



Australian
Human Rights
Commission

Religious Freedom Roundtable – Issues Paper

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Table of Contents

1	Introduction.....	3
2	Rights and Responsibilities consultation	3
3	The right to freedom of religion and its limits	5
4	What are the key issues for religious communities in relation to contemporary Australian public policy?	5
4.1	<i>Government laws and regulations that respect the right to religious freedom</i>	6
4.2	<i>Government laws and regulations that limit the right to religious freedom</i>	7
4.3	<i>Preserving religious freedom when an organisation receives taxpayers' money to provide a public service.....</i>	8
4.4	<i>Balancing the right to religious freedom with equality before the law – what are the areas of shared agreement?.....</i>	9
4.5	<i>Developing mechanisms to support religious inclusion and social cohesion</i>	10
5	Outcome	10

1 Introduction

Freedom of religion, conscience and belief (“religious freedom”) is fundamental to the Australian way of life and liberal democratic values.

The Australian Constitution recognises freedom of religion in the following terms:

Section 116: 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.

This provision was designed to restrain the federal Parliament from passing certain kinds of laws, including laws that would impose a particular form of religious belief or observance on people in Australia.

Notably, this constitutional provision does not operate as a free-standing individual right to freedom of religion and provides individuals with limited avenues for legal protection.¹

There is limited protection of religious freedom in federal and state legislation. For example,

- discrimination law in most Australian jurisdictions prohibits discrimination on the grounds of religion in areas such as education, employment and access to good and services
- exemptions to laws that prohibit discrimination on the grounds of age, gender and sexual orientation are given to religious bodies in particular circumstances
- state-based religious vilification or hate laws can protect freedom of religion by allowing people to exercise their religion free of fear of threats, intimidation or hostility.²

Religious freedom is primarily preserved by the common law principle that all is legal unless it is specially made illegal.

Historically, Australia’s population overwhelming identified as some denomination of Christianity. Approximately 61 per cent of Australians still identify as Christian.³ However, Australia also has an increasingly diverse religious population resulting from immigration, as well as a rising number of Australians identifying as having no religion.⁴ This diversity provides both opportunities and challenges in terms of advancing religious freedom in a pluralist society.

2 Rights and Responsibilities consultation

At the commencement of his term, the Human Rights Commissioner, Tim Wilson, conducted a national consultation on rights and responsibilities.⁵ The importance of, and threats to, religious freedom was consistently raised throughout these consultations.

Religious communities expressed differing views, including that:

- the freedom to practice their faith, maintain independent religious communities and participate in the public square was diminishing
- secular objectives were being imposed on their faith
- the capacity for Australia to be equally a multicultural society *and* a multi-faith society was not being fully realised.

There were significant differences in opinion among the Australian community about how best to promote and advance religious freedom while also respecting other important human rights.

From the consultations, the predominant attitude held by Australians was that they did not see religious freedom as a significant issue because they felt it was sufficiently protected and respected. However, there were diverse attitudes about how current laws and practice affect religious freedom.

Nearly every person saw religious freedom as an important human right. But there were different views about the extent that the manifestation of religious freedom was justified.

Some clearly felt that religious freedom was overly protected in law, particularly when it intersected with anti-discrimination law. Many thought that individuals were entitled to their faith, but their capacity to practice it should not extend beyond their private spiritual relationship and formal worship.

Many people from faith communities felt that religious freedom was being marginalised and deprioritised, and there was a need to reassert its importance.

These opposing views reflect that Australians approach the issue of religious freedom from very different perspectives. As a consequence, the extent that laws can protect religious freedom or promote the principle of equality is often misrepresented as a zero-sum argument: either religious freedom wins, or secularism wins. This approach is neither helpful nor accurate.

To address these issues Commissioner Wilson recommended the establishment of a Religious Freedom Roundtable. This Roundtable is an opportunity for representatives of religious communities to have a respectful and trusting discussion about how religious freedom can be advanced in contemporary Australia while recognising the pluralistic nature of Australian society.

To inform the Roundtable discussions, Commissioner Wilson conducted a public submissions process during September 2015. More than 90 submissions have been received and considered by the Commissioner as part of drafting this Issues Paper.⁶

3 The right to freedom of religion and its limits

The right to religious freedom encompasses the beliefs of all religions, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.

