA A/RES/36/55 (*Religion Declaration*).

\textsuperscript{11} *Religion Declaration*, art. 4.

\textsuperscript{12} *Religion Declaration*, art. 6. See Chapter Three for further discussion.

\textsuperscript{13} Associate Professor Foster, *Submission 7*, Attachment A: ‘Religious Freedom in Australia’, p. 15; Presbyterian Church of Queensland, *Submission 192*, pp. 60-61; Attorney-General’s Department, *Submission 193*, p. 3.

International Convention on the Elimination of All Forms of Racial Discrimination

2.15 Religious freedom is one of the rights listed in the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).\(^\text{15}\) This Convention was highlighted in some submissions as a source of religious freedom rights.\(^\text{16}\)

**UNESCO Principles**

2.16 The United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted its *Declaration of Principles on Tolerance*\(^\text{17}\) in 1995. This document was discussed briefly at the Sydney hearing and commended by Dr Taylor as a useful means of addressing intolerance and hurtful speech.

2.17 The UNESCO Principles define tolerance as “respect, acceptance and appreciation of the rich diversity of our world’s cultures, our forms of expression and ways of being human”. It is not “concession, condescension or indulgence” and it does not mean “toleration of social injustice or the abandonment or weakening of one’s convictions”.\(^\text{18}\) Associate Professor Neil Foster described this as the “classic principles of tolerance”, while warning against the notion that being tolerant means never criticising someone else’s opinion.\(^\text{19}\) Professor Michael Quinlan likewise noted this classic approach, warning against the “new tolerance” approach of demanding that everybody’s viewpoint must be accepted as equally correct.\(^\text{20}\) Professor Iain Benson commented that the concept of tolerance, if not “firmly hooked to the reality of difference”, could “effect authoritarian outcomes”.\(^\text{21}\)

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\(^\text{16}\) See Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 179*, p. 46. Human Rights Law Centre, *Submission 176* also noted that it is a source of the right to equality and non-discrimination: p. 7.


\(^\text{18}\) *Declaration on Principles of Tolerance*, art. 1.

\(^\text{19}\) Associate Professor Neil Foster, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 42.

\(^\text{20}\) Professor Michael Quinlan, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 42.

\(^\text{21}\) Professor Iain Benson, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 42.
Siracusa Principles

2.18 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) were issued by the American Association for the International Commission of Jurists in 1985. The Siracusa Principles provide guidance for interpreting the “limitations clauses” in the ICCPR, such as those found in Article 18(3) which allow limitations to the freedom to manifest one’s religion only if they are “prescribed by law and... necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

2.19 These Principles are important to the discussion of when freedom of religion may be subject to legitimate limitations, and were raised a number of times in evidence. They will be considered further in the discussion of legitimate limitations to religious freedom in Chapter Three.

UN Human Rights Committee

2.20 The UN Human Rights Committee consists of international human rights experts with certain responsibilities with respect to the ICCPR. Among other roles, the Committee will occasionally issue General Comments on its understanding of certain issues of interpretation of the ICCPR. Several of these are relevant to religious freedom, in particular General Comment 22.

General Comment 22 – freedom of religion

2.21 This Comment gives a broad scope to the freedom, noting that it “cannot be derogated from, even in time of public emergency”. It provides important guidance to what is included within the freedom, emphasising “theistic, non-theistic and atheistic beliefs” as well as the right not to profess any

22 Human Rights Law Alliance and Australian Christian Lobby, Submission 156, p. 3; Human Rights Law Centre, Submission 176, p. 9; Presbyterian Church of Queensland, Submission 192, pp. 47, 50, 62.

23 These include General Comment No. 11: Prohibition of propaganda for war and inciting national, racial and religious hatred (Art. 20), 19th sess (29 July 1983); General Comment No. 18: Non-discrimination, 37th sess (10 November 1989); and General Comment No. 34: Article 19: Freedoms of opinion and expression, 102nd sess, UN Doc CCPR/C/GC/34, (12 September 2011).


25 UN Human Rights Committee, General Comment 22, [1].
religion or belief. The Comment addresses the distinction between having or adopting a religion or belief and manifesting a religion or belief, and provides a broad range of practices which may be included as “manifestations” of religion or belief. It also discusses permissible restrictions on manifestations of religion or belief. Many of these aspects will be discussed in following chapters.

2.22 A number of submissions highlighted the relevance of General Comment 22. Attention was drawn to the UN Human Rights Committee’s language, which reflects the “fundamental” nature of the right to religious freedom.

2.23 Professor Carolyn Evans has described this Comment as an elaboration of the obligations in the ICCPR, calling it:

…the most comprehensive and detailed international law instrument giving substance to the protection of freedom of religion or belief under art 18 of the ICCPR. It should be understood as an authoritative and expert overview of the obligations under the ICCPR.

General Comment 18 – non-discrimination and equality

2.24 In General Comment 18, the UN Human Rights Committee stated that non-discrimination and equality before the law “constitute a basic and general principle relating to the protection of human rights”. The principle is expressly mentioned in several ICCPR Articles, and its application is not limited to ICCPR rights but extends to “any field regulated and protected by public authorities”.

2.25 The UN Human Rights Committee noted that “discrimination” is not defined, but drew attention to the CERD, which:

26 UN Human Rights Committee, General Comment 22, [2].
27 UN Human Rights Committee, General Comment 22, [4].
28 UN Human Rights Committee, General Comment 22, [8].
29 AHRC, Submission 12, pp 4-5; Australian Lawyers for Human Rights, Submission 51, p 5; Attorney-General’s Department, Submission 193, p. 6.
30 Presbyterian Church of Queensland, Submission 192, p. 48.
32 UN Human Rights Committee, General Comment 18, [1].
33 UN Human Rights Committee, General Comment 18, [3], [5].
34 UN Human Rights Committee, General Comment 18, [12].
provides that the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.\textsuperscript{35}

2.26 A similar explanation of discrimination is found in the \textit{Convention on the Elimination of All Forms of Discrimination against Women}.\textsuperscript{36}

2.27 The UN Human Rights Committee concludes with this comment:

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.\textsuperscript{37}

2.28 Although not addressing religious freedom directly, Comment 18 is generally accepted as an important statement on the nature of discrimination, both in terms of discrimination based on religion and of the tension between religious freedom and non-discrimination when religious bodies wish to discriminate on the basis of some other attribute. This tension was a significant topic throughout evidence, and a number of submissions and witnesses refer to General Comment 18 in this context. This will be discussed in Chapter Seven.

\textbf{General Comment 34 – freedom of expression}

2.29 General Comment 34 addresses Article 19, which protects the right to freedom of expression and the right to “hold opinions without interference”. The UN Human Rights Committee commented that:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.\textsuperscript{38}

2.30 It is noteworthy that some Australian jurisdictions maintain laws against blasphemy. This is discussed in Chapter Five.

\textsuperscript{35} UN Human Rights Committee, \textit{General Comment 18}, [6].


\textsuperscript{37} UN Human Rights Committee, \textit{General Comment 18}, [13].

\textsuperscript{38} UN Human Rights Committee, \textit{General Comment 34}, [48]
2.31 Australia’s reservation to Article 20 was noted above. Article 20 is the subject of General Comment 11, which states that the prohibitions required are “fully compatible with the right of freedom of expression”. This has been noted by the AHRC.

Sub-Committee comment

2.32 Human Rights discourse is well developed internationally, and the further development of Australian human rights law should look to the ICCPR and other instruments for guidance.

2.33 The Sub-Committee notes that the ICCPR has not been adopted into Australian legislation. Some rights have been adopted in some jurisdictions, but the Commonwealth has failed to implement the range of ICCPR rights despite committing to do so. Although there is legislative protection for some ICCPR rights, notably the Article 26 right to non-discrimination, religious freedom has very little legislative protection and there is a risk of an imbalanced approach to resolving any conflict between the right to freedom of religion or belief and other rights.

2.34 In addition to enumerating fundamental human rights, the various international instruments also provide guidance for applying these rights and balancing competing rights. The Siracusa Principles provide guidance on appropriate limitations on human rights. The UNESCO Principles on Tolerance could be helpful in guiding discussions about tolerance, including what tolerance does not require.

2.35 The UN Human Rights Committee has established a broad scope of the right to freedom of religion or belief, which includes freedom of thought and conscience, non-theistic beliefs and no religious beliefs. It has also given helpful comments on the role of non-discrimination within a human rights framework, particularly in General Comment 18, which draws the distinction between unlawful discrimination and mere differentiation of treatment which is for a legitimate aim.

2.36 Evidence suggests that these instruments and UN Human Rights Committee comments should provide guidance to how best to implement protection for freedom of religion or belief in Australian law.

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39 UN Human Rights Committee, *General Comment 11*, [2].

40 AHRC, *Submission 12*, p. 6. See also Dr Taylor’s comments cited above at 2.11
3. Definition and Scope of the Right to Freedom of Religion or Belief

3.1 The Terms of Reference direct the Sub-Committee to inquire into “the freedom of religion or belief”. This wording “freedom of religion or belief” has attracted some comment in submissions. Additionally, providing a definition for religion or belief is challenging due to the intangible nature of religion or belief. This chapter will briefly discuss what is included in the freedom, noting some key phrases and distinctions.

Definition of Religion

3.2 Australian case law has recognised the difficulty in attempting to exhaustively define “religion”. In the Jehovah’s Witnesses case, discussed further in Chapter Four, Latham CJ said in this regard:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world.¹

3.3 The members of the Court in the Scientology case, also discussed in Chapter Four, concurred with this view.² They nevertheless went on to point out certain indicia of religion. Mason ACJ and Brennan J held that:

… for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of

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¹Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116, 123 (Jehovah’s Witnesses case).

²Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria) (1983) 154 CLR 120, 131, 150, 173 (Scientology case).
canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

... We would hold the test of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described.³

3.4 Noting that the indicia of “religion” could be no more than aids in determining the meaning of the word and would vary in different contexts, Wilson and Deane JJ said:

One of the most important indicia of “a religion” is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has a “religion”. Another is that the ideas relate to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium … is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.⁴

3.5 Referring to the High Court decisions, Dr Alex Deagon has noted that the Court has been generous and inclusive in defining religion.⁵

3.6 The Sub-Committee does not intend to add or subtract anything from the High Court’s comments on how religion is to be defined.

Phrasing

3.7 The ICCPR uses the expression “right to freedom of thought, conscience and religion”. The Wilberforce Foundation called this a “composite right”,⁶ while

³Scientology case, 136, 140.
⁴Scientology case, 174.
⁵Dr Alex Deagon, Submission 9, p. 8.
⁶Wilberforce Foundation, Submission 115, p. 2.
the Australian Lawyers for Human Rights (ALHR) argued that this phrasing:

- encompasses agnosticism, atheism, secularism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions. … [The] interpretation also follows on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing.\(^7\)

3.8 The ALHR further noted that the European Court of Human Rights has given a wide interpretation to the meaning of “religious beliefs” to include “pacifism, veganism and atheism”.\(^8\) The Secular Party of Australia also emphasised the right to be “free from any or all religion” as part of the right to freedom of religion.\(^9\)

3.9 The broad scope of the right is highlighted by the UN Human Rights Committee, which states in General Comment 22 that the “freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief”. The terms “belief” and “religion” are to be broadly construed, with the UN Human Rights Committee stating that “Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief”.\(^10\)

3.10 In Australian case law, this broad scope was confirmed by Latham CJ in the Jehovah’s Witnesses Case, when his Honour said:

> The prohibition in s. 116 [of the Constitution] operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion… Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.\(^11\)

3.11 While, for brevity’s sake, this Interim Report will continue to use the phrase “religion or belief”, this can be taken to cover the broad conception of this right and includes conscience and thought, including non-religious systems of belief and the absence of any belief system. The phrase “religious

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\(^7\) Australian Lawyers for Human Rights (ALHR), Submission 51, p. 3.

\(^8\) ALHR, Submission 51, p. 5.


\(^10\) Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), [1].

\(^11\) Jehovah’s Witnesses case, 123.
“Hold” and “manifest”

3.12 Several submissions emphasised the important distinction between having or holding and manifesting a belief. Religious freedom includes both the right to hold (or to change) a belief and the right to manifest that belief.\(^{12}\) The freedom to hold a religion or belief is absolute and cannot be limited for any reason. In contrast, the freedom to manifest a religion or belief may be subject to necessary legitimate limitations, as the manifestation of a religion can potentially conflict with other human rights in certain circumstances.

3.13 The ICCPR reflects this distinction. Article 18(1) states (emphasis added):

>This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

3.14 The UN Human Rights Committee confirms that to “have or to adopt” a religion or belief “necessarily entails the freedom to choose a religion or belief”, as well as the “right to replace one’s current religion or belief” with another, including atheistic views.\(^{13}\)

3.15 The freedom to have or adopt a religion or belief of one’s choice is protected “unconditionally”.\(^{14}\) In contrast, Article 18(3) does permit limitations on the freedom to manifest in certain circumstances.

3.16 The Human Rights Law Centre observed that the “active exercise” of the right to manifest one’s belief is “usually performed externally, to the outside world”.\(^{15}\) Similarly, ALHR noted that holding or changing a belief has “no impact on others” whereas manifesting one’s belief has “potential impact upon others”.\(^{16}\)

\(^{12}\) See e.g. ALHR, Submission 51, pp 3-4; Australian Human Rights Commission (AHRC), Submission 12, p 5; Wilberforce Foundation, Submission 115, p 1, 8; Attorney-General’s Department, Submission 193, p. 6.

\(^{13}\) UN Human Rights Committee, General Comment 22, [5]

\(^{14}\) UN Human Rights Committee, General Comment 22, [8]

\(^{15}\) Human Rights Law Centre, Submission 176, p. 8.

\(^{16}\) ALHR, Submission 51, p. 5.
3.17 The Religion Declaration elaborates to some extent on activities constituting “manifestations” of religion. A range of freedoms are listed under nine heads of Article 6, covering activities including worship, the establishment of charitable institutions, writing and disseminating publications, teaching, observing days of rest, and appointing leaders.

3.18 As noted above, General Comment 22 also gives broad scope to the activities encompassed by “manifest”.

3.19 Appropriate limitations on the manifestation of religion are discussed later in this Chapter.

“Individually or in community with others”

3.20 The right to manifest religion or belief is held both “individually” and “in community with others”. In addition to the ICCPR, Article 18 of the UDHR, Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 (1) of the Religion Declaration make it clear that the freedom to manifest religion or belief is held “either alone [or individually] or in community with others”.

3.21 Professor Nicholas Aroney and Mr Mark Fowler argued in their joint submission in relation to the right to manifest religion or belief “individually”:

Religious freedom is the ultimate test of a society’s willingness to recognise the liberty of the individual. The very idea of individual freedom and its protection in modern liberal democracies owes its origin to the defence of religion against encroachments by the state. The right of individuals to formulate and articulate their beliefs, to act upon their consciences and to associate with fellow believers is fundamental to a free society.

3.22 This argument was supported by the Presbyterian Church of Queensland:

The right to religious freedom (including as recognised under Article 18 of the ICCPR) is not limited in its application, it applies to ‘everyone’, not just religious ministers.

...
Freedom to act in accordance with one’s conscience (including as informed, or burdened, by religious conviction) is at the root of the post-Enlightenment vision of the modern liberal State.²⁰

3.23 In an Australian context, Dr Alex Deagon noted that s 116 of the Constitution does not distinguish between individuals and religious communities or organisations in protecting freedom of religion and argued that the protections afforded to religious organisations should therefore also be extended to religious individuals.²¹

3.24 Mr Joshua Forrester, Dr Augusto Zimmerman and Ms Lorraine Finlay referred to Latham CJ’s comment in the Jehovah’s Witnesses case:

[Section 116 of the Constitution] refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of a religion.²²

3.25 They argued that Latham CJ’s formulation means that the exercise of religion is not only limited to gathering to worship but also extends to individuals living by a particular religion’s principles.²³

3.26 The right to manifest religion or belief “in community with others” is highlighted by the Australian Human Rights Commission,²⁴ which noted the UN Human Rights Committee statement that this “includes acts integral to the conduct by religious groups of their basic affairs”. This includes the freedom to:

- choose their religious leaders, priests and teachers,
- the freedom to establish seminaries or religious schools, and
- the freedom to prepare and distribute religious texts or publications.²⁵

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²⁰ Presbyterian Church of Queensland, Submission 192, pp. 29, 30. The Presbyterian Church of Queensland submission was prepared by Mr Mark Fowler, a Partner at Neumann & Turnour Lawyers, who appeared on their behalf as their legal representative at the Melbourne public hearing. The submission addresses at great detail the legal issues that this Interim Report is examining.

²¹ Dr Deagon, Submission 9, p. 1.

²² Jehovah’s Witnesses case, 124.

²³ Mr Joshua Forrester, Dr Augusto Zimmerman and Ms Lorraine Finlay, Submission 179, p. 10.

