

Freedom of Religion and Belief in a Multicultural Democracy: an inherent contradiction or an achievable human right?

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Abstract

Article 18 of both the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) outline freedoms of religion, conscience and belief as fundamental to the whole framework of human rights. However, of all human rights, those outlined so clearly and confidently in article 18 and which seem so simple at face value, they are perhaps the most complex and contested.

The Australian Human Rights Commission has, since mid 2007, been undertaking with its research partners the most comprehensive national analysis of freedom of religion and belief ever undertaken in Australia. This research has highlighted a number of important issues. For example, it has demonstrated the concerns that some groups and some individuals express when there is a public discourse about the role of faith in peoples lives, public and private; it has exposed inconsistencies in existing laws and policies; and it has encouraged debate about essentially philosophical issues relating to conflicts between private views and public responsibility, and between universal values and particular moral dilemmas (for example, when does speaking one's own truth represent the vilification of another person or their beliefs?)

This paper will, firstly, describe the background to the project, why the research was considered worthy of undertaking and what it hopes to achieve. It will then look briefly at the international treaties and analyse what they mean and how they can be interpreted, especially given the various limited guarantees of human rights that exist in Australia. Finally, the bulk of the paper will describe the major concerns that have been raised about these human rights principles in the research consultations.

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The compatibility of religious freedom with human rights is the subject of the most comprehensive study ever undertaken in Australia in this area, it hopes to help gain a clearer understanding about what people think of these issues at the beginning of the 21st century. The research, funded by the Australian Human Rights Commission under a Commonwealth government community cohesion initiative¹, is not due to be published until 2010, however, as the research project has progressed there have emerged important issues that are worthy of analysis. This paper explains how and why the Commission is conducting this research, some of what has been discovered, some of the ethical issues that have arisen and their relation to both Australian policy and law, as well as their wider relevance to international debates around religion, peace-building and inter-cultural dialogue.

Why research freedom of religion and belief in Australia?

Trends in religious affiliation reveal a complex and evolving picture in Australian society. In the early 20th century 96.9% of the population were Christians, with Anglicans the largest faith. As the century progressed, so did a decline in Anglicanism and an increase in Catholicism: a competition for an ever-decreasing pool of those who stated they had either Christian or religious beliefs.² By the time of the 2006 Census direct affiliation with Christianity had dropped by approximately one third, to 63.9%, and almost one in five Australians claimed to have no religion (18.7%). Of those who did claim to have a religion, the vast majority continue to be Christian, although there are small and rapidly increasing communities of different faiths. Buddhism is the largest of these (2.1%), followed by Islam (1.7%) and Hindus (0.7%).³

The decline in religious affiliation is normally measured by attendance at a place of worship. The data reflects these shrinking attendance rates, particularly of churches since the Second World War. However, as Bouma has noted, this trend is seen across a range of voluntary community activities so it is not unique to churches⁴ and, while some of those that focus on sharing the Eucharist (such as Catholics and Anglicans) have seen sharp declines and an ageing of their congregations, this is not the case of the Evangelical churches which, in recent years, have seen their numbers rapidly increase especially with younger members.

However, as Bouma also points out, the statistical declines seen in the Census tell only part of a story. While secularism may, generally, be increasing private spirituality or a sense of sacredness is probably not shrinking. What tends to be in decline is 'formal' religion, or institutionalised faith. In the (contentiously described) post-modern world religion is moving away from public into more private domains. Furthermore, the notion that secularism is the same as anti-religious is inaccurate: the secular state is not necessarily one without religious or spiritual beliefs and practices.⁵

However, given this may seem little more than marginal demographic shifts in preference around religious affiliation in contemporary Australia, why is this important, and why conduct a major piece of national research around faith? There are both local and international reasons to explore current phenomena about religious affiliations. As was noted in a major Australian report released in 2004:

*"...it is very apparent, certainly for the several decades ahead, that religion and faith are not going to drift away into a privatised world as many atheists and agnostics had predicted. In fact, one of the major features of twentieth century history was the enduring stability of religion and its institutions.."*⁶

This reality has just been restated in a new book by Micklethwait and Wooldridge which explores the global rise in faiths and contests the claims of, particularly European, secularists:

*"... the American model... is spreading around the world: religion and modernity are going hand in hand, not just in China but throughout much of Asia, Africa, Arabia and Latin America. It is not just that religion is thriving in many modernizing countries; it is also that religion is succeeding in harnessing the tools of modernity to propagate its message. The very things that were supposed to destroy religion – democracy and markets, technology and reason – are combining to make it stronger."*⁷

In a globalised, integrated, inter-dependent and mobile world religion is not something that anybody, religious or irreligious, can escape. The presence of the religious, or spiritual, in both public and private lives of those living in developed and developing economies is real and persistent. This reality should be understood by any person who is concerned with international affairs, peace-building, civil society and the consequences of public policy: all these issues, for good or ill, will inevitably and substantially be influenced by the persistence of religious belief.

These facts pose important questions for governments everywhere to ponder. What is the nature of the intersections between the secular and the religious, between politics and belief, between the public and the private, are these even reasonable questions to ask at all? (many people of faith argue that they are not). Furthermore, how, if at all, should governments as law-makers understand and respond to these intersections? Religion is often presented in the media as a powerful force for harm and instability. Like political ideology, so it can. But religion can also be a powerful force for peace-building and harmony.⁸ At the broadest level, the challenge must be (globally) to harness and promote the later, rather than to exploit or attempt to repress behaviours that are related to the former.

The Australian Human Rights Commission has previously, conducted research into freedom of religion and belief. However, although relatively recent (*Article 18* was published in 1998) this study indirectly demonstrates that the subject is both profound and widespread. So much so that, while it contains important information, *Article 18* does not discuss many of the issues within the global and transformative reality of contemporary faith and its related politics.⁹

The next important report released by an Australian government agency was *Religion, Cultural Diversity and Safeguarding Australia*, which was commissioned by the then Department of Immigration and Multicultural Affairs and published six years after *Article 18*. For two reports which may seem so closely related thematically, they are radically different. Within such a short space of time the later report highlights the urgency and importance of engaging with the persistence of cultural pluralism, notions of civic responsibility and an increase in religious ideology in an era of global terrorist networks many of which purport to be faith-based. On the other hand, the older report was a more leisurely survey of rights and practices associated with such issues as autopsies, circumcision, burials, marriages, family law and the like.

The current research, in a sense, attempts to build upon and bring up-to-date both earlier reports and to also incorporate the views of those groups that represent 'belief' generally, including unbelief, not just religion.¹⁰ Far more comprehensive, the study has received well over two thousand submissions from both private individuals and institutions. Group consultations, and face-to-face meetings with key informants, have lasted for months, numbered in the hundreds and have been conducted across the country. As well as the main report, a series of supplementary papers have also been commissioned that will explore related issues, *inter alia*, freedom of religion and belief and the media; social and emotional well-being; international law; Australian law; Indigenous spirituality; the arts; and gender issues.¹¹

Despite the project being announced by the former Attorney-General, Philip Ruddock, in June 2007 at an Australian Partnership of Religious Organisations symposium in Sydney, there has been confusion about this project, especially within the context of the Rudd government's election commitment to hold a national consultation on human rights protections. Many submissions to the Commission mistakenly connected the two and have been critical. The strength of opinion and feeling expressed in a large number of the submissions received, is evidence of the continuing importance that religion and belief play in the lives