The internal/private dimension of the right – the freedom to adopt or hold a belief – is absolute.⁷ However, the external/public dimension – the freedom to manifest that belief in worship, observance, practice or teaching – may be limited by law when deemed necessary to protect the public safety, order, health or morals, or the fundamental rights and freedoms of others.⁸ Notably, any measure that limits the human right to religious freedom must be ‘necessary, reasonable and proportionate and ... [have] adequate safeguards against abuse’.⁹

Religious freedom is integrally linked to the enjoyment of other human rights. It interacts with other fundamental freedoms including freedoms of thought, conscience, speech and association, as well as property rights.

Religious freedom also includes the freedom to not have a religious faith.

Religious freedom is not unlimited. Like other human rights it must be exercised with a mindfulness of the rights of others, and has the potential to intersect and at times compete with other human rights such as equality before the law and the freedoms of those without faith. The role of law should be to seek accommodation of competing rights and enlarge the freedom for all. Care must be taken to balance rights so that neither religious freedom nor any right with which it may intersect is granted an imbalanced privileging so as to permanently impair the enjoyment of the other.

Human rights are underpinned by the assumption of the inherent equality and dignity of all individuals. Consequently, the right to religious freedom must accommodate the right that all people are equal before the law and are entitled to the equal protection of the law without any discrimination. This means that people must be treated equally by law and government irrespective of their faith, age, disability, gender, race, sexual orientation, gender identity, intersex status or other irrelevant personal attribute.

4 What are the key issues for religious communities in relation to contemporary Australian public policy?

Balancing the rights to religious freedom and equality before the law raises a number of issues for religious communities in contemporary Australian public policy debates. This paper identifies the following key issues:

- Government laws and regulations that respect the right to religious freedom.
- Government laws and regulations that limit the right to religious freedom.
- Preserving religious freedom when an organisation receives taxpayers’ money to provide a public service.
- Balancing the right to religious freedom with equality before the law – what are the areas of shared agreement?

- Developing mechanisms to support religious inclusion and social cohesion.

4.1 Government laws and regulations that respect the right to religious freedom

Each State and Territory, with the exception of New South Wales and South Australia, contains a prohibition in its anti-discrimination laws against discrimination on the grounds of religious belief.¹⁰ New South Wales prohibits discrimination on the grounds of ethno-religious origin.¹¹ South Australia prohibits discrimination on the grounds of religious appearance or dress.¹² These laws protect individuals against discrimination in certain areas of public life such as education, employment and the provision of goods and services.

Each of Victoria and the Australian Capital Territory has enacted statutory charters of rights which include freedom of religion.¹³ The charters require statements of compatibility to be prepared in respect of proposed legislation which sets out whether the law is compatible with human rights, including freedom of religion. They also allow the Supreme Court of the relevant jurisdiction to make a declaration that an existing law cannot be interpreted consistently with a human right. In those circumstances, the declaration is provided to the responsible Minister for him or her to consider whether to amend the legislation.

At the federal level, a person who suffers discrimination in employment on the basis of religion can make a complaint to the Australian Human Rights Commission. The Commission has the function of inquiring into such complaints and attempting to reach a settlement of such complaints through conciliation.¹⁴ Similarly, the Commission has the function of inquiring into complaints about acts or practices by or on behalf of the Commonwealth or under a Commonwealth Act which may be inconsistent with Articles 18 (freedom of religion) or 26 (discrimination, eg on the basis of religion) of the *International Covenant on Civil and Political Rights* or the *Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*.¹⁵ If complaints cannot be conciliated, the Commission may inquire into the acts or practices and prepare a report to the Attorney-General if it finds that there has been a breach. Such report may contain recommendations to prevent a repetition of the act or practice or to remedy a breach of rights but these recommendations are not binding.

As in Victoria and the Australian Capital Territory, the federal Parliament must also prepare statements of compatibility in respect of proposed legislation which set out whether the law is compatible with human rights, including freedom of religion.¹⁶

Discussion points:

- Is there a need for legal protections of religious freedom in Australia?
- Do existing laws adequately protect religious freedom?
- To what extent should laws accommodate religious freedom to ensure there is no discrimination against people because of their faith?

4.2 Government laws and regulations that limit the right to religious freedom

Government laws and regulations that seek to protect individual rights sometimes place limitations on the exercise of religious freedom.

Government restrains religious freedom, primarily through federal and state anti-discrimination laws that seek to ensure equality. These laws deal with discrimination between government and individuals, as well as between individuals, and between individuals and institutions. These laws aim to balance:

- the right of religious individuals and communities to practice their religion, against
- the prohibition of discrimination on the basis of personal attributes such as age, gender or sexual orientation.