²⁴ AHRC, Submission 12, p. 5.

²⁵ UN Human Rights Committee, General Comment 22, [4]
3.27 Professor Aroney and Mr Fowler emphasised this right in their submission, arguing:

If religious freedom is restricted to an individual’s right to believe, with no right to practice one’s belief, then it does not amount to very much at all. If religious freedom includes an individual’s right to believe and practice their religion, but does not include the right to associate with other religious believers in accordance with their shared convictions, then something that lies at the heart of religious faith and practice will be severely jeopardised.\(^{26}\)

3.28 The Human Rights Law Alliance noted the connection between the language of Article 18(1) of the ICCPR and various associated freedoms, including the freedom of association, which is:

the freedom to gather around shared beliefs in community with others, including the formation of groups and institutions which protect and promote those shared beliefs.\(^{27}\)

3.29 Mr Fowler argued that:

part of a democratic society is we want individuals to be able to aggregate around issues of common concern and then, through these associated functions, present those concerns to the wider society.\(^{28}\)

3.30 The Presbyterian Church of Queensland emphasised the communal character of religion, arguing that religious freedom does not operate solely at the individual level but is also “expressed and nourished” by religious communities:

…the right of religious communities to define their character is foundational to the preservation of the religious freedoms of the individual.\(^{29}\)

3.31 The European Court of Human Rights has articulated the importance of this “community” aspect in \textit{Hasan v Bulgaria}, commenting that the autonomy of religious communities is “indispensable for pluralism” and is thus “at the very heart of the protection” of religious freedom:

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\(^{26}\) Professor Aroney and Mr Fowler, \textit{Submission} 148, p. 1.

\(^{27}\) Mr Martyn Iles, Managing Director, Human Rights Law Alliance, \textit{Committee Hansard}, Sydney, 6 June 2017, p. 31.

\(^{28}\) Mr Mark Fowler, legal representative, Presbyterian Church of Queensland, \textit{Committee Hansard}, Melbourne, 7 June 2017, p. 8.

\(^{29}\) Presbyterian Church of Queensland, \textit{Submission} 192, p. 50.
It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms], all other aspects of the individual’s freedom of religion would become vulnerable. \(^{30}\)

**The rights of parents**

3.32 Subparagraph 4 of Article 18 of the ICCPR requires States Parties to:

> have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

3.33 This extends the breadth of Article 18’s scope. Its importance was argued by a number of submissions. \(^{31}\) The Presbyterian Church of Queensland argued that the right may be breached if religious exemptions from anti-discrimination laws were removed, having the effect of preventing religious schools from requiring adherence to religious principles in the hiring of their staff. \(^{32}\) This is discussed further below when non-discrimination laws are considered in Chapter 7.

3.34 In the context of government education, some submissions argued that any “doctrinal religious instruction” in a state school by “outside religious people” should be seen as a “form of coercion in religion and as a limitation of freedom of religion”. \(^{33}\) The Attorney-General’s Department drew attention to the UN Human Rights Committee’s General Comment 22, \(^{34}\) which states that religious instruction in public education is permissible under Article 18(4), provided that “provision is made for non-discrimination exemptions or alternatives that would accommodate the wishes of parents and guardians”. \(^{35}\)

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\(^{32}\) Presbyterian Church of Queensland, *Submission 192*, p. 49.

\(^{33}\) Secular Party of Australia, *Submission 157*, pp. 1, 5. See also Ms Catherine Walsh, *Submission 181*, p. 3; Mr Alastair Lawrie, *Submission 183*, p. 5; Geoff Allshorn, *Submission 309*, p. 3.

\(^{34}\) Attorney-General’s Department, *Submission 193*, p. 7.

\(^{35}\) UN Human Rights Committee, *General Comment 22*, [6].
3.35 It was noted\(^\text{36}\) that the Article 18(4) right is mirrored in the *Convention on the Rights of the Child*,\(^\text{37}\) which protects a child’s right to freedom of thought, conscience and religion, while also protecting the right of parents and guardians to “provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child”.\(^\text{38}\)

3.36 Dr Paul Taylor said there is “no discernible protection” in Australian domestic law giving effect to the rights of parents in this regard.\(^\text{39}\)

**Legitimate limitations on the freedom of religion or belief**

3.37 As already noted, the freedom to *have or adopt* a religion or belief of one’s choice is absolute and cannot be limited or restricted in any way. However, Article 18(3) of the ICCPR permits limitations on the freedom to *manifest* one’s religion or beliefs in certain circumstances. Indeed, several submissions acknowledged that the right to manifest one’s religion or beliefs may be subject to limitations because of its potential impact on other rights.\(^\text{40}\)

3.38 Any limitations on the freedom to manifest beliefs under Article 18(3) must meet the criteria set out in that article:

> 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.

3.39 Firstly, the limitations must be prescribed by law, which means that there must be a sufficiently clear law regulating the area.\(^\text{41}\) According to Professor W Cole Durham Jnr, the requirement also has a qualitative element in the

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\(^{36}\) AHRC, *Submission 12*, p. 4; Dr Paul Taylor, *Submission 140*, p. 10.


\(^{39}\) Dr Taylor, *Submission 140*, p. 10.


sense that the law must observe fundamental rule of law constraints such as non-retroactivity and the absence of arbitrary enforcement.\textsuperscript{42}

3.40 Secondly, the limitations must be necessary. The \textit{Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights} (Siracusa Principles) provide that for a limitation under Article 18(3) to be “necessary”, it must be based on one of the relevant grounds in Article 18(3), respond to a pressing public or social need, pursue a legitimate aim and be proportionate to the aim.\textsuperscript{43} The UN Human Rights Committee has also stated in regards to Article 18(3):

Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. … Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.\textsuperscript{44}

3.41 The international jurisprudence which has developed in relation to the “necessity” requirement under Article 18(3) reflects the interpretative guidance of the Siracusa Principles and the Human Rights Committee. As noted in several submissions,\textsuperscript{45} the international jurisprudence indicates that a limitation will be “necessary” where the limitation:

\begin{itemize}
  \item[a.] has a legitimate aim, that is, the limitation “reflects a concern that is pressing and substantial in a free and democratic society” and has a “specific purpose, rather than being based on a general concern.”\textsuperscript{46}
\end{itemize}

The concept of legitimate aim is further discussed below in connection with the third limitation criterion under Article 18(3);

\begin{itemize}
  \item[43] \textit{Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights} (Siracusa Principles), [10].
  \item[44] UN Human Rights Committee, \textit{General Comment 22}, [8].
\end{itemize}
b. is reasonable, that is, the limitation is neutral and impartial, does not impose an excessive burden on the right to freedom of religion or belief, and is not arbitrary, irrational or ineffective; and

c. is proportionate, that is, there is a “reasonable relationship of proportionality between the means employed and the aim sought to be realised.” The limitation must be appropriate to achieve its aim; must be the least intrusive means of achieving the desired aim; and must be proportionate to the interest to be protected. Further, the principle of proportionality has to be respected “not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.”

3.42 The Human Rights Law Alliance and Australian Christian Lobby argued in their joint submission that overall the term “necessary” imposes a very high threshold when compared to other terms such as “reasonable” or “reasonably necessary”. This was echoed by the Presbyterian Church of Queensland which argued that the “reasonable” standard “offers a much shorter path to majoritarian rule than the test of ‘necessity’”. The Presbyterian Church of Queensland’s legal representative, Mr Fowler, stated at the Melbourne hearing that this standard “draws the boundary much into the heartland of an individual’s rights”. The view that the term “necessary” imposes a high threshold is also borne out in the jurisprudence of the European Court of Human Rights which has found that: 

['Necessary'] is not synonymous with ‘indispensable’ … neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’. … [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.

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47 Presbyterian Church of Queensland, Submission 192, p. 50.
48 Human Rights Law Centre, Submission 176, p. 10
49 Human Rights Law Centre, Submission 176, p. 10.
50 Dr Taylor, Submission 140, p. 8.
52 Presbyterian Church of Queensland, Submission 192, pp. 66-67.
53 Mr Fowler, legal representative, Presbyterian Church of Queensland, Committee Hansard, Melbourne, 7 June 2017, p. 5.
54 Handyside v United Kingdom (1976) 1 EHRR 737 at [48].
3.43 The last criterion under Article 18(3) is that limitations can only be imposed on the legitimate grounds set out in the article, namely, to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The UN Human Rights Committee has indicated that the grounds set out in Article 18(3) are the only grounds on which a State is permitted to limit the right to manifest one’s religion or beliefs. Limitations on other grounds that are not specified in the article are not permitted, even grounds such as national security that would be permitted as limitations on other rights in the ICCPR, further underlying the fundamental position of religious freedom.\textsuperscript{55}

3.44 The Siracusa Principles provide guidance on how the specified grounds in Article 18(3) should be interpreted:

a. public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property;\textsuperscript{56}

b. public order means the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order;\textsuperscript{57}

c. public health means measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured;\textsuperscript{58}

d. public morals vary over time and from culture to culture and therefore any limitation on this ground should be demonstratively essential to the maintenance of respect for fundamental values of the community.\textsuperscript{59} Further in this regard, the Human Rights Committee has also stated:

\ldots the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must

\textsuperscript{55} UN Human Rights Committee, \textit{General Comment 22}, [8].

\textsuperscript{56} Siracusa Principles, [33]–[34].

\textsuperscript{57} Siracusa Principles, [22]–[24].

\textsuperscript{58} Siracusa Principles, [25]–[26].

\textsuperscript{59} Siracusa Principles, [27]–[28].
be based on principles not deriving exclusively from a single tradition.\(^6\)

e. fundamental rights and freedoms of others extend beyond the scope of the rights and freedoms recognised in the ICCPR. Limitations are permitted if they are the result of balancing claims of other human rights, including the fundamental human rights provided for under the ICCPR.\(^6\)

3.45 Submissions suggested several examples of situations where freedom of religion or belief may be limited for legitimate aims or grounds. These include legal prohibitions on child marriage, polygamy or female genital mutilation (to protect fundamental sex equality rights),\(^6\) limitations on certain customary forms of physical punishment (to protect the rule of law),\(^6\) limitations on religious teaching that involves violence or brainwashing,\(^6\) and limitations on religious protests in the vicinity of abortion clinics (to protect patients and staff and to avoid public disorder).\(^6\)

With regard to religious protests, the Hon. Mr Shane Rattenbury MLA, the ACT Minister for Justice and Consumer Affairs, noted that the amendments to the Health Act 1993 (ACT) “clearly limited the protestors’ right to freedom of expression (including expression of their religious beliefs)”, but stated that they were “reasonable and proportionate to achieve a justifiable policy aim”.\(^6\) This example is discussed further in Chapter Five.

3.46 In addition to the right to freedom or belief under Article 18, Article 26 of the ICCPR prohibits discrimination and provides for equal protection from discrimination on religious grounds. The UN Human Rights Committee said about Article 26:

[T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable

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\(^6\) UN Human Rights Committee, *General Comment 22*, [8].

\(^6\) Siracusa Principles, [35]–[37].


\(^6\) Mr Forrester, Dr Zimmerman and Ms Finlay, *Submission 179*, pp. 34-35.

\(^6\) ALHR, *Submission 51*, p. 9.

\(^6\) ALHR, *Submission 51*, p. 9.

\(^6\) Hon. Mr Shane Rattenbury, Minister for Justice and Consumer Affairs, ACT Government, *Submission 8*, pp. 4-6.
and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

3.47 As noted by the Presbyterian Church of Queensland, the Committee’s statement does not indicate that differentiation must be necessary or appropriate (as is the case with Article 18(3) limitations); rather the test is whether the differentiation achieves a legitimate purpose which is determined by reasonable and objective criteria.67

3.48 The preceding discussion has focussed on legitimate limitations to the freedom of religion or belief under the ICCPR. In relation to Australia, Dr Taylor argues that Australia’s failure to implement the ICCPR in domestic legislation means that there is nothing in Australian law which safeguards against limitations on the right to manifest freedom of religion or belief which extend beyond the legitimate limitations in Article 18(3).68

3.49 On the other hand, Equal Opportunity Tasmania noted that the guidance produced by the Commonwealth Parliamentary Joint Committee on Human Rights on the circumstances under which a human right may be limited is “based on well-established legal principles”.69 The guidance states that a right may be limited when the limitation is prescribed by law, has a legitimate objective, has a rational connection to the objective to be achieved, is proportional and is not retrospective.70

3.50 The ACT Government also submitted that any limitations to freedom of religion or belief in the ACT would be subject to the international jurisprudence discussed above. In this regard, Mr Sean Costello, Director of Civil Law, Legislation, Policy and Programs, ACT Justice and Community Affairs Directorate, indicated that although the limitation section in the Human Rights Act 2004 (ACT) only referred to “reasonable” limits, the matters that must be considered under the provision and the requirement under the Act to consider international jurisprudence implies that consideration will also be given to the “necessity” of a limitation to the

67 Presbyterian Church of Queensland, Submission 192, p. 48. See also Human Rights Law Alliance and Australian Christian Lobby, Submission 156, p. 4.

68 Dr Taylor, Submission 140, p. 10.

69 Equal Opportunity Tasmania, Submission 6, p. 10.

freedom of religion or belief. The limitation section of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is in similar terms.

**Sub-Committee Comment**

3.51 The evidence has highlighted the importance of phrasing when discussing this right. Significantly, the right to freedom of “religion or belief” includes the right to non-theistic belief systems and the right not to profess any beliefs at all.

3.52 The right as expressed in Article 18 is carefully worded. It draws important distinctions between “holding” and “manifesting” a religion or belief, and emphasises that the right is held both “individually” and “in community with others”. The rights of parents and guardians with respect to the religious and moral education of their children are also protected. The importance of these terms and their implications were explored throughout the submissions and hearings.

3.53 The right to hold a religion or belief is absolute. The right to manifest a religion or belief is not absolute, as the manifestation of one’s beliefs may impact the enjoyment of the rights of other people. The appropriate limitations on the right to manifest a religion or belief are carefully considered in international human rights jurisprudence, including within the ICCPR itself. Among other requirements, any limitations on the right to manifest one’s religion or belief must be specifically prescribed in law, must be reasonable and proportionate, and, significantly, must be necessary to achieve a legitimate aim or respond to a pressing public or social need.

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4. Federal Protection of Freedom of Religion or Belief

Australian Constitution

4.1 While Australia has no Bill of Rights, its Constitution does protect certain rights. There are a small number of “express rights”, which are explicitly articulated in the Constitution, as well as certain “implied rights”, which are not articulated explicitly but which the High Court has found are implied by other provisions within the Constitution. Religious freedom is protected to some extent in section 116, while courts have found, among others, implied rights to political communication and freedom of association. These implied rights have implications for religious freedom.

Section 116

4.2 The starting point in any discussion about religious freedom in Australia is section 116 of the Australian Constitution:

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.

4.3 There are four prohibitions on the Commonwealth in this section:

- establishing any religion

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1 Professor Adrienne Stone has identified just three express rights in the Constitution: trial by jury when a Commonwealth offence is tried on indictment (section 80); non-discrimination based on state residence (section 117); and the free exercise of religion in section 116.
imposing any religious observation
prohibiting the free exercise of any religion
requiring a religious test as a qualification for any office or public trust under the Commonwealth.

4.4 As Professor George Williams pointed out in his submission, these prohibitions apply to the Commonwealth, and not to the States. The Constitution contains no direct protection from State laws which may restrict religious freedom.² Protection of religious freedom at State level is deliberately left to the States by the drafters of the Constitution. Indeed, the drafters’ primary purpose in section 116 was not to protect religious freedom, “but to preserve the States’ exclusive powers to regulate religious practices and local affairs”.³

4.5 Dr Luke Beck, a constitutional scholar whose principal research focus is on the history, meaning, and operation of section 116,⁴ agreed that this was the intention of the framers.⁵

4.6 State protections of religious freedom are discussed further in Chapter Five.

Case law

4.7 The “free exercise of religion” under section 116 has been interpreted narrowly by the High Court of Australia in the small number of cases that have considered the issue. As Dr Alex Deagon commented:

Any constitutional protection of religious exercise in Section 116 is questionable due to the historically narrow construction of the free exercise clause by the High Court.⁶

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² Professor George Williams, Submission 71, p. 2.
³ Professor Williams, Submission 71, p. 2.
⁴ Dr Luke Beck, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 12.
⁵ Dr Beck, Committee Hansard, Sydney, 6 June 2017, pp. 26-27. Dr Beck went on to describe the section as a “rough copy and paste” from the US first amendment, and stated that there was “no deep thought” given to the section’s phrasing. He explained the role that Seventh-Day Adventists, who observe a Saturday Sabbath, had in the origins of the section, due to their concerns about nation-wide Sunday trading laws being enforced. See Committee Hansard, pp. 26-27.
⁶ Dr Alex Deagon, Submission 9, p 1.
4.8 This view was supported by a number of other submissions.7

*Krygger v Williams*

4.9 In chronological order, the first major case brought to the Sub-Committee’s attention was the 1912 decision in *Krygger v Williams*.8 The plaintiff, Mr Krygger, was a Jehovah’s Witness who objected to involvement in “and support for” military operations. The relevant legislation, the *Defence Act 1903*, required all men to report for military training, but made concessions for those with conscientious objections to bearing arms by allowing them to undertake non-combatant roles, although they were still required to report for training. In dismissing Mr Krygger’s claims, the High Court took a narrow approach to freedom of religion, considering the allowances made for conscientious objectors to be adequate protection for the “exercise” of religion. Griffith CJ commented:

It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere.9

4.10 Barton J was even more dismissive:

…the *Defence Act* is not a law prohibiting the free exercise of the appellant’s religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill.10

*Jehovah’s Witnesses case*

4.11 The 1943 *Jehovah’s Witnesses case*11 is one of the most important section 116 cases.12 The case arose out of an effective ban on the Jehovah’s Witnesses by

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8*Krygger v Williams* (1912) 15 CLR 366.