The question for some religious organisations is how to maintain and consistently practice their religious beliefs, especially when these conflict with the rights of individuals to be treated equally before the law. This dialogue becomes more complex when government finances religious institutions (schools, hospitals) to deliver a public service. This can lead to tension about the extent to which religious organisations should be subject to anti-discrimination laws and the scope of religious practices that should be exempt from these laws.

Religious organisations generally seek exemptions from anti-discrimination laws in relation to:

- the employment and membership decisions of a religious organisation
- the employment and service-related decisions of bodies that are connected to religious organisations (eg schools, health bodies, employment agencies and charitable or social welfare bodies) or employers with a religious ethos.¹⁷

Examples of exemptions from federal laws include:

- The *Sex Discrimination Act 1984* (Cth) prohibits discrimination on the grounds of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding but provides exemptions for 'religious bodies' and 'educational institutions established for religious purposes'.¹⁸
- The *Age Discrimination Act 2004* (Cth) prohibits discrimination on the grounds of a person's age but provides exemptions for 'religious bodies'.¹⁹
- The *Fair Work Act 2009* (Cth) prohibits adverse action against employees on a broad range of grounds but includes exemptions for action taken against staff of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, if the action was taken in good faith and to avoid injury to the religious 'susceptibilities' of adherents of that religion.²⁰

Discussion points:

- What laws should be reviewed due to their adverse impact on religious freedom?
- Are the existing religious exemptions appropriate?
- How should the interaction of religious practice and anti-discrimination protections be addressed? For example,
 - are exemptions processes the best option?
 - is the religious ‘doctrines, tenets, beliefs or teachings’ test the best approach?
- What is the role of accommodating provisions in law to stop people being compelled to act against their conscience?
- Are there alternatives to the design of existing laws that focus on ‘exceptions’ to protect religious freedom?
- How do laws regulating the rights to freedom of speech and association impact on religious freedom?

4.3 *Preserving religious freedom when an organisation receives taxpayers’ money to provide a public service*

Religious organisations play a key role in the delivery of health, education and social welfare services in Australia at all stages of the life cycle. Some of these services are funded by government.

When religious organisations are funded by taxpayers, there is a question that arises as to the extent to which it is legitimate for them to limit their activities or implement them strictly in accordance with their religious beliefs. Some issues that arise are whether a religious organisation receiving taxpayer funding to deliver services should be able to:

- only employ staff who adhere to the religious beliefs of the organisation
- preference the provision of services to people of its religious faith
- provide these services in a manner that adheres to its religious doctrines, tenets, beliefs and teachings
- select clients of services that hold their faith, or act consistent with the tenets of their faith.

Discussion points:

- When religious organisations receive taxpayer funding to provide services, should they also be able to claim exemption from anti-discrimination laws?

- Should religious institutions that receive taxpayer funding be able to practice positive discrimination in:
 - the client base (students/patients/other) who are of the same religious faith?
 - the employment of staff to deliver their client base (teachers/health professionals/other) services?
- Are there comparable examples of bodies that receive taxpayers' money that may justify exemptions from anti-discrimination law outside of a religious context, such as a secular organisation not being required to hire an employee who disagrees with their mission or purpose?
- At what stage does a potential client's vulnerability place their needs ahead of another's religious freedom?
- Should the availability of other services, such as in a rural or remote setting, be taken into account in balancing the extent to which religious organisations can exercise their beliefs?

4.4 *Balancing the right to religious freedom with equality before the law – what are the areas of shared agreement?*

The question is what are the areas of shared agreement within contemporary Australian public policy that balance the right to religious freedom and equality before the law? As Harrison and Parkinson state, public policy should seek to:

ensure that different values and beliefs around personal morality and religious faith are respected, while maintaining the most important aspect of the principle of non-discrimination – that in our shared communal life as a society, differences in race, gender, sexual orientation, and other personal attributes are not grounds for exclusion.²¹

Harrison and Parkinson argue that non-discrimination norms ought to operate in the 'commons' in which members of the community come together in a shared existence, and where access and participation rights need to be protected; but that beyond the commons different groups ought to be able to maintain their identity and different beliefs on issues such as sexual practice through, where relevant, their staffing, membership or service provision policies.²²

Discussion points:

- What are the areas of public policy and business activities where religious organisations should not discriminate in a way that impairs the principle of equality?
- Are there examples where Australians are discriminated against because of their religion, or because they seek to act in a way that is consistent with their faith or conscience?

- How reasonable is it for an individual's private religion to be accommodated in a public environment?
- To what extent is it reasonable for an individual's private religion to inform the way they operate in the marketplace or as a goods and services provider?