9*Krygger v Williams*, 369.

10*Krygger v Williams*, 372–373.

11*Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116, 124 (*Jehovah’s Witnesses case*).

12 According to Associate Professor Neil Foster, it is the “major Australian authority on freedom of religion under s 116”: *Submission 7*, p. 11.
the Commonwealth under certain war-time regulations. The ban was found to be invalid, albeit not for the reason that it breached section 116.

4.12 Nevertheless, Latham CJ’s lengthy comments on the scope of religion are of ongoing importance. His Honour highlighted Buddhism as a non-theistic religion and emphasised that section 116 also protected the absence of religion. Notably, Latham CJ also remarked that the religion of the majority can “look after itself”, and that section 116 is required to “protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities”.

4.13 Referring to the term “exercise of religion”, Latham CJ stated:

Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion.

4.14 Latham CJ also had some useful comments on the limits of religious freedom, citing John Stuart Mill’s opinion that self-protection is the “sole end” for which mankind, either individually or collectively, is warranted in interfering with “liberty of action”. Latham CJ said that it “may be going too far” to call self-protection the “sole end”, but that without the protection of society liberty would be “meaningless and ineffective”. Thus, ordered government, including state restraints on its citizens and on religious communities, may be consistent with the maintenance of religious liberty. The Courts will be required to determine whether a law fairly “protect[s] the existence of the community” or whether it goes beyond this and “prohibit[s]...

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13 Briefly, the details of the case were as follows: the Jehovah’s Witnesses had a theological teaching that all organised political entities, including the British Empire, were “organs of Satan” and that Jehovah’s Witnesses had a duty to not participate in human wars and to refuse to take an oath of allegiance to the King. The National Security (Subversive Associations) Regulations 1940 were made under the National Security Act 1939, and under the regulations the Governor-General declared the Jehovah’s Witnesses to be a “subversive association”, and the Commonwealth took control of its main meeting centre. The regulations were found to be invalid because they went beyond the regulation-making power, not on section 116 grounds. For a brief overview of the details and judgement of the case, see Associate Professor Foster, Submission 7, p. 4.

14 Jehovah’s Witnesses case, 123–126.

15 Jehovah’s Witnesses case, 124.

16 Jehovah’s Witnesses case, 124.

the free exercise of any religion”, and the purpose of the legislation in question should be taken into account.18

4.15 Rich, Starke and Williams JJ also found that freedom of religion was not absolute and could be subject to restrictions necessary for the preservation of the community.19

4.16 Chapter Three contains a more detailed discussion on appropriate limits on religious freedom.

*Scientology case*

4.17 The next major High Court decision on section 116 raised in the evidence is the *Scientology case*.20 It is worth citing Mason ACJ and Brennan J’s well-known comments, part of their lengthy consideration of the definition of religion, at length:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.21

4.18 These comments have been seen as confirming the fundamental place of freedom of religion to democratic societies.22 As one submission stated, the statement:

provides a suitable recognition of the foundational importance of religious freedom within Australian society and a suitable standard against which to demonstrate the extent of incursion upon that freedom within current Commonwealth law.23

4.19 Mason ACJ and Brennan J did note that the freedom of religion can be limited:

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18 *Jehovah’s Witnesses case*, 131.


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

21 *Scientology case*, 130.


23 Presbyterian Church of Queensland, *Submission 192*, p. 16.
But the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them.\textsuperscript{24}

\textit{Kruger v Commonwealth}

4.20 The most recent prominent High Court decision to consider the free exercise of religion aspect of section 116 is 1997 decision in \textit{Kruger v Commonwealth}, better-known as the \textit{Stolen Generations case}.\textsuperscript{25} The case was brought by a number of Aboriginal adults who challenged the Northern Territory Ordinance which had authorised their removal from their families and communities from the 1920s to the 1950s. The ordinance was enacted under Acts made by the Commonwealth under its territories power in section 122 of the Constitution.

4.21 The ordinance was challenged on a number of grounds, including the ground that it had been inconsistent with section 116 of the Constitution. That claim was unsuccessful but the case is notable because all the members of the Court confirmed the view that in order for a law to be invalid under section 116, its purpose or objective must be directed at achieving an object which section 116 forbids.

4.22 Gummow J (Dawson and McHugh JJ agreeing in separate judgments) said:

\textit{The use of the preposition "for" in the expression in s 116 of the Constitution "for prohibiting the free exercise of any religion" directs attention to the objective or purpose of the law in issue. The question becomes whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved. “Purpose” refers not to the underlying motive but to the end or object the legislation serves.}\textsuperscript{26}

4.23 Brennan CJ said:

\ldots none of the impugned laws on its proper construction can be seen as a law for prohibiting the free exercise of a religion \ldots To attract invalidity under s

\textsuperscript{24}Scientology case, 135-136.

\textsuperscript{25}Kruger v The Commonwealth (1997) 190 CLR 1.

\textsuperscript{26}Kruger v The Commonwealth, 160 per Gummow J, 60–61 per Dawson J, 144 per McHugh J.
116, a law must have the purpose of achieving an object which s 116 forbids. None of the impugned laws has such a purpose …

4.24 Toohey J noted that even if the effect of a law is to impair religious practices, the law may not have such an effect as its purpose:

It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, … But I am unable to discern in the language of the Ordinance such a purpose.

4.25 Gaudron J agreed that the use of the “for” indicated that the “purpose” of the law was the “sole criterion selected by s 116 for invalidity”. However, her Honour qualified this test by saying:

[Section] 116 is not, in terms, directed to laws the express and single purpose of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass any law which has a proscribed purpose. … Clearly a law may have more than one purpose. Similarly, a particular purpose may be subsumed in a larger or more general purpose. That latter proposition is well illustrated by the present case. It is clear from the terms of the Ordinance that one of its purposes, evident from the terms of s 16, was to remove Aboriginal and half-caste people to and keep them in Aboriginal reserves and institutions. That purpose is not necessarily inconsistent with the more general purpose which the Commonwealth asserts. And neither purpose is necessarily inconsistent with the purpose of removing Aboriginal children from their families and communities, thereby preventing them from participating in community practices. Indeed, in the absence of some overriding social or humanitarian need - and none is asserted -- it might well be concluded that one purpose of the power conferred by s 16 of the Ordinance was to remove Aboriginal and half-caste children from their communities and, thus, prevent their participation in community practices. And if those practices included religious practices, that purpose necessarily extended to prohibiting the free exercise of religion.

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27 Kruger v The Commonwealth, 40.
28 Kruger v The Commonwealth, 86.
29 Kruger v The Commonwealth, 132.
30 Kruger v The Commonwealth, 133. Gaudron J’s judgement formed a key part of the submission by Dr Deagon. Dr Deagon used Her Honour’s judgement to argue for a more expansive understanding of the free exercise clause which considers the indirect effect of a law as well as its direct purpose.
4.26 Her Honour was in the minority insofar as her opinion on the “purposive test” is concerned.

4.27 The case also confirmed that section 116 only acts as a limit to Commonwealth legislative power and is not a constitutional guarantee of the rights of individuals to freedom of religion. It further confirmed the view that section 116 does not bind the States and that States can enact laws which prohibit the free exercise of religion, as noted at the start of this Chapter.

*Cheedy on behalf of the Yindjibarndi People v State of Western Australia*

4.28 The purposive test in relation to the free exercise of religion under section 116 was confirmed by the Full Court of the Federal Court in *Cheedy on behalf of the Yindjibarndi People v State of Western Australia*. The case challenged provisions of the Native Title Act 1992 which allowed mining concessions on native land to be granted without the consent of local native title holders. The appellants argued that this impaired the exercise of religion obligations under their traditional Aboriginal spiritual views.

4.29 The Full Court in affirming the trial judge’s decision to dismiss the claim said:

> The question thus became whether s 116 of the Constitution operates to invalidate Commonwealth laws which have the indirect effect of prohibiting the free exercise of religion.

…

The primary judge answered this question in the negative. He relied on Kruger. We agree that each of the judges in Kruger, in the passages extracted by the primary judge and which are referred to in these reasons at [66]–[70], establish that the test for invalidity under s 116 is whether the Commonwealth law in question has the purpose of prohibiting the free exercise of religion.

4.30 The Full Court again confirmed that section 116 does not apply to legislation or actions taken by the States.

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31 *Kruger v The Commonwealth*, 124.

32 *Kruger v The Commonwealth*, 60, 125. See comments by Professor Williams and Dr Beck at paragraphs 3.4 and 3.5 above.

33 *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* (2011) 194 FCR 562, 580 [88]–[89].

34 *Cheedy on behalf of the Yindjibarndi People v State of Western Australia*, 581 [96].
Implied right to freedom of political communication

4.31 A number of rights are said to be implied in the Constitution. One such implied right is the freedom of political communication.

4.32 The right is derived from the Constitutional system of representative government in a pair of cases decided in 1992. In the *Nationwide News* case, Deane and Toohey JJ discerned from this Constitutional system “an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth”, arguing:

The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.

4.33 In *Australian Capital Television Pty Ltd v The Commonwealth*, Mason CJ called freedom of communication an “indispensable” element of representative government, stating that only with this freedom can a citizen:

communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision... criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.

4.34 The High Court has unanimously upheld the implied right.

4.35 This implied right is of great relevance to religious freedom. Professor Adrienne Stone has argued that other kinds of communication might be “at least as important” or even more so than political speech:

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35 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72–73.
36 *Nationwide News Pty Ltd v Wills*, 72.
37 (1992) 177 CLR 106.
38 *Australian Capital Television Pty Ltd v The Commonwealth*, 138.
people may form their political opinions by discussion of matters not on the political agenda, including matters like religion and philosophy that develop more fundamental commitments.\(^{40}\)

4.36 This argument was repeated in a number of submissions. Dr Deagon argued that since voters’ political predilections may be “fundamentally influenced by their religious convictions”, the implied freedom of political communication “operates to protect religious speech”.\(^{41}\)

4.37 Professor Carolyn Evans agreed at the Melbourne hearing that “there will be times when the implied freedom of political communication at a constitutional level – that about which one is communicating which is political – may also be religious”.\(^{42}\)

4.38 Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay also argued for this view, stating that “religion informs the opinions of many Australians about politics and government”.\(^{43}\) Their submission noted the 2008 Federal Court case \textit{Evans v NSW}, in which the Court stated:

\begin{quote}
Religious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies.\(^{44}\)
\end{quote}

4.39 Similar comments are found in the \textit{Jehovah’s Witnesses} case:

\begin{quote}
Such [religious] beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives.\(^{45}\)
\end{quote}

4.40 These comments, it is argued, show that the implied freedom of political communication “extends to limiting laws that may inhibit expression of religious views on government and political matters”.\(^{46}\)

4.41 Professor Williams took a more cautious approach, emphasising that the implied rights (including other implied rights such as association) are


\(^{41}\) Dr Deagon, \textit{Submission 9}, pp. 18-19.

\(^{42}\) Professor Carolyn Evans, \textit{Committee Hansard}, Melbourne, 7 June 2017, p. 6.

\(^{43}\) Mr Forrester, Dr Zimmermann and Ms Finlay, \textit{Submission 179}, pp. 8-9.


\(^{45}\) Jehovah’s Witnesses case, 125 per Latham CJ.

\(^{46}\) Mr Forrester, Dr Zimmermann and Ms Finlay, \textit{Submission 179}, p. 9.
implied in the “broader structures of the Constitution – to establish a judiciary, a representative government”, and are not related to religion.\footnote{Professor George Williams, private capacity, Committee Hansard, Sydney, 6 June 2017, pp. 2-3.}

**Implied right to freedom of association**

4.42 Another right which is implied in the Constitution is the right to freedom of association. In *Australian Capital Television Pty Ltd v Commonwealth*, Gaudron J said:

The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally.\footnote{*Australian Capital Television Pty Ltd v Commonwealth*, 212.}

4.43 In *Kruger v The Commonwealth*, Gaudron J observed the link between freedom of political communication and freedom of association:

[Just as communication would be impossible if ‘each person was an island’, so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others.\footnote{*Kruger v The Commonwealth*, 115}]

4.44 Later decisions of the High Court have clarified that the implied right to freedom of association is not a free standing right under the Constitution. Rather, it is only a corollary of the implied right to freedom of political communication. As stated by Gummow and Hayne JJ (Heydon J agreeing):

There is no such “free-standing” right [of association] to be implied from the Constitution. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation* and considered in subsequent cases.\footnote{Mulholland v Australian Electoral Commission (2004) 220 CLR 181, 234 [148], 306 [364]. See also *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112], per Gummow, Hayne, Crennan and Bell JJ (French CJ and Kiefel J agreeing at 220 [72]).}

4.45 This view was confirmed in *Tajjour v New South Wales*, in which Hayne J observed that the High Court has found no “free-standing” right of association implied in the Constitution, and any such right exists “only as a
corollary” to that of political communication. Hayne J said that these conclusions “should not be revisited”.51

4.46 In the same decision, Gageler J clarified:

Statements in subsequent cases, to the effect that any freedom of association implied by the Constitution would exist only as a corollary of the freedom of communication formulated in Lange, should be read in light of that observed reality [that political communication depends on the freedom to associate with others]. They should not be read as suggesting that the constitutional protection of freedom of association for governmental or political purposes is in doubt. They should not be read as suggesting that it is secondary or derivative. Association for the purpose of engaging in communication on governmental or political matter is part and parcel of the protected freedom.52

4.47 In their submission, Mr Forrester, Dr Zimmermann and Ms Finlay argued that the implied freedom of association is an indispensable incident to the exercise of religion, which involves activities taken in community with others.53 They also argued that as the implied freedom of association is a corollary of the implied freedom political communication, laws impeding a religion’s ability to organise would impermissibly infringe the implied freedom of political communication.54

4.48 Several other submissions noted the link between freedom of religion and freedom of association, although they did not specifically refer to the implied freedom of association under the Constitution.55

4.49 For example, the Australian Lawyers for Human Rights argued that freedom of religion is a “gateway” to other freedoms, including the freedom of association, and that “there can be no free religious community life without respect for those other freedoms”.56 This was echoed by the Human Rights Law Alliance and Australian Christian Lobby joint submission:

51Tajjour v New South Wales (2014) 254 CLR 508, 566–567 [95], 606 [244] per Keane J.

52Tajjour v New South Wales, 578 [143]. See also Gaudron J’s views in Kruger v The Commonwealth, 126.

53 Mr Forrester, Dr Zimmermann and Ms Finlay, Submission 179, p. 11.

54 Mr Forrester, Dr Zimmermann and Ms Finlay, Submission 179, p. 9.

55 See Professor Nicholas Aroney and Mr Mark Fowler, Submission 148, p. 2; Dr Paul Taylor, Submission 140, p. 7; Wilberforce Foundation, Submission 115, p 9; Mr Martyn Iles, Managing Director, Human Rights Law Alliance, Committee Hansard, Sydney, 8 June 2017, p. 31.

56 Australian Lawyers for Human Rights (ALHR), Submission 51, p. 4.
All the democratic freedoms, including speech, expression and association, depend on freedom of thought, conscience and religion or belief. When a citizen is free to speak, they speak their beliefs and convictions. When free to express, they live out their convictions in practice. When free to associate, they form official and unofficial groups around common causes borne out of their beliefs and convictions. Freedom of thought, conscience and religion or belief is therefore, in the words of Mason CJ and Brennan J, “the essence of a free society.”

No implied right to freedom of religion

4.50 It is worth noting briefly one South Australian case which attempted to invoke an implied right to freedom of religion in the Constitution. This failed, with the South Australian Supreme Court confirming that the Constitution does not prevent the States from restricting the free exercise of religion, and further stating that “the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression”.

Federal Legislation

4.51 Outside the Constitution, specific religious protection in federal law is limited to the Fair Work Act 2009, which prohibits discrimination on the basis of religion, along with other protected attributes, in a range of cases. For example, an employer is prohibited from taking “adverse action against” an employee or prospective employee, and an award must not contain a term that discriminates, based on these protected attributes.

Anti-discrimination law


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58 Grace Bible Church Inc v Reedman (1984) 36 SASR 376, 388. The case involved a school run by Grace Bible Church which was not accredited with the State authorities. The Church argued that they had a religious objection to the requirement of State approval and that this was being breached by South Australian law. For a brief overview of the case, see Associate Professor Foster, Submission 7, p. 18.

59 Fair Work Act 2009 (Cth), s. 351(1).

60 Fair Work Act 2009 (Cth), s. 153(1).
Discrimination on the basis of religion is not prohibited by federal anti-discrimination legislation.

Anti-discrimination law: exemptions and exceptions

4.53 Some level of religious protection is found within the federal SDA and the ADA in the form of exemptions specifically for religious bodies in certain contexts. Specifically, Division 4 in each Act covers exemptions for a variety of reasons. Section 35 of the ADA reads:

This Part does not affect an act or practice of a body established for religious purposes that:

(a) conforms to the doctrines, tenets or beliefs of that religion; or

(b) is necessary to avoid injury to the religious sensitivities of adherents of that religion

4.54 In the SDA, section 37 creates exemptions for internal religious practices including ordination and appointment of priests, ministers, and members of a religious order, the training or education of persons seeking these appointments, and selection or appointment of persons to perform duties or functions in connection with any religious observance or practice. The section also exempts religious bodies for:

any other act or practice of a body established for religious purposes, being an act that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

4.55 Amendments in 2013 provided that these exemptions do not apply to Commonwealth-funded aged care providers, both in the provision of aged care and the employment of aged care providers.

4.56 Section 38 applies to “educational institutions established for religious purposes”. It provides that the Act does not render it unlawful to discriminate on the basis of “sex, sexual orientation, gender identity, marital or relationship status or pregnancy” in connection with employment,

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61 The Racial Discrimination Act and the Disability Discrimination Act contain exemptions (s 18D and Division 5 respectively) and exceptions (s 8 and ss 21A and 21B respectively), but these are not specific to religious bodies or religion.

62 Sex Discrimination Act 1984, s. 37(1)(d).
including a position as a contract worker, or with the provision of education or training by:

an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.63

Common law protections

4.57 There is some degree of protection for religion in the common law. Dr Beck noted that:

The general proposition at common law is that you are free to do anything at all you want unless some law expressly forbids you from doing it”.64

4.58 This has been established by the High Court in Lange v Australian Broadcasting Corporation.

4.59 However, common law protection is limited and can be overruled. Professor Williams stated at the Sydney hearing:

The common law provides no effective protection. At the margins it may well be useful in interpreting statutes, but it is not recognised as a right that can trump any legislation.65

4.60 Similarly, Dr Paul Taylor said that while “possibly an interpretative principle in favour of religious freedom might be argued for”, common law protection is “very minimal”.66

4.61 Mr Martyn Iles, the Managing Director of the Human Rights Law Alliance, observed in response to the discussion of this principle that “the only reason the freedom [of religion] is being limited is that there are laws which infringe”.67

63Sex Discrimination Act 1984, s. 38.
64 Dr Beck, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 15.
65 Professor Williams, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 2.
66 Dr Taylor, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 32.
67Committee Hansard, Sydney, 6 June 2017, p. 36.
Principle of legality

4.62 The “interpretative principle” referred to by Dr Taylor is the principle of legality, a common law principle of statutory interpretation that:

assumes that Parliament does not intend to interfere with fundamental human rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.  

4.63 This principle has been endorsed by the High Court in a number of cases, notably in Coco v The Queen. It applies to all fundamental common law rights and has been applied by Courts specifically to freedom of religion. In Coco, the majority stated that the insistence on an “express authorization” curtailing a particular right is a requirement for some indication that:

the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.

4.64 The principle has been further examined at some length by French CJ in more recent High Court cases.

4.65 The principle is not a strong protection of freedom of religion, however. The Australian Law Reform Commission (ALRC) notes that it “has its limits”, and that the presumption that a parliament “does not intend to interfere with common law rights and freedoms remains rebuttable.” The Presbyterian Church of Queensland submission states that the principle:

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68 Attorney-General’s Department, Submission 193, p. 2.

69 See Mr Forrester, Dr Zimmermann and Ms Finlay, Submission 179, p. 6, fn 10.


72 Coco v The Queen, 437.

73 Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1, 30–33 [42]–[46]; Monis v The Queen (2013) 249 CLR 92, 116 [28], 127 [59].

fails to provide a clearly enunciated religious freedom protection, and suffers from the prospect of failing to protect religious freedom against legislative incursion.\textsuperscript{75}

**Parliamentary scrutiny**

4.66 The Parliamentary Joint Committee on Human Rights was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* to examine all Bills and legislative instruments which come before either House of Parliament for compatibility with human rights, and to report to both Houses on that issue\textsuperscript{76}

4.67 The *Human Rights (Parliamentary Scrutiny) Act 2011* defines human rights as the rights and freedoms recognised or declared by the seven core international human rights treaties which Australia has ratified, including the ICCPR.\textsuperscript{77} This means that the Committee must consider whether Bills or legislative instruments are compatible with the freedom of religion or belief as articulated in Article 18 of the ICCPR.

4.68 Since its establishment, the Committee has raised concerns about the impact on freedom of religion or belief by the following Bills: the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015; the Marriage Legislation Amendment Bill 2015;\textsuperscript{78} the Marriage Legislation Amendment Bill 2016; the Marriage Legislation Amendment Bill 2016 [No. 2];\textsuperscript{79} and the Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017.\textsuperscript{80}

4.69 Professor Williams argues that the Committee has not been effective in protecting religious freedom or other rights, noting that there are many

\textsuperscript{75} Presbyterian Church of Queensland, *Submission 192*, p. 45.

\textsuperscript{76} *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s. 7. The Senate Standing Committee on Regulations and Ordinances also scrutinises disallowable instruments to ensure that they do not “trespass unduly on personal rights and liberties”, while the Senate Standing Committee for the Scrutiny of Bills considers whether Bills “trespass unduly on personal rights and liberties”. See Senate Standing Orders 23 and 24.

\textsuperscript{77} *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s. 3.

\textsuperscript{78} Index of bills considered by the Parliamentary Joint Committee on Human Rights in 2015.

\textsuperscript{79} Index of bills considered by the Parliamentary Joint Committee on Human Rights in 2016.

\textsuperscript{80} Index of bills considered by the Parliamentary Joint Committee on Human Rights in 2017.
examples where Parliament has enacted laws despite the Committee raising concerns about limitations to the freedom of religion and other rights.\textsuperscript{81}

**Australian Human Rights Commission**

4.70 Established by the *Australian Human Rights Commission Act 1986* (Cth), the Australian Human Rights Commission (AHRC) is an independent statutory body and is Australia’s national human rights institution.

4.71 The Commission consists of a President and seven Commissioners, one for each federal anti-discrimination law, as well as the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Children’s Commissioner and the Human Rights Commissioner.\textsuperscript{82} The Human Rights Commissioner has a wide portfolio and is responsible for certain basic freedoms, including freedom of religion.\textsuperscript{83}

4.72 One of the functions of the President of the Commission is to inquire into, and attempt to conciliate, complaints of unlawful discrimination.\textsuperscript{84} The *Australian Human Rights Commission Act 1986* does not make religious discrimination “unlawful” – the definition of unlawful discrimination in the Act being limited to acts, omissions or practices that are unlawful under the four federal anti-discrimination laws.\textsuperscript{85} As previously noted, religious discrimination is not prescribed as being unlawful by any of the federal anti-discrimination laws.

4.73 Nevertheless, the President of the Commission does have the power to inquire into and attempt to conciliate in relation to any act or practice that may constitute religious discrimination\textsuperscript{86} or that may be inconsistent with or contrary to the human rights in Articles 18 and 26 of the ICCPR\textsuperscript{87} and Article

\textsuperscript{81} Professor Williams, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 2.


\textsuperscript{84} *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), s. 11(1)(aa).

\textsuperscript{85} AHRC Act, s. 3(1).

\textsuperscript{86} AHRC Act, s 3.1(b). Section 3(1) includes religious discrimination in the definition of discrimination.

\textsuperscript{87} AHRC Act, s. 11(1)(f). Section 3(1) provides that human rights means the rights and freedoms recognised in the ICCPR.
1 of the Religion Declaration. The President of the Commission also has the power to inquire into and conciliate complaints of religious discrimination in employment.

Where the Commission finds that a complaint has been substantiated, it must prepare a report for the Attorney-General setting out its findings and any recommendations for preventing a repetition of the act and any recommendations on remedies, including compensation. Any recommendations made by the Commission are not binding on the person found to be at fault or on the Commonwealth.

In addition to its inquiry and conciliation functions, the Commission’s functions also include promoting understanding, acceptance and public discussion of human rights in Australia and undertaking research and educational programs and other programs on behalf of the Commonwealth to promote human rights. Mr Edward Santow, the Human Rights Commissioner, highlighted the importance of education in increasing the understanding of human rights issues in society at the Canberra hearing.

Sub-Committee Comment

Commonwealth protection for freedom of religion or belief is limited. The Constitution does prohibit Parliament from restricting religion and the free exercise of religion, and there is a set of implied Constitutional rights which combine to offer some further protection in the form of, for example, religious expression and association. These Constitutional protections are not absolute in their effect, nor do they prohibit such restrictions at state or territory level. There is no positive protection of religious freedom.

There is also a history of common law protection for fundamental rights, including religious freedom. There is a general principle of Australians being free to act as they wish unless a law specifically prohibits them. However, evidence to the inquiry suggests that there has been a slow erosion of this general freedom, or a concern that it may be eroded in the

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89 AHRC Act, ss. 3(1), 31(b)(i), (c).

90 AHRC Act, s. 35.

future, by the enactment of legislation, including of legislation which seeks
to uphold other rights but may conflict with religious freedom.

4.78 Suggestions to strengthen protections for religious freedom include a broad
human rights instrument such as a bill of rights, a specific religious freedom
act, and a religious discrimination act, or a variation or combination of these.

4.79 Addressing the perceived current threats to religious freedom found in
federal laws, there are questions about the effectiveness and the
appropriateness of existing religious exemptions and exceptions in non-
discrimination laws. While many believe the existing exemptions are
appropriate, some believe they inappropriately favour religious freedom
over non-discrimination, while others believe they are inadequate in their
protection of religious freedom. The Sub-Committee will consider whether
policymakers should give consideration to a general limitations clause as an
alternative means of balancing religious freedom and non-discrimination,
and the Sub-Committee will continue to consider this in its deliberations
throughout the inquiry and in the Final Report.
5. State and Territory Protections

5.1 There are various state and territory instruments that go some way to offering protection of religious freedom, including human rights instruments and anti-discrimination legislation.

5.2 Some states and territories made submissions to this inquiry, outlining their frameworks for protecting religious freedom. Submissions were received from NSW,1 Victoria,2 Tasmania,3 and the ACT,4 as well as from the Victorian Multicultural Commission5 and Equal Opportunity Tasmania.6

Tasmanian Constitution Act

5.3 The only state with constitutional protection of religious freedom is Tasmania. Section 46 of the Constitution Act 1934 states:

1 Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

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1 The Hon Ray Williams MP, Minister for Multiculturalism, NSW Government (NSW Government), Submission 374.
2 The Hon Robin Scott MP, Minister for Multicultural Affairs, Victorian Government (Victorian Government), Submission 328.
3 The Hon Matthew Groom MP, Acting Attorney-General, Acting for and on behalf of the Minister for Justice, Tasmanian Government (Tasmanian Government), Submission 375.
4 The Hon Mr Shane Rattenbury, Minister for Justice and Consumer Affairs, ACT Government (ACT Government), Submission 8.
5 Submission 329.
6 Submission 6.
2. No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public offence.

5.4 Professor George Williams noted in his submission that this provision is “of limited, perhaps no, utility” as it is “not entrenched in that Constitution and may be overridden by any subsequent statute of the Tasmanian Parliament.” Dr Luke Beck concurred, calling the provision “largely useless”.

5.5 At the Sydney hearing, however, Professor Williams did qualify this legal ineffectiveness, remarking that such a section in the “highest law within a state” is “significant” as it “sets out what Tasmania sees as a value that deserves regard and respect”.

Charter of Rights/Human Rights Act

5.6 Only two Australian jurisdictions have enacted rights instruments of this kind.

5.7 The ACT was the first to do so, with the Human Rights Act 2004 (ACT) (HRA). The relevant section is section 14:

14. Freedom of thought, conscience, religion and belief

(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

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7 Professor George Williams, Submission 71, p. 2.


9 Professor George Williams, Committee Hansard, Sydney, 6 June 2017, p 5. See also Associate Professor Neil Foster, Submission 7, p. 6. Professor Foster noted a Federal Court case which suggests that section 46 may have some value beyond being merely aspirational. In Corneloup v Launceston City Council (2016) 151 ALD 462, a man was prevented from preaching in public in Launceston. The City Council lost the case on administrative grounds, but Mr Corneloup also was also challenging on Federal Constitutional grounds and on the basis of section 46. Justice Tracey did not pursue these arguments in detail, but stated that they would have “confronted a number of difficulties”. Nevertheless, Professor Foster submitted that the section may have an “interpretive” role under the doctrine of “legality”, a statutory interpretation principle discussed in Chapter 4.
(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.

5.8 Victoria enacted its Charter of Human Rights and Responsibilities Act in 2006, with the substantially similar section 14 the equivalent of the ACT provision. The instruments are similar both in the rights they enumerate and their operation.

5.9 The ACT and Victorian instruments require proposed laws to be accompanied by statements setting out their compatibility with human rights.10 In Victoria, the Scrutiny of Acts and Regulations Committee must consider Bills introduced into Parliament, and report to Parliament on whether the Bill is compatible with human rights.11 In the ACT, it is the “relevant standing committee”.12

5.10 In each jurisdiction, if a question about a law’s compatibility with human rights arises during a proceeding before the Supreme Court, the Court can declare a law to be incompatible with human rights.13 In neither jurisdiction does such a declaration invalidate a law,14 nor does failure to comply with the requirements for statements of compatibility “affect the validity, operation or enforcement” of the law in question.15 In fact, the Victorian Parliament can make an express override declaration stating that an Act has effect despite being incompatible with the Charter.16

5.11 The ACT Government noted the “dialogue process” of its Act, and provided an example of what this process looks like in practice, noted briefly in

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10 Section 37 of Human Rights Act 2004 (ACT) requires a “compatibility statement” prepared by the Attorney-General. Section 28 of the Charter of Human Rights and Responsibilities Act 2006 requires the Member of Parliament proposing the bill to cause a “statement of compatibility” to be prepared.


12 Human Rights Act 2004 (ACT), s. 38.

13 Human Rights Act 2004 (ACT), s. 32; Charter of Human Rights and Responsibilities Act 2006 (Vic), s. 33.

14 Human Rights Act 2004 (ACT), s. 32; Charter of Human Rights and Responsibilities Act 2006 (Vic), s. 33.

15 Human Rights Act 2004 (ACT), s. 39; Charter of Human Rights and Responsibilities Act 2006 (Vic), s. 29.

Chapter Three. Seeking to “safeguard rights to access abortion services in the ACT”, the ACT amended its *Health Act 1993* to make it an offence to “protest, or film, in declared protected areas” in the vicinity of abortion service providers. This was “in response to community concerns about potentially intimidating and harassing conduct”.\(^{17}\) The submission states further:

The amendments clearly limited the protestors’ right to freedom of expression (including expression of their religious beliefs and convictions)... Yet, because the rights in the HRA are not absolute, but can be limited if they are considered reasonable and proportionate to achieve a justifiable policy aim the HRA processes facilitated an open community debate about the merits of the laws.\(^{18}\)

5.12 The ACT Government noted that the measures taken were the “least restrictive necessary”, in accordance with the HRA.

**Support for State and Territory Instruments**

5.13 Professor Iain Benson praised the Australian Charter of Rights model, specifically in the context of the Victorian Charter, noting that courts are given a “declaratory power”, maintaining the importance of the legislature. Professor Benson contrasts this to the courts in the US, Canada, and South Africa and what he calls the “spectacle of judicial usurpation, frankly, of principles that should be left to democracy”. Victorian courts can give “varying degrees of guidance” to parliaments but would leave to them “the determination as to how precisely the law is formulated in response to the judicial declaration”.\(^{19}\) This has been called an “advisory model” or a “dialogue model”.\(^ {20}\)

5.14 As discussed further in Chapter Six, Professor Williams supports a human rights act model, saying that “it is the right time” to be talking about bills of rights at state level.\(^ {21}\)

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\(^{17}\) ACT Government, *Submission 8*, p. 5.


\(^{19}\) Professor Iain Benson, private capacity *Committee Hansard*, Sydney, 6 June 2017, p. 34.

\(^{20}\) Associate Professor Neil Foster, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 35; ACT Government, *Submission 8*, p. 5.