4.5 *Developing mechanisms to support religious inclusion and social cohesion*

There are existing mechanisms, such as interfaith dialogue processes, that seek to build relationships between religious organisations and support religious inclusion and social cohesion. Mechanisms need to:

- enhance respect for the partial, or central, role of religion as motivation for participation in life
- appropriately accommodate religious practice in all aspects of life
- enable the full participation of religious individuals and communities in civil life, whether motivated by faith, or not
- ensure religious individuals or communities are not discriminated against or maligned because of their faith.

Discussion points:

- What mechanisms currently exist that provide constructive and inclusive engagement?
- What opportunities are there for the outcomes from the Religious Freedom Roundtable to complement these mechanisms?
- Are there any themes or issues that should be addressed by the Religious Freedom Roundtable that have not been raised in this Issues Paper?

5 Outcome

The Religious Freedom Roundtable will aim to identify next steps and future processes to advance religious freedom as part of a better respect for the rights and freedoms of all Australians.

A likely conclusion of the Religious Freedom Roundtable will be to establish guiding principles to direct future discussions on the issues raised, and working parties to seek to address these issues.

¹ The High Court of Australia has generally adopted a narrow view of the scope of section 116. For example, it held that a law providing for financial aid to the educational activities of church schools was not a law for establishing a religion, even though the law might indirectly assist the practice of religion, and accordingly, the law was not in breach of section 116 (*Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559).

² C Evans, *Legal Aspects of the Protection of Religious Freedom in Australia*, Centre for Comparative Constitutional Studies, Melbourne Law School (June 2009), pp 6-8.

³ Australian Bureau of Statistics, *Reflecting a Nation – stories from the 2011 census, 2012-2013* (2012). At <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013> (viewed 3 September 2015).

⁴ Australian Multicultural Council, *Interfaith and Social Cohesion in Australia: looking to the future* (June 2014), pp 6-9.

⁵ T Wilson, Human Rights Commissioner, *Rights and Responsibilities Consultation Report*, Australian Human Rights Commission (2015). At <http://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/rights-responsibilities-2014> (viewed 3 September 2015).

⁶ This Issues Paper is also informed by other recent interfaith consultation processes including the Australian Multicultural Council, *Interfaith and Social Cohesion in Australia: looking to the future* (June 2014); and G Bouma, D Cahill, H Dellal and A Zwartz, *Freedom of Religion and Belief in 21st Century Australia*, Australian Human Rights Commission (2011).

⁷ 'Absolute' human rights means they cannot be limited for any reason.

⁸ The right to freedom of thought, conscience and religion is set out in Article 18 of the *International Covenant on Civil and Political Rights*; Article 5(d)(vii) of the *International Convention on the Elimination of All Forms of Racial Discrimination*; and Article 14 of the *Convention on the Rights of the Child*.

⁹ Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, Commonwealth of Australia (2014), p 8.

¹⁰ *Discrimination Act 1991* (ACT), s 7(1)(i); *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.

¹¹ *Anti-Discrimination Act 1977* (NSW), s 4 and 7.

¹² *Equal Opportunity Act 1984* (SA), s 85T(1)(f).

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 14; *Human Rights Act 2004* (ACT), s 14.

¹⁴ *Australian Human Rights Commission Act 1986* (Cth), ss 3 (definition of 'discrimination') and 31.

These functions are conferred on the Commission in pursuance of Australia's international obligations under International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958.

¹⁵ *Australian Human Rights Commission Act 1986* (Cth), ss 3 (definition of 'human rights'), 11(1)(f) and 47; *Human Rights and Equal Opportunity Commission Act 1986 – Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, 8 February 1993.

¹⁶ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

¹⁷ J Harrison and P Parkinson, 'Freedom Beyond the Commons: managing the tension between faith and equality in a multicultural society' (2015) 40(2) *Monash University Law Review* 413, 428.

¹⁸ *Sex Discrimination Act 1984* (Cth), ss 37 and 38.

¹⁹ *Age Discrimination Act 2004* (Cth), s 35.

²⁰ *Fair Work Act 2009* (Cth), s 351(2).

²¹ J Harrison and P Parkinson, 'Freedom Beyond the Commons: managing the tension between faith and equality in a multicultural society' (2015) 40(2) *Monash University Law Review* 413, 414.

²² J Harrison and P Parkinson, 'Freedom Beyond the Commons: managing the tension between faith and equality in a multicultural society' (2015) 40(2) *Monash University Law Review* 413.