\(^{21}\) Professor Williams, private capacity *Committee Hansard*, Sydney, 6 June 2017, pp. 5-6. This was in response to Senator Lisa Singh’s question about whether states could each have their own human rights instruments “in light of [there] not being anything in place federally”.
5.15 Ms Anna Brown of the Human Rights Law Centre argued that the Charter has developed a “human rights culture within the government”, resulting in better policymaking and “more thoughtfully considered” due to the balancing of competing rights under the Charter.\(^{22}\)

## Criticism of State and Territory Instruments

5.16 The existing rights instruments have been criticised for failing to protect religious freedom. For example, the Presbyterian Church of Queensland argues that these instruments “effectively limit rather than protect human rights”.\(^{23}\) The Presbyterian Church of Queensland noted that the ICCPR permits only “necessary” limitations, in contrast to the Victorian and ACT instruments which permit “reasonable” state incursion.\(^{24}\) This distinction was discussed in more detail in Chapter Three.

5.17 Dr Paul Taylor stated they do “not meet the obligation” to respect and ensure rights, but “merely call for a human-rights-compatible interpretation of laws where this is possible”. The rights listed in the charters “[lack] the precision required by the Covenant” because they are subject to an omnibus limitation provision.\(^{25}\)

5.18 While not criticising the concept of charters of rights, Dr Beck said that committees should ask nuanced questions which require “much deeper and more practical thinking” than simply recommending such instruments be enacted. He stated:

> Victoria has a charter of rights. New South Wales does not. The Victorian charter of rights protects freedom of speech and freedom of religion. Is freedom of speech and freedom of religion, in practice, better protected in people’s day-to-day lives in Victoria than in New South Wales? What is the lived experience of people? What sort of problems are people running into?... What, actually, would the statue do in practice?\(^{26}\)

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\(^{22}\) Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, Melbourne, 7 June 2017, p. 17.

\(^{23}\) Presbyterian Church of Queensland, *Submission 192*, p. 67.

\(^{24}\) Presbyterian Church of Queensland, *Submission 192*, p. 66.

\(^{25}\) Dr Paul Taylor, *Submission 140*, p. 9.

\(^{26}\) Dr Beck, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 14.
State and territory legislation

Anti-discrimination law

5.19 The anti-discrimination laws of most states and territories prohibit discrimination on the basis of religion. New South Wales prohibits discrimination on the basis of race, and defines “race” to include “ethno-religious” origin. South Australia prohibits discrimination based on “religious appearance or dress”.

5.20 The ACT amended its Act in 2016 to add a definition of “religious conviction”, clarifying that it includes “engaging in religious activity” as well as having no religious conviction. The amendments also separated “political conviction” and “religious conviction”, which were previously combined as a single protected attribute. The threshold test for vilification was also revised by the amendments so that vilification is prohibited in respect of any act done “other than in private”. This revision was made to avoid technical arguments about what is a “public act”.

5.21 The various state and territory anti-discrimination legislation is summarised in a helpful table provided in Attachment A of the Attorney-General’s submission.

Exceptions and exemptions

5.22 The state and territory laws provide a range of exceptions for certain acts in certain contexts, which are broadly similar to the Commonwealth exceptions. Of note, Victoria is the only state that provides religious

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27 Discrimination Act 1991 (ACT), s. 7(1)(u); Anti-Discrimination Act (NT) s. 19(1)(m); Anti-Discrimination Act 1991 (Qld) s. 7(i); Anti-Discrimination Act 1998 (Tas) s. 16(o) and (p); Equal Opportunity Act 2010 (Vic) s. 6(n); Equal Opportunity Act 1984 (WA) s. 53.

28 Anti-Discrimination Act 1977 (NSW), s. 7.

29 Anti-Discrimination Act 1977 (NSW), s. 4.

30 Equal Opportunity Act 1984 (SA), s. 85T(1)(f).

31 ACT Government, Submission 8, p. 3.

32 ACT Government, Submission 8, p. 3.

33 Attorney-General’s Department, Submission 193, pp. 8-9.

34 Discrimination Act 1991 (ACT), ss. 32-33; Anti-Discrimination Act 1996 (NT), ss. 37A and 51, Anti-Discrimination Act 1991 (Qld), Part 4; Anti-Discrimination Act 1998 (Tas), Part 5; Equal Opportunity
exemptions for individuals, as opposed to religious organisations or professionals.\textsuperscript{35} Section 84 of the \textit{Equal Opportunity Act 2010} (Vic) states:

\textbf{Religious beliefs or principles}

Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

5.23 In September 2017, the Northern Territory Government (NT Government) indicated that it proposed to amend the \textit{Anti-Discrimination Act 1996} (NT).\textsuperscript{36} Amongst a range of other proposals, the NT Government proposes to remove automatic religious exemptions for religious organisations that act as accommodation service providers and for religious education institutions in relation to employment and student enrolment. Religious bodies would instead be required to seek exemptions from the Anti-Discrimination Commission and justify why their services require particular exemptions.\textsuperscript{37} Exemptions in relation to internal religious practices, such as the ordination of priests, ministers of religion or members of a religious order (including training or education) and the selection or appointment of people to perform functions in relation to any religious observance would remain in place. The NT Government has said that the proposals would “ensure that cultural and religious bodies are more accountable for their actions and more inclusive.”\textsuperscript{38}

\textbf{Religious vilification laws}

5.24 Religious vilification laws prohibit speech which attacks other people on the basis of their religion. The ACT, Queensland, Tasmania and Victoria have legislation which prohibits religious vilification or acts which incite hatred

\begin{footnotesize}
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\item \textsuperscript{35} This was observed by Associate Professor Foster, \textit{Submission 7}, pp. 32-33.
\item \textsuperscript{36} Northern Territory Department of the Attorney-General and Justice (NT Government), \textit{Discussion Paper: Modernisation of the Anti-Discrimination Act}, September 2017.
\end{itemize}
\end{footnotesize}
on religious grounds. Similar to its anti-discrimination provisions, NSW prohibits vilification on the grounds of ethno-religious origin.

5.25 The most comprehensive of the anti-vilification laws is the Victorian Racial and Religious Tolerance Act 2001 (Vic). Section 8 of that Act provides:

**Religious vilification unlawful**

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

5.26 The most famous case relating to this provision is the *Catch the Fire case*. The case was brought by the Islamic Council of Victoria against a Christian organisation, Catch the Fire Ministries, and two pastors on the basis that statements the two pastors had made at a seminar and in publications criticising Islam contravened section 8 of the Racial and Religious Tolerance Act. In the first instance, the Victorian Civil and Administrative Tribunal found the pastors guilty of religious vilification. This decision was overturned on appeal, with Neave JA finding that the Tribunal had failed to distinguish between criticisms of the doctrines of Islam and the incitement of hatred towards followers of Islam. His Honour said:

… s 8 does not prohibit statements about religious beliefs per se or even statements which are critical or destructive of religious beliefs. Nor does it 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. The proscription is limited to that which incites hatred or other relevant emotion and s 8 must be applied so as to give it that effect.

5.27 The parties ultimately settled after the matter was referred back to the Tribunal, but a number of commentators used this case to highlight their
concerns that anti-vilification laws have an undesirable chilling effect on religious speech and debate.43

5.28 On the other hand, the organisation involved in this case, the Islamic Council of Victoria (ICV), stated in its submission:

In 2001 the Government of Victoria enacted the Racial and Religious Tolerance Act 2001. The ICV has experience in the use of this Act which is applicable today to only the most extreme cases of religious vilification. Although it can be argued that it has proved weak in preventing the rise of Islamophobia in Victoria, the ICV commend Victoria’s efforts to keep multiculturalism relevant and to find new narratives for diversity which the ICV recognise and support.44

5.29 Others laws that prohibit certain speech against religion are blasphemy laws. Blasphemy is still a crime under statute in NSW, the ACT and Tasmania45 and likely remains a crime under common law in the Northern Territory, South Australia and Victoria. Queensland and Western Australia have specifically abolished common law blasphemy by statute.46

5.30 Dr Beck argued that the offence of blasphemy, which is “not about vilification or inciting hatred”, is only related to speech against Christian beliefs and therefore gives “official preference to Christianity”.47 He noted that although attempts had been made to use the laws, there were no successful prosecutions.48 The most well-known example was in 1997, when Catholic Archbishop of Melbourne George Pell, as he then was, sought an injunction against the National Gallery of Victoria, seeking to prevent the display of an artwork titled “Piss Christ” on the basis that is contravened the common law crime of blasphemous libel. Harper J refused to grant the injunction, essentially finding that the matter was one best suited to criminal

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43 See Associate Professor Foster, Submission 7, pp 7-8; Human Rights Alliance and Australian Christian Lobby, Submission 156, p. 13; Professor Nicholas Aroney and Mr Mark Fowler, Submission 148, p. 3; Wilberforce Foundation, Submission 115, p. 5.

44 Islamic Council of Victoria, Submission 191, p. 12.

45 Crimes Act 1900 (NSW), ss. 529, 574; Crimes Act 1900 (ACT), s. 440; Criminal Code Act 1924 (Tas), s. 119.

46 Criminal Code Act Compilation Act 1913 (WA), Appendix B s 4; Criminal Code Act 1899 (Qld).

47 Dr Luke Beck, Submission 139, p. 4.

48 Dr Beck, Committee Hansard, Sydney, 6 June 2017, p. 21.
sanctions, but found that the common law crime of blasphemous libel may still exist. 49

Common law decisions

CYC v Cobaw

5.31 A significant case dealing with religious freedom under state law, especially as it interacts with anti-discrimination law, is the Victorian case Christian Youth Camps Limited v Cobaw Community Health Service Limited50 (‘Cobaw’). That case involved a camping organisation run by Christian Brethren, Christian Youth Camps (CYC), refusing to accept a booking for a program being run for same-sex attracted young people. Cobaw Community Health Service (Cobaw), the organisation running the program, sued CYC for discrimination on the basis of sexual orientation.51

5.32 Under the 1995 Equal Opportunity Act, an exemption existed for discrimination that was “necessary for the first person to comply with the person’s genuine religious beliefs or principles”.52 An exemption also existed for a “body established for religious purposes” for conduct that conforms to religious doctrine or is “necessary to avoid injury to the religious sensitivities of the people of the religion”.53

5.33 The Victorian Supreme Court interpreted these provisions narrowly, first by holding that CYC was not a “body established for religious purposes”,54 due to the commercial nature of the business.55 This was despite the fact that its Constitution focused on activities conducted in accordance with Brethren beliefs,56 being established under a Brethren Trust,57 and requiring staff to subscribe to a statement of faith.58


50 (2014) 50 VR 256 (Cobaw).

51 For an overview of the case, see Associate Professor Foster, Submission 7, pp. 25-29.

52 Equal Opportunity Act 1995 (Vic), s. 77.

53 Equal Opportunity Act 1995 (Vic), s. 75.

54 Cobaw, 317 [245].

55 Cobaw, 318 [250].

56 Cobaw, 307 [205].

57 Cobaw, 306 [203].
5.34 Secondly, the Court found that CYC’s rejection of Cobaw was not done in order to conform with the doctrines of the Brethren faith, and limited “doctrines” to “core architectural statements of faith”.59

5.35 Finally, the Court also determined that the conduct was not “necessary” to conform to the Brethren faith as the belief about sexuality was a “rule of private morality”.60

5.36 The application of the Charter of Rights and Responsibilities had been discussed earlier in the Tribunal decision.61 In weighing the right to freedom of religion in section 14 of the Charter against the rights to equality and freedom from discrimination in section 8, Her Honour Judge Hampel made the following comments:

I must therefore interpret ss 75(2) and 77, having regard to the purpose of those exceptions, namely to protect religious freedoms, and in a manner consistent with the rights to freedom of thought, conscience, religion and belief in s 14 of the Charter, and freedom of expression in s 15 of the Charter but also, so far as is possible, in a manner which is compatible with the rights to equality and freedom from discrimination in s 8 of the Charter. I must do so in a way which does not privilege one right over another, but recognises their co-existence.62

5.37 Professors Aroney and Babie and Dr Harrison called the “bright-line” between religious and commercial purposes a “blunt instrument”, noting that many organisations “undertake commercial work within a religious ethos”. Examples of such organisations may be kosher or halal certifiers, religious publishers, and wedding photographers, with the authors commenting that:

CYC’s decision not to attempt a booking does not necessarily cease to be an act of religious conscience simply because it takes place in a commercial setting.63

58 Cobaw, 308 [206].
59 Cobaw, 324 [277].
60 Cobaw, 325 [281], 337 [330].
61 It should be noted that there was some dispute on appeal about the extent of the applicability of the Charter to the case: see, in particular, paragraphs 299–301 [168]-[179] of the Court of Appeal judgement.
62 Cobaw Community Health Services v Christian Youth Camps Ltd & Anor [2010] VCAT 1613, [225].
63 N Aroney, P Babie and J Harrison, ‘Religious Freedom Under the Victorian Charter of Rights’ in M Groves and C Campbell, eds, Australian Charters of Rights a Decade On, Federation Press,
5.38 This echoed the dissenting judgement in that case from Redlich JA, who stated that:

Engagement in commercial activity will not ordinarily support an imputation that the person does not in that setting rely upon their religious beliefs or principles or has abandoned their obligation of obedience to them.\(^{64}\)

5.39 This case is discussed further in Chapter Seven in the context of non-discrimination and religious freedom.

**Other state case law**

5.40 There have been a small number of Victorian cases which have dealt with that State’s Charter of Rights. In *Hoskin v Greater Bendigo City Council*, Victorian Court of Appeal found that a city council was obliged to consider the Charter, including section 14, in its decision regarding the construction of a mosque.\(^{65}\)

5.41 *Rutherford & Ors v Hume CC* also considered an application to build a mosque, in this case next door to an Assyrian Church. The Victorian Civil and Administrative Tribunal stated that allowing the mosque to be built would not offend charter or the religious freedoms of the church members. While they did not finally decide on whether refusing the permit would offend the Charter, the bench noted the Council’s argument that it may do so by “impinging on the ability of an identifiable group of Shi’ite Muslims to practise their faith.”\(^{66}\)

5.42 In *Fraser v Walker*,\(^{67}\) a woman protesting outside an abortion clinic and displaying a poster showing aborted foetuses was charged with displaying an obscene figure. She argued that displaying the poster was part of her right to freedom of conscience and religion. This was rejected, with the Court stating that “the display of obscene figures is not part of religion nor can it be said the display is done in furtherance of religion”.\(^{68}\)

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Annandale, Australia, 2017, p. 128. This chapter examines the Victorian Charter with a particular focus on the Cobaw decision.

\(^{64}\) *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75, [557].


\(^{66}\) *Rutherford & Ors v Hume CC* [2014] VCAT 786, [30].

\(^{67}\) [2015] VCC 1911.

\(^{68}\) *Fraser v Walker*, [49].
5.43 A number of cases from outside of Victoria are also worth noting. One case which received some attention in submissions was the NSW case *OV & OW v Members of the Board of the Wesley Mission Council*.\(^69\) This case also involved a “religious organisation” and considerations of what constitutes doctrine and the relevance of doctrine to behaviour. The case involved a same-sex couple which inquired about becoming foster carers of a child through the services of the religious organisation, Wesley Dalmar. Wesley Dalmar, relying on the exemptions in section 56 of the *Anti Discrimination Act*, told the couple they would not be permitted to apply because they were a same-sex couple. Wesley Dalmar argued that one of its doctrinal beliefs was that the “monogamous heterosexual partnership within marriage is both the norm and ideal of the family”.\(^70\) The Administrative Decisions Tribunal initially found that Wesley Dalmar had failed to establish that the belief was a doctrine of the Christian religion. On appeal, the Court of Appeal ordered the Administrative Decision Tribunal to reconsider the matter. The Administrative Decisions Tribunal ultimately found that the organisation was “entitled to propagate its own doctrines... by teaching or other means not necessarily amounting to the formal pronouncement of a ‘doctrine’”.\(^71\)

5.44 Professor Foster briefly cites several other cases. In *McIntosh, Ahmad v TAFE Tasmania*,\(^72\) the Tasmanian Anti-Discrimination Tribunal ruled that the TAFE had not discriminated against a Muslim employee by not providing a separate prayer room. This decision was made on the basis that any other member of staff requesting a room set aside for their own purposes would also have been declined.\(^73\)

5.45 In *Walsh v St Vincent de Paul Society Queensland (No 2)*,\(^74\) a woman was asked to step down from her position because she was not a Roman Catholic. The St Vincent de Paul Society attempted to use the exemption allowing a “religious body” to discriminate on the basis of religion, but the Tribunal ruled that the exemption did not apply because St Vincent de Paul Society is

\(^69\) The case culminated in the decision in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

\(^70\) *OV & OW v Members of the Board of the Wesley Mission Council*, [6].

\(^71\) *OV & OW v Members of the Board of the Wesley Mission Council*, [33]. For further discussion of this case, see Associate Professor Foster, *Submission 7*, pp. 29-30.

\(^72\) [2003] TASADT 14.

\(^73\) Associate Professor Foster, *Submission 7*, p. 23.

\(^74\) [2008] QADT 32.
not a “religious body”. This decision was discussed at some length at the Melbourne hearing.  

5.46 Finally, Professor Foster notes *Burke v Tralaggan*, a NSW decision in which a Christian couple who refused to allow an unmarried couple to rent their flat had unlawfully discriminated based on “marital status”. The refusal was based on moral grounds informed by their religious convictions. Professor Foster noted that the NSW *Anti-Discrimination Act* does not prohibit discrimination if the provider of the accommodation lives on the premises and the premises contains no more than six beds, suggesting that NSW has determined that discrimination law should not extend as far as people who provide accommodation in what is effectively their own home. The relevance of this is apparent in light of the UK case *Bull v Hall*, in which a couple was found guilty of discrimination on the grounds of sexual orientation when they refused, on religious grounds, to give accommodation in their home-based boarding house to a same-sex couple. This case was raised in a number of submissions.

### State human rights commissions

5.47 Each of the States and Territories has an independent statutory human rights commission or anti-discrimination body which handles complaints made under its relevant anti-discrimination laws, including complaints of religious discrimination. The State and Territory bodies also provide public training...
and education on human rights, undertake community engagement activities and advise their governments on discrimination and/or human rights matters.

5.48 Notably, the ACT Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission do not deal with complaints arising out of their human rights legislation. In the case of the ACT, persons whose human rights are breached by a public authority can commence proceedings in the ACT Supreme Court to enforce those rights.\textsuperscript{81} In Victoria, complaints about breaches to its Charter by public authorities are the remit of the Victorian Ombudsman while complaints in relation to police misconduct are handled by the Victorian Independent Broad-based Anti-corruption Commission.\textsuperscript{82}

**Sub-Committee Comment**

5.49 There is a range of approaches to protecting religious freedom among the states and territories. Two jurisdictions have human rights instruments which have been proffered as potential models on which to base an equivalent instrument at federal level. While many people praise the existing instruments, some have concerns that they do not adequately protect ICCPR rights including religious freedom.

5.50 One reason for this concern is a lower threshold for when religious freedom may be limited. The threshold of “reasonable” rather than “necessary” diverges from the ICCPR and international human rights jurisprudence.

5.51 All states and territories have anti-discrimination laws, although not all of these include religion as a protected attribute.

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6. Implementing the ICCPR in Domestic Law

Implementing religious freedom into Australian law

6.1 As discussed in Chapter Two, despite ratifying the ICCPR, Australia has not adopted the rights it enumerates into domestic legislation. This Chapter examines some of the discussion about this feature of Australia’s legal framework and discusses some of the suggested approaches to implementing the ICCPR in the law.

6.2 Dr Paul Taylor noted that Article 2(2) requires State Parties to the Covenant to “take the necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”. Dr Taylor was critical of Australia’s failure to formally implement the Covenant rights in domestic law.¹ He noted that a country may not justify failing to comply with this obligation by appealing to “political, social, cultural or economic considerations within the State”.²

6.3 The UN Human Rights Committee has commented on this failure to implement the Covenant. In its 2009 concluding observations on the fifth periodic report submitted by Australia, the HRC recommended enacting “comprehensive legislation” implementing all the Covenant provisions, commenting:

¹ Dr Paul Taylor, Submission 140, pp. 3-5.
The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level.\(^3\)

6.4 In its 2017 concluding observations to the sixth periodic report of Australia, the UN Human Rights Committee repeated its concerns about the “lack of direct protection against discrimination on the basis of religion at the federal level”, and made the following recommendation:

The State party should take measures, including by 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 inter-sectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.\(^4\)

**Bill of Rights, Charter of Rights, or Human Rights Act**

6.5 Two Australian jurisdictions have implemented human rights instruments akin to a “bill of rights” or “charter of rights”. Victoria’s *Charter of Human Rights and Responsibilities* was enacted in 2006, following the ACT’s *Human Rights Act* in 2004. This Chapter extends the discussion of these instruments in Chapter Five to the context of enacting a federal instrument.

6.6 In the absence of a federal bill of rights, states and territories could each have their own bills of rights incorporating ICCPR rights.\(^5\) Professor George Williams noted that in addition to Victoria and the ACT, there are discussions underway about bills of rights in Queensland, Tasmania, and New South Wales, and Tasmania, Queensland, and Western Australia have all had reports in favour of bills of rights. Professor Williams said that “it is the right time” to be talking about this at the state level.

6.7 However, this piecemeal approach would rely on the eight jurisdictions passing their own instruments to achieve a consistent level of protection across the country.

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\(^3\) Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee*, 95\(^{th}\) sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), [8].

\(^4\) Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 102\(^{nd}\) sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [17-18].

\(^5\) See discussion between Senator Lisa Singh and Professor George Williams, *Committee Hansard*, Sydney, 6 June 2017, pp. 5-6.
6.8 The preferred option, one which was discussed at some length in submissions and at public hearings, would be to implement a federal bill of rights or similar instrument, either through a single act or through Constitutional change.

Support for a federal rights instrument

6.9 A national bill of rights received some support in evidence. Although Dr Taylor did not advocate for a bill of rights, he did state that a bill of rights best reflects the universality, indivisibility, interdependence, and interrelatedness of human rights. Professor Carolyn Evans also favoured a “more comprehensive human rights act” which incorporates all the ICCPR rights rather than the current situation in which some rights have been “cherrypicked” and given stronger status than others. Some submissions favoured a bill of rights model, including the specific term “Bill of Rights”.

6.10 At the Sydney hearing, Dr Taylor commented that the distinguishing feature between a bill of rights as opposed to a charter of rights is that:

a charter simply lists the rights as if they were values and they do not apply them in the legislation as rights that can be invoked in a particular way.

6.11 Dr Taylor further commented that it should be possible, in order to achieve compliance with the Covenant, for a rights holder to appeal to the state.

6.12 Professor Williams noted that the advantage of being the only democracy without a bill of rights or equivalent instrument is that we can look widely to the experience in other countries. For example, according to Professor Williams, the US system has transferred power to the courts at the expense of parliamentary sovereignty. In contrast, the approach used in New Zealand and the UK maintains the sovereignty of parliament while requiring that due weight be given to “democratic values that we think are

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6 Dr Taylor, Submission 140, p. 13; see also discussion at Sydney hearing, Committee Hansard, Sydney, 6 June 2017, pp. 17-19.

7 Professor Carolyn Evans, private capacity, Committee Hansard, Melbourne, 7 June 2017, p. 9.

8 Professor Gary Bouma, Submission 186, p. 3; Professor Gary Bouma, private capacity, Committee Hansard, 7 June 2017, p. 39. See also Civil Liberties Australia, Submission 47, p. 3.

9 Dr Paul Taylor, private capacity, Committee Hansard, Sydney, 6 June 2017, pp. 17-18.

10 Dr Taylor, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 18.
enduring, and important and should not be forgotten.”

Professor Williams commented:

I do not support anything like the American instrument, which means courts can strike down laws. I favour the UK approach, which means the courts interpret statutes; and so they effectively take direction from parliament that, in applying anti-discrimination and other laws, there are certain important rights and values that must be taken into account.

6.13 As noted in Chapter Five, this model is also used in the Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act, allowing what the ACT Government calls a “dialogue process”.

6.14 Due to his concerns noted above, Professor Williams does not like the language of “bill of rights”, and favours moving towards a Human Rights Act approach.

6.15 The Human Rights Law Centre recommended enacting a Human Rights Act in addition to other measures, arguing that it would “consolidate and modernise the disparate Commonwealth anti-discrimination law protections and ensure there was appropriate coverage”.

Opposition to a federal rights instrument

6.16 Some submissions stated their opposition to a Bill of Rights or similar instrument. The Human Rights Law Alliance and Australian Christian Lobby (HRLA and ACL) noted that attempts in 1944 and 1988 to introduce rights, including religious freedom, into the Constitution were defeated. Commenting on the 2008 National Human Rights Consultation Committee established by then Attorney-General Robert McClelland, which recommended the adoption of a bill of rights, HRLA and ACL claimed that “unpopularity and widespread opposition” lead to the recommendation being abandoned.

11 Professor Williams, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 6.
12 Professor Williams, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 5.
13 ACT Government, Submission 8, p. 5.
14 Professor Williams, private capacity, Committee Hansard, Sydney, 6 June 2017, pp. 3-4.
15 Human Rights Law Centre, Submission 176, pp. 3-5.
6.17 HRLA and ACL expressed concern that the “legislation of human rights” can:

have the effect of enlarging the power of unelected judges on questions of public policy which have ordinarily been resolved by democratically elected parliaments.\(^\text{18}\)

6.18 Professor Augusto Zimmermann also cautioned against a bill of rights, calling the idea “counterproductive”, and expressing similar concerns to those above about the transferal of power to judges in the United States.\(^\text{19}\)

### Challenges to a federal rights instrument

6.19 There are also political considerations when discussing a bill of rights, beginning with the fact that a majority of Australians believe their rights are already adequately protected, including 61 per cent who believe Australia already has a bill of rights.\(^\text{20}\) Professor Williams highlighted the importance of education, including the work of the Sub-Committee in this inquiry, as part of the process of achieving reform.\(^\text{21}\) The importance of education in increasing the understanding of human rights issues in society was also discussed at the Canberra hearing.\(^\text{22}\)

6.20 The unpopularity noted by HRLA and ACL above presents further political difficulties. Dr Luke Beck argued that both a bill of rights and a human rights act would be too difficult to implement “in the current political climate”.\(^\text{23}\)

6.21 In a 1999 paper, Professor Williams argued that the 1988 referendum, which received the lowest ever Yes vote in a national referendum, demonstrated that:

any move to bring about an Australian Bill of Rights should follow a gradual and incremental path. Certain core rights should be protected before others,

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\(^\text{19}\) Dr Augusto Zimmermann, private capacity, *Committee Hansard*, Melbourne, 7 June 2017, p. 25.

\(^\text{20}\) Professor Williams, private capacity, *Committee Hansard*, Sydney, 6 June 2017, p. 3, referring to a recent survey.

\(^\text{21}\) Professor Williams, private capacity, *Committee Hansard*, Sydney, 6 June 2017, pp. 3, 7.


and then in legislation, subject to a legislative override, before any constitutional entrenchment.\textsuperscript{24}

6.22 This more gradual approach would:

maximise the opportunity to create a workable balance between enabling the judiciary to foster the rights of Australians and not vesting misplaced faith in the courts to solve Australia’s pressing social, moral and political concerns.\textsuperscript{25}

\textbf{Religious Freedom Act}

6.23 There was some discussion about the suitability of a Religious Freedom Act or similar legislation which specifically protects the Article 18 right to freedom of religion without implementing a broader catalogue of human rights.\textsuperscript{26}

6.24 Associate Professor Neil Foster agreed that a religious freedom act, or similar legislation that “broadly protects religious freedom based on the principles of article 18”, would be one possible method of implementing the ICCPR right. Such an act would provide, in his words, “rights to hold religious beliefs, rights to practice within the limits set out in article 18.3, to live and practise one’s life in accordance with one’s religious commitment”.\textsuperscript{27}

6.25 The Australian Human Rights Commission in 1998 proposed the enactment of a Religious Freedom Act. The AHRC’s report was considered in this Committee’s 2000 inquiry, and a Religious Freedom Act was considered unnecessary. The AHRC stated that it remains of the view that the Australian Government should consider “expanding the circumstances in


\textsuperscript{26} While not taking a position in support of or against a religious freedom act, and recommending caution in moving towards such an act, the Presbyterian Church of Queensland did offer proposed drafting of certain clauses which such an act could contain that would address some key concerns: Presbyterian Church of Queensland, Submission 192, pp. 8-10.

\textsuperscript{27} Associate Professor Neil Foster, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 44.
which anti-discrimination law protects against discrimination and vilification on the basis of religion”.  

6.26 As noted above, Professor Evans favours a single, more comprehensive human rights act, and cautioned that:

The danger at the moment is that various religious groups say, ‘We need a religious freedom act,’ then the media say, ‘We need a media protection act,’ and you could end up multiplying the problem rather than resolving it.  

Protecting religious freedom in anti-discrimination law

6.27 Several witnesses and submissions discussed whether religious freedom could be protected by expanding federal anti-discrimination law. Professor Foster called this a “fairly minimal option” but thought it a “sensible model”. He did emphasise the fact that “different religions have different views about other religions”, and “careful discussion” would be required to:

- allow religions to make robust comments about the truth or otherwise of other religions. You would allow religions to exercise their own religious freedom in the way they run their affairs… some churches have resisted the idea of a religious discrimination law because they feared that it would unduly impair the way they ran their religious institutions.  

6.28 The Human Rights Law Alliance and Australian Christian Lobby submission recommended the enactment of a “consolidated Commonwealth Anti-Discrimination Act” embodying four criteria:

- (i) non-discrimination should be balanced against other ICCPR rights;
- (ii) General Comment 18 should be codified in the act, clarifying that the “reasonable and objective pursuit” of legitimate purposes is not unjust discrimination;
- (iii) religious exemptions should be removed in favour of religious freedom; and
- (iv) the absence of any vilification or speech provisions.  

6.29 The Presbyterian Church of Queensland also stated that religion should be a protected attribute in Commonwealth anti-discrimination law, noting the

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29 Professor Evans, private capacity, Committee Hansard, Melbourne, 7 June 2017, p. 9.
30 Associate Professor Foster, private capacity, Committee Hansard, Sydney, 6 June 2017, pp. 33-34.
importance of this “in light of the preponderance of religious minorities within contemporary, multicultural Australia”. The PCQ did not take a position on how best to achieve this, but noted that it could be achieved through a Religious Freedom Act or as a standalone measure.32

6.30 As noted, the Australian Human Rights Commission has also advocated for freedom of religion to be a protected attribute in federal anti-discrimination law.33

Sub-Committee Comment

6.31 There has been general agreement about the need to formally implement the right to freedom of religion or belief, if not the ICCPR in its entirety. Australia is rare among modern liberal democracies in its lack of a federal bill of rights instrument. There are various arguments in support of and opposing the implementation of such an instrument at federal level. Some contributors favour a Religious Freedom Act directly implementing Article 18 in federal law. Others have suggested protecting religious freedom through federal anti-discrimination law, either in a separate act or by consolidating anti-discrimination law into a single act. The Sub-Committee notes the strengths and weaknesses in each of the suggestions proffered.

6.32 The Sub-Committee notes that the preponderance of evidence from all sides of the issue support the claim that religious freedom should be specifically protected in Commonwealth law, however this is achieved.

32 Presbyterian Church of Queensland, Submission 192, pp. 32-34.
7. Balancing the Right to Freedom of Religion or Belief and Other Rights

Freedom of Religion or Belief and the right to non-discrimination

7.1 As with all rights, the right to freedom of religion or belief needs to be balanced against other rights. Often rights will be closely aligned, and protecting the right to freedom of religion may not involve impeding other fundamental rights. This is seen with the close association between the right to freedom of religion or belief and rights such as freedom of association and freedom of speech. Anti-discrimination laws can protect religious minorities from discrimination, and so the rights to non-discrimination and religious freedom interact in a way which enhances religious freedom.¹

7.2 At other times, however, different rights may compete with each other and to some extent be mutually exclusive. The most common contemporary example of this is when the right to freedom of religion or belief clashes with the right to non-discrimination. It is worth quoting Professor Evans’ clear summary of the issue at length:

…discrimination laws intersect with religious freedom [when] religious groups or individuals claim that they should be exempt from certain aspects of discrimination law. Religious groups may wish to engage in discrimination (on the basis of religion or other bases such as sex, marital status or sexuality).

Religious groups believe that it is essential that they maintain autonomy when it comes to issues such as selection of clergy or other key religious appointments. This autonomy is an important element of religious freedom, impacts on a relatively small number of people and would be hard to justify removing. However, religious groups often also wish to be permitted to discriminate in other areas in which they are active, for example in relation to admissions to religious schools, employment in religious organisations or the types of groups to whom they rent property. In such cases, the religious freedom of individuals or groups can come into conflict with the right of other individuals not to be discriminated against.2

7.3 This potential conflict is the focal point of much of the discussion about religious freedom in Australia and was a common refrain throughout the evidence received. The Australian Human Rights Commission highlights the issue, supporting consideration of a “mechanism for ensuring an appropriate balance is maintained”.3

7.4 Dr Alex Deagon’s paper bears the pertinent title “Australia in the Crucible: Religious Freedom versus Anti-Discrimination”,4 and focuses at some depth on this issue. This paper focuses on section 116 and the surrounding jurisprudence, its central argument being:

That the free exercise clause should be understood more broadly to motivate legislative protection for religious freedom from the general operation of anti-discrimination law in particular circumstances.5

7.5 The two main components to this argument are that the interpretation of the free exercise clause of section 116 should be expanded,6 and that religious freedom “should be protected from the general operation of anti-discrimination law in particular circumstances”.7

7.6 Different approaches to resolving this tension will have different emphases and priorities, and although it is generally agreed that there is no

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4 Dr Alex Deagon, Submission 9.

5 Dr Deagon, Submission 9, p. 5.

6 Dr Deagon’s argument for an expanded view of section 116 rests on Gaudron J’s judgment in Kruger: see Chapter 4, paragraphs [4.18-4.25].

7 Dr Deagon, Submission 9, pp. 5, 7.
“hierarchy” of human rights, some witnesses have emphasised what they regard as “fundamental” rights, including religious freedom, while others have cautioned against placing too much emphasis on these rights at the expense of others. The Wilberforce Foundation highlighted freedom of religion as “fundamental” and even “the bedrock and genesis of all human rights discourse”.  

7.7 The Human Rights Law Alliance and Australian Christian Lobby (HRLA and ACL) claimed that freedom of thought, conscience and religion or belief is “in certain significant ways the most fundamental” of all freedoms. The HRLA and ACL claims that non-discrimination has been set up as the “paradigm under which human rights claims are to be resolved”, with an “unconventionally broad scope” given to the term “discrimination”. As one example of this “paradigm shift”, HRLA and ACL cited the example of Cobaw, discussed in Chapter Five above, claiming that this case has made “equality and non-discrimination the paradigm human right”.  

7.8 The HRLA and ACL further claimed that there has been a “proliferation” of laws “enshrining far-reaching rights of non-discrimination in Australia”, arguing that this is “the enactment, essentially, of article 26 of the ICCPR over and over again”, while article 18 has not been so enacted. HRLA’s Martyn Iles pointed out that there are as many as 50 protected attributes across Australia’s different jurisdictions.  

7.9 Some submissions have had a different emphasis. The Human Rights Law Centre argued that the rights to equality and non-discrimination “constitute basic and general principles relating to the protection of all human rights”. The HRRC submission focused largely on this issue of balancing competing rights, saying that this notion is “not radical” but is a “fundamental concept  

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8 The Hon Mr Shane Rattenbury, Minister for Justice and Consumer Affairs, ACT Government (ACT Government), Submission 8, p. 6; Australian Lawyers for Human Rights, Submission 51, pp. 3, 8; Professor Iain Benson, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 37.  
9 Wilberforce Foundation, Submission 115, p. 2.  
13 Mr Martyn Iles, National Director, Human Rights Law Alliance, Committee Hansard, Sydney, 6 June 2017, p. 36.  
14 Human Rights Law Centre, Submission 176, p. 7.
embedded within the international and domestic” human rights instruments.¹⁵

7.10 Referring to the Cobaw decision mentioned above, HRLC’s Ms Anna Brown commented that the decision was a good decision and that:

its outcome was a good example of how these competing rights can be balanced. If the service is not advertised as a service that is Christian and is conducted in accordance with particular beliefs, there was no reason for that group to believe that they should be turned away from it.¹⁶

7.11 Ms Brown added that if exemptions continue to exist, something HRLC does not support, there needs to be “a level of transparency and consistency in the way they are operated, so people can make informed choices”.¹⁷

7.12 With a similar emphasis on the right to non-discrimination, Australian Lawyers for Human Rights argued that the “right to express one’s religious beliefs does not ‘trump’ other rights”.¹⁸ ALHR highlighted Article 26 of the ICCPR, which states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. ALHR argued:

Article 26 is a ‘stand-alone’ right which forbids discrimination in any law and in any field regulated by public authorities, even if those laws do not relate to a right specifically mentioned in the ICCPR.¹⁹

7.13 ALHR went on to “reject the suggestions that anti-discrimination law conflicts directly with the right to freedom of ‘religion’”.²⁰

**Same-sex marriage and non-discrimination**

7.14 The tension between the right of non-discrimination and the religious freedom to discriminate in some cases was a common theme received throughout many of the hundreds of submissions from the broader public, and was raised frequently in particular in connection with same-sex

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¹⁶ Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, Melbourne, 7 June 2017, p. 18.

¹⁷ Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, Melbourne, 7 June 2017, pp. 18-19.


marriage.\textsuperscript{21} It is noted that the recent Senate Select Committee’s report on the exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill, tabled in February 2017, considered the connection between same-sex marriage and religious freedom at length, including close examination of religious exemptions and exceptions. This Interim Report will not examine the issue in such detail, but the weight of evidence on the topic warrants some attention in this Interim Report.

7.15 Dr Alex Deagon’s submission drew attention to the “emerging tension between religious freedom and anti-discrimination law, particularly in relation to sexual orientation and same-sex marriage”, arguing that anti-discrimination law “could be used to restrict religious freedom which conflicts with same-sex marriage”.\textsuperscript{22} It is also important to note Dr Deagon’s comments that he is not advocating the right to discriminate in general:

there is no-one, or at least very few people, who are advocating that there should just be a blanket right for people to refuse to serve the LGBTI community in terms of goods and services because of their religious convictions… The particular issue is in relation to the support of same-sex marriage ceremonies through the provision of services. The idea is: by providing a service which directly contributes to a same-sex marriage ceremony, it implies an endorsement of same-sex marriage.\textsuperscript{23}  

7.16 The Wilberforce Foundation argued that the “same-sex marriage and gender fluidity movements” have been a cause of religious freedom violations internationally “under the protection of incorrect pre-eminence given to the right of non-discrimination”.\textsuperscript{24} The Wilberforce Foundation submission, and several others, cited numerous examples from around the world that it argued establishes this claim, including the so-called “cakemaker” cases: incidents in which religious people, often in the wedding services industry, decline to provide services for a same-sex wedding on the basis of religious conviction and are found to have been in breach of anti-discrimination law, often receiving large fines or other sanctions.\textsuperscript{25}  

\textsuperscript{21} More than half of the total submissions addressed same-sex marriage specifically in the context of religious freedom. Most of the various form letters received addressed either anti-discrimination laws or same-sex marriage or both.  

\textsuperscript{22} Dr Deagon, \textit{Submission 9}, p. 1.  

\textsuperscript{23} Dr Deagon, private capacity, \textit{Committee Hansard}, Sydney, 6 June 2017, p. 24.  

\textsuperscript{24} Wilberforce Foundation, \textit{Submission 115}, p. 7.  

\textsuperscript{25} See e.g. Wilberforce Foundation, \textit{Submission 115}, passim; Mr Joshua Forrester, Dr Augusto Zimmermann & Mrs Lorraine Findlay, \textit{Submission 179}, passim; Dr Deagon, private capacity,
7.17 Several Australian cases of concern were raised, although these were typically examples of people attracting controversy for their comments rather than the “cakemaker” examples from other countries. Perhaps the most prominent example, and that most commonly cited in evidence, is that of the Catholic Archbishop of Hobart Julian Porteous, who was subject to a complaint under the Tasmanian *Anti-Discrimination Act 1998* after producing a booklet outlining the Catholic Church’s teaching on marriage for distribution within Catholic schools.\(^{26}\) The complaint was eventually withdrawn, but has been cited frequently in evidence as an example of the conflict between religious freedom and anti-discrimination law, particularly as it combines with differing views on same-sex marriage.\(^{27}\) It is to be noted that Tasmania does not enshrine the right to freedom of religion in the manner that, for example, Victoria does in its *Charter of Human Rights and Responsibilities*.

7.18 In contrast to these concerns, a number of submissions argued that religious freedom is unfairly favoured above the right to non-discrimination and equality by the current marriage and anti-discrimination laws.\(^{28}\) Much of this argument focused on exceptions and exemptions in anti-discrimination laws, which are discussed further below.\(^{29}\)

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\(^{26}\) *Committee Hansard*, Sydney, 6 June 2017, passim. In the United States, the most famous of these “cakemaker” cases, *Masterpiece Cakeshop v Colorado Civil Rights Commission*, is due to be heard by the Supreme Court of the United States on 5 December 2017. The Supreme Court has been asked to determine whether the Colorado anti-discrimination laws violate rights of free speech and free exercise of religion, [https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-111.html](https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-111.html).


\(^{29}\) Note that the Australian Human Rights Commission limited its submission to the law “as it stands at the time of writing”, and consequently did not comment on any religious freedom issues relating to marriage: Australian Human Rights Commission, *Submission 12*, fn 2. It did discuss these issues at some length in its submission to the same-sex marriage exposure draft earlier in 2017: Australian Human Rights Commission, Submission No 72 to the Select Committee on the
7.19 Some submitters also argued that religious freedom is violated by not allowing religious groups to recognise same-sex marriages. Professor Gary Bouma said:

Some [Anglicans] have got the State to support their view and prevent the marriage of same-sex couples for all Australians, not just their own members. But what of my FRB [freedom of religion or belief] since I believe that it is congruent with my faith and theology but am denied my FRB?  

Exceptions and exemptions in anti-discrimination law

7.20 As highlighted by Professor Evans, there are certain contexts in which religious groups may wish to discriminate for a variety of reasons. In some cases this will be relatively straightforward, as in the appointment of clergy. In other cases it will be more controversial, for example for employment in or admission to religious schools, or in the provision of services to which the service provider objects on religious grounds. In either case, there is a need to determine whether a person’s right to non-discrimination should be given priority over the religious freedom of a religious group.

7.21 Professor Evans notes the “highly controversial” nature of this tension, which is growing in Australia, and also the trend of a narrowing of “the scope of exemptions for religious groups” in many countries. These countries are mainly in Europe, but there has been “increasing public debate in Australia over whether the exemptions in Australian discrimination Act should likewise be narrowed”.  

7.22 Some witnesses opposed religious exemptions altogether. For example, the Human Rights Law Centre argued that current permanent exemptions “do not strike the right balance”, stating that “the mere existence of these exceptions operates as a barrier to vulnerable people”. The HRLC submission called existing permanent religious exceptions “unacceptably broad”, saying they may allow for discrimination that is “not reasonable and proportionate”. While supporting the right of religious organisations to

Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Inquiry into the Commonwealth Government’s Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill.

30 Professor Gary Bouma, Submission 186, p. 2.
32 Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, Committee Hansard, Melbourne, 7 June 2017, p. 2. See also Ms Lee Jia-Yi Carnie, Lawyer, Human Rights Law Centre, Committee Hansard, Melbourne, 7 June 2017, p. 10.
organise and conduct affairs closely connected to religious practice and observance… in a manner that accords with their religious beliefs and customs”, this should require an “intimate nexus between belief and conduct”.33

7.23 Further, HRLC stated that justification for a broad religious exemption “materially lessens” when a religious body is providing goods or services “in the public sphere as part of a commercial enterprise”. HRLC supported a general limitations defence, as discussed below.34

7.24 Australian Lawyers for Human Rights had similar concerns about religious exemptions, stating:

Any legislation which impinges upon human rights or provides any exemptions from human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights.35

7.25 ALHR argued that it is “not valid for Christians to have exemptions from Australian laws so as to be able to ‘live out their public faith’ free from legal responsibilities to others”.36

7.26 Professor Gary Bouma also made similar arguments, stating that the demand by religious groups for broad exemptions is:

a clear example of the change in FRB issues from the capacity of individuals to practice their faiths to groups having FRB rights to practice as they see fit including to act in ways that contradict Australian laws.37

7.27 Other witnesses oppose religious exemptions because, it is argued, they place religious freedom in subordination to non-discrimination. The Human Rights Law Alliance and Australian Christian Lobby said that religious freedom is a “plenary” freedom, and “not merely narrowly defined exceptions to a non-discrimination paradigm”.38

7.28 Wilberforce Foundation stated that anti-discrimination acts “reduc[e] the freedom of religion to narrow exemptions from anti-discrimination acts”. In

33 Human Rights Law Centre, Submission 176, pp. 11-12.
34 Human Rights Law Centre, Submission 176, p. 12.
37 Professor Bouma, Submission 186, p. 3.
the context of the *Sex Discrimination Act* particularly, Wilberforce Foundation stated that dealing with the “co-equal” (with non-discrimination) right of religious freedom by way of an exemption, this “necessarily subordinates it to the right to non-discrimination”. Similarly, HRLA and ACL stated that the “feeble system of exemptions and exceptions” have the effect of:

setting non-discrimination up as the paradigm under which human rights claims are to be resolved. As but one of several rights, this [is] an inaccurate representation of human rights principles. The actual paradigm is “human rights” and within it is located each of the rights set out in the ICCPR.

7.29 Mrs Lorraine Finlay commented:

When you are dealing with freedom of religion as an exception, it automatically suggests that it is a right that is not as important as the primary right, which is the antidiscrimination legislation. That is the wrong approach. We would submit that both are equal. They need to be balanced against one another, and anything that presupposes one as being primary is simply an incorrect approach.

**Genuine occupational requirement test**

7.30 In some jurisdictions, anti-discrimination law exemptions contain within them a “genuine occupational requirement” test in the employment context. Equal Opportunity Tasmania submits that it can be appropriate for a religious organisation to require an employee to share the tenets, beliefs, teachings, principles and practices of the organisation if the employee is seeking to “oversee or lead the rites and/or rituals” of the religion. In such a case, a shared faith and shared practices would be a “genuine occupational requirement”. In contrast, a person employed as a “cleaner or gardener” should not be required to share these attributes, as that person’s role does not require these attributes as part of the occupation.

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41 Mrs Finlay, private capacity, *Committee Hansard*, Melbourne, 7 June 2017, p. 26.

42 At the Commonwealth level, see *Fair Work Act 2009* (Cth), ss. 153, 195, 351; *Sex Discrimination Act 1984*, s. 30. At State level, see, for example, *Anti-Discrimination Act 1991* (Qld), s. 25; *Anti-Discrimination Act 1988* (Tas), s. 51.

7.31 This position is contested by some submissions. The Presbyterian Church of Queensland contends that these requirements “risk encroaching upon religious freedom by failing to account for several foundational and distinct attributes unique to religious institutions”. PCQ argues that, similar to a political party, for example, which would not be required to employ a member of an opposing political party, religious institutions may also value a “mission fit” for their employees, regardless of an employee’s role within the organisation. Religious groups, political parties, and other associations “are defined by their unifying attributes, being adherence to a legitimate common philosophy, worldview, culture or cause”.  

7.32 Similarly, the HRLA and ACL expressed concern that religious bodies would be “stripped of their right to employ staff who share their ethos”. This right was called a “right of positive selection” by Sydney University law professor Patrick Parkinson, who said that it “is rather different from discrimination”.  

7.33 Professor Carolyn Evans, while cautioning against a “language of persecution” which is “emotive and exaggerated on both sides”, acknowledged that “as a society we are becoming less religiously literate”. Consequently, at times there is “no real understanding of the way religious groups operate, their ethos and so forth”. This can lead to problems in areas such as genuine occupational tests, although Professor Evans did nuance her comments by noting that some religious bodies employ “tens of thousands of people” and receive “considerable public funds” for doing so, which weakens the argument for allowing too wide an exemption.  

**General Limitations Clause**

7.34 Against this backdrop of concerns around existing exemptions and exceptions, several submissions highlighted the “general limitations clause” an alternative method of balancing religious freedom and non-  

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44 Presbyterian Church of Queensland, Submission 192, pp. 25-27.  

45 Human Rights Law Alliance and Australian Christian Lobby, Submission 156, p. 11. Note that the HRLA and ACL submission specified the Victorian Equal Opportunity Amendment (Religious Exceptions) Bill 2016 (Vic), which had been defeated by the Victorian Upper House in December 2016.  


47 Professor Carolyn Evans, private capacity, Committee Hansard, Melbourne, 7 June 2017, pp. 8-9.
discrimination. This was a key recommendation of the Presbyterian Church of Queensland, and formed part of a recommendation from the Human Rights Law Centre to reform exemptions in anti-discrimination law. The HRLC would replace permanent exemptions with a “general defence of justification” which would enshrine the principles of necessity, reasonableness, proportionality and legitimacy.

7.35 Constitutional law scholars Professor Nicholas Aroney and Professor Patrick Parkinson have proposed a version of a general limitations clause which the ALRC has recommended for further consideration. This clause is worth reproducing in full:

1 A distinction, exclusion, restriction or condition does not constitute discrimination if:
   a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
   b. it is made because of the inherent requirements of the particular position concerned; or
   c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
   d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.

2 The protection, advancement or exercise of another human right protected by the *International Covenant on Civil and Political Rights* is a legitimate objective within the meaning of subsection 1(a).

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48 Presbyterian Church of Queensland, *Submission 192*, p. 36.

49 Human Rights Law Centre, *Submission 176*, p. 12. See also comments by Ms Anna Brown, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, Melbourne, 7 June 2017, p. 19.

50 The ALRC submission to this inquiry noted the support for a general limitations clause as opposed to exemptions: Australian Law Reform Commission, *Submission 358*, p 5. The submission did not include further discussion on this, but Chapter 5 of the ALRC’s Freedoms Report (2012), from which the submission was extracted, contained a detailed consideration of the general limitations clause and recommended that it be considered as an alternative form of protection for religious freedom within anti-discrimination law, as opposed to religious exemptions.
7.36 The ALRC notes that the definition includes a proportionality test, and also clarifies “what is not discrimination”.\textsuperscript{51} Such a definition would be consistent with the UN Human Rights Committee’s comments in General Comment 18: not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.\textsuperscript{52}

7.37 The HRLA and ACL also recommended the “codification of the principle in General Comment 18” within a consolidated anti-discrimination act.\textsuperscript{53}

7.38 Other submissions contained similar proposals, providing suggestions for clauses which could be inserted into anti-discrimination law. Dr Alex Deagon’s suggestions specifically protected “individuals who refuse to express a view or offer goods or services” if doing so would conflict with that individual’s “doctrine and practice of their religion”. Significantly, Dr Deagon’s proposal did not provide an absolute right to refuse services, stating that the individual may not be compelled “unless the refusal directly results in concrete hardship for those who seek the expression or service”.\textsuperscript{54}

7.39 Along a similar line of argument, although specifically with reference to the Sex Discrimination Act, the Wilberforce Foundation proposed an “overriding clause” which would clarify that the Act does not apply to discrimination that is “reasonably necessary” to “act in accordance with” one’s religion. Again, an absolute right is not proposed, and discrimination would be “unlawful and actionable” if the service denied is “not reasonably obtainable elsewhere by the person who has been denied the service”.\textsuperscript{55}

7.40 The Australian Catholic University also supported measures similar to the general limitations clause described.\textsuperscript{56}


\textsuperscript{52} UN Human Rights Committee, General Comment 18, [13].

\textsuperscript{53} Human Rights Law Alliance and Australian Christian Lobby, Submission 156, p. 15.

\textsuperscript{54} Dr Alex Deagon, Submission 9, p. 1.

\textsuperscript{55} Wilberforce Foundation, Submission 115, p. 11.

\textsuperscript{56} Australian Catholic University, Submission 11, p. 10.
Freedom of Religion or Belief and access to abortion

7.41 Another area in which careful balancing of competing rights is required involves access to abortion services. This conflict manifests in two main areas: “exclusion zones” around health service providers, and conscientious objection to abortion by medical practitioners.

7.42 Both of these issues were raised numerous times in hearings and submissions.

Exclusion zones

7.43 Some states have introduced laws creating “exclusion zones” around health service providers, areas in which people may not protest against abortion or in any way impede or intimidate those seeking the services.\(^{57}\)

7.44 ALHR stated that it may be necessary to limit “‘religious’ protests and vigils” in the interests of “protecting the rights of clinic patients and staff”, as well as to avoid public disorder.\(^{58}\) ALHR’s Freedoms Committee Chair Dr Tamsin Clarke stated in Sydney:

> some people might think they have a right to express their religious beliefs against abortion, but it must depend on context. If you are standing outside an abortion clinic, screaming and waving placards and really distressing the women who are going into that clinic, who probably did not want to have to be going in there anyhow, that is an inappropriate exercise of your free speech rights, which is hurting other vulnerable people.\(^{59}\)

7.45 On the other hand, Professor Foster argued that in some cases “opposition to abortion may not even be expressed in polite and respectful ways”. The Tasmanian law prohibits certain behaviour within 150 metres of a clinic. This behaviour includes “besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding” a person, but also extends to interference “in relation to terminations”, which Professor Foster argues

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\(^{57}\) Reproductive Health (Access to Terminations) Act 2013 (Tas), s. 9; Public Health and Wellbeing Act 2008 (Vic), Part 9A.

\(^{58}\) Australian Lawyers for Human Rights, Submission 51, p. 9.

\(^{59}\) Dr Tamsin Clarke, Chair, Freedoms Committee, Australian Lawyers for Human Rights, Committee Hansard, Sydney, 6 June 2017, p. 23.
could prohibit “quietly hand[ing] out leaflets… on the other side of the road”.  

Conscientious objection

7.46 Some states have introduced laws requiring a doctor with a conscientious objection to abortion to refer a patient to another doctor who is known not to object to abortion. The HRLA and ACL argues that this “forc[es] them to facilitate abortions” and is “a grave assault on the person’s conscience”. Professor Iain Benson argues that this treats “the autonomous moral views of the health care worker (doctor, nurse or pharmacist) as irrelevant”.

7.47 There was some discussion on these laws at the Sydney hearing. Dr Michael Casey commented:

it is helpful to remember that [this] is not just a clash of sensibilities or a personal sense of authenticity… We are talking about very difficult issues around questions of right and wrong, true and false, not just a clash of sensibilities.

7.48 Dr Deagon echoed these comments, arguing that it is important that medical professionals, including counsellors, are “not compelled to perform an abortion or recommend an abortion”.

7.49 There was some evidence in support of these provisions. Liberty Victoria made the following comments:

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60 Associate Professor Neil Foster, Submission 7, pp. 88-89.

61 Abortion Law Reform Act 2008 (Vic), s. 8; see also NSW Ministry of Health, Pregnancy – Framework for Terminations in New South Wales Public Health Organisations, 2 July 2014, section 4.2.


63 Professor Iain Benson, Submission 376, p. 15.

64 Dr Michael Casey, Director, PM Glynn Institute, Australian Catholic University, Committee Hansard, Sydney, 6 June 2017, p. 23.

65 Dr Deagon, private capacity, Committee Hansard, Sydney, 6 June 2017, p. 25.

66 Australian Lawyers for Human Rights acknowledged this issue, stating that there is no absolute right to freedom of conscience as that can be used to justify the refusal to provide abortions: Submission 51, p. 5, fn 14. Ms Lee Jia-Yi Carnie also commented that protection of conscientious belief with respect to medical treatment “has always concerned the procedure itself… and it has not related to the characteristics of the person receiving the treatment”. Ms Carnie further added that it would be a “dangerous precedent to set for conscientious belief to be used as a defence to otherwise unlawful discrimination”, although this was in the broader context of non-discrimination laws. See Ms Carnie, Lawyer, Human Rights Law Centre, Committee Hansard, Melbourne, 7 June 2017, p. 12.
Putting a vulnerable woman in distress to the unnecessary and undignified quest for yet another medical appointment is a manifestation of religious belief by the doctor, or the doctor’s employer, which steps well beyond the confines of the devotees of the religion in question...

This raises the question as to whose human rights prevail: the woman’s or the religious doctor’s?

…in a secular democracy religious beliefs, particularly in the context of publicly funded provision of services, should not be privileged over rights such as unbiased and timely access to counselling or medical services.\(^{67}\)

7.50 It is worth noting that those advocating the protection of conscientious objection have commented that there are other ways of achieving the policy aim of ensuring safe access to, and information about, abortion services. Professor Michael Quinlan, Dean of Law at the University of Notre Dame, stated at the Sydney hearing:

> if the intention is to ensure that people have sufficient information so that they can obtain that service, then there are ways in which government could achieve that objective without putting someone into an impossible situation of conscientious objection... The state... can ensure whether there is any absence of that information... without forcing someone to act against their conscience. So legislation like that would help to solve the problem.\(^{68}\)

7.51 Professor Benson echoed that point:

on whom is the onus to provide services?... If the state wishes people to have access to services, there is no reason why that burden cannot be on the medical association... in Canada, we have a lawyers referral number. If you want to seek a service from a lawyer you call the general number and the law society provides the list of practitioners in that area of law. The same thing could be done easily in medicine.\(^{69}\)

Sub-Committee Comment

7.52 The right to freedom of religion or belief interacts with other fundamental human rights. While rights are often harmoniously aligned, their interaction

\(^{67}\) Liberty Victoria, Submission 227, pp. 8-9.

\(^{68}\) Professor Michael Quinlan, Dean, Professor of Law, University of Notre Dame Australia, Committee Hansard, Sydney, 6 June 2017, pp. 35-36.

\(^{69}\) Professor Iain Benson, private capacity, Sydney, 6 June 2017, p. 36.
can create tension in some cases. Protecting the right is most challenging when these tensions arise.

7.53 In contemporary society, this is most apparent when the right to freedom of religion or belief and the rights to equality and non-discrimination come into conflict. The desire of religious individuals to express and act on their religious beliefs, and the desire of religious organisations to maintain autonomy over their affairs, can compete with the desires of people not to be treated differently or unequally. Striking the right balance between these competing rights is a challenging and delicate task.

7.54 There was a great deal of evidence which addressed the balance between non-discrimination laws and religious freedom. Various opinions were put forth on the effectiveness and appropriateness of religious exemptions in non-discrimination laws. Some believe that religious exemptions give unfair weight to religious freedom over equality before the law. Others believe that religious freedom is unjustly subordinated to non-discrimination by religious exemptions. Different concerns were raised and a number of solutions to these concerns were suggested.

7.55 Other contemporary societal challenges were also raised in evidence. The Sub-Committee notes the difficulty and delicacy in determining how best to strike an appropriate balance, acknowledging the many varying arguments received in submissions and discussed at the public hearings. The Sub-Committee will continue to examine this issue carefully throughout the remainder of the inquiry.

The Hon Mr Kevin Andrews MP
Chairman
Human Rights Sub-Committee
30 November 2017

Senator David Fawcett
Chairman
Joint Standing Committee on Foreign Affairs, Defence and Trade
30 November 2017
A. Bibliography

Articles/Books


Parkinson, Patrick, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 16(2) *Australian Journal of Human Rights* 83


Reports


Cases

*Adelaide Company of Jehovah’s Witness Incorporated v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116

*Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013)

*Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45

*Bull v Hall* [2013] UKSC 73 (27 November 2013)

*Burke v Tralaggan* [1986] EOC 92-161

*Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525

*Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284

*Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100

*Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014)

*Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120

*Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* (Anti-Discrimination) [2010] VCAT 1613 (8 October 2010)

*Coco v The Queen* (1994) 179 CLR 427

*Corneloup v Launceston City Council* [2016] FCA 974 (19 August 2016)

*Fraser v Walker* [2015] VCC 1911 (19 November 2015)
Grace Bible Church Inc v Reedman (1984) 36 SASR 376
Kruger v The Commonwealth (1997) 190 CLR 1
Krygger v Williams (1912) 15 CLR 366
Lange v Australian Broadcasting Corporation [1997] HCA 25
Monis v The Queen [2013] HCA 4 (27 February 2013)
The Most Reverend Dr George Pell Archbishop of Melbourne v The Council of Trustees of The National Gallery of Victoria (1998) 2 VR 391
McIntosh, Ahmad v TAFE Tasmania [2003] TASADT 14 (10 November 2003)
Nationwide News Pty Ltd v Wills [1992] HCA 46
OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155 (6 July 2010)
Rutherford & Ors v Hume CC [2014] VCAT 786
Tajjour v New South Wales [2014] HCA 35; (2014) 254 CLR 508
Walsh v St Vincent de Paul Society Queensland (No 2) [2008] QADT 32

International Case Law

Hasan and Chaush v Bulgaria, (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)
Handyside v United Kingdom (1976) 24 Eur Court HR (ser A)

Legislation

Federal
Age Discrimination Act 2004
Australian Constitution
Australian Human Rights Commission Act 1986
Disability Discrimination Act 1992
Fair Work Act 2009
Health Act 1993
Human Rights and Equal Opportunity Commission Act 1986
Human Rights (Parliamentary Scrutiny) Act 2011
Race Discrimination Act 1975
Sex Discrimination Act 1984

Bills
Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017
Marriage Legislation Amendment Bill 2015
Marriage Legislation Amendment Bill 2016
Marriage Legislation Amendment Bill 2016 [No. 2]
Social Services Legislation Amendment (No Jab, No Pay) Bill 2015

State/Territory
Abortion Law Reform Act 2008 (Vic)
Anti-Discrimination Act 1991 (Qld)
Anti-Discrimination Act 1977 (NSW)
Anti-Discrimination Act (NT)
Anti-Discrimination Act 1998 (Tas)
Charter of Human Rights and Responsibilities Act 2006 (Vic)
Constitution Act 1934 (Tas)
Crimes Act 1900 (ACT)
Crimes Act 1900 (NSW)
Criminal Code Act 1899 (Qld)
Criminal Code Act 1924 (Tas)
Criminal Code Act Compilation Act 1913 (WA)
Discrimination Act 1991 (ACT)
Equal Opportunity Act 1984 (SA)
Equal Opportunity Act 2010 (Vic)
Human Rights Act 2004 (ACT)
Public Health and Wellbeing Act 2008 (Vic)
BIBLIOGRAPHY

Racial and Religious Tolerance Act 2001 (Vic)
Reproductive Health (Access to Terminations) Act 2013 (Tas)

Regulations


Other

Australian Senate Standing Orders

International Law

Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (entry into force 2 September 1990, in accordance with article 49)


Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49)

American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights

UN Human Rights Committee Commentary


Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102nd sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017)

Human Rights Committee, General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20), 19th sess (29 July 1983)


Human Rights Committee, *General Comment 34: Freedoms of opinion and expression (Art. 19)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011)

**Other**


Parliamentary Joint Committee on Human Rights, Commonwealth, Guidance No. 1: Drafting statements of compatibility (2014)


**Public hearing transcripts**

Joint Standing Committee on Foreign Affairs, Defence and Trade, *Committee Hansard*, Sydney, 6 June 2017

Joint Standing Committee on Foreign Affairs, Defence and Trade, *Committee Hansard*, Melbourne, 7 June 2017

Joint Standing Committee on Foreign Affairs, Defence and Trade, *Proof Committee Hansard*, Canberra, 27 October 2017
B. Submissions

List of submissions utilized in this interim report

7 Associate Professor Neil Foster
8 The Hon Mr Shane Rattenbury MLA, ACT Government
9 Dr Alex Deagon
10 Australian Catholic Bishops Conference
12 Australian Human Rights Commission
47 Civil Liberties Australia
51 Australian Lawyers for Human Rights
115 Wilberforce Foundation
140 Dr Paul Taylor
148 Professor Nicholas Aroney and Mr Mark Fowler
156 Human Rights Law Alliance and Australian Christian Lobby
157 Secular Party of Australia
176 Human Rights Law Centre
179 Mr Joshua Forrester, Dr Augusto Zimmermann & Ms Lorraine Finlay
181 C Walsh
183 A Lawrie
186 Professor Gary Bouma
191 Islamic Council of Victoria
192 Presbyterian Church of Queensland
193  Attorney-General's Department
309  G Allshorn
328  The Hon Mr Robin Scott MP, Minister for Multicultural Affairs, Victorian Government
358  Australian Law Reform Commission
374  Hon Mr Ray Williams
375  Tasmanian Government
376  Prof Iain Benson
C. Public hearings

Tuesday, 6 June 2017

Macquarie Room, Sydney

*Private Capacity*
- Prof George Williams

*Australian Lawyers for Human Rights*
- Dr Tamsin Clarke

*Private Capacity*
- Dr Luke Beck

*Private Capacity*
- Dr Alex Deagon

*Private Capacity*
- Dr Paul Taylor

*Australian Catholic University*
- Dr Michael Casey, Director, PM Glynn Institute

*Wilberforce Foundation*
- Mr Christopher Brohier

*The University of Notre Dame Australia*
- Professor Michael Quinlan
Human Rights Law Alliance

- Mr Martyn Iles

Private Capacity

- Associate Professor Neil Foster

The University of Notre Dame Australia

- Professor Iain Benson

Wednesday, 7 June 2017

55 St Andrews Place, East Melbourne

Human Rights Law Centre

- Ms Anna Brown, Director of Legal Advocacy
- Ms Lee Jia-Yi Carnie, Lawyer

Private capacity

- Professor Carolyn Evans

Presbyterian Church of Queensland

- Mr Mark Fowler, Legal Representative

Private capacity

- Associate Professor Patrick Quirk

Private capacity

- Dr Augusto Zimmermann

Private capacity

- Mr Joshua Forrester

Private capacity

- Ms Lorraine Finlay

Private capacity

- Professor Gary Bouma

Religions for Peace Australia

- Professor Desmond Cahill, Chair
Friday, 27 October 2017

Committee Room 1R1, Parliament House, Canberra

*Australian Human Rights Commission - via Skype*

- Mr Daniel Nellor, Adviser to the Human Rights Commissioner
- Mr Edward Santow, Human Rights Commissioner

*The Australian Law Reform Commission - via Skype*

- Mr Robert Cornall AO, Acting President
- Mr Matthew Roger, Principal Legal Officer

*ACT Justice and Community Safety Directorate*

- Mr Sean Costello, Director, Civil Law, Legislation, Policy and Programs
- Ms Julie Field, Executive Director, Legislation, Policy and Programs

*Attorney-General’s Department*

- Ms Autumn O'Keefe, Acting Assistant Secretary, Civil Law Unit, Civil Justice and Corporate Group
- Mr John Reid, Acting Deputy Secretary, Civil Justice and Corporate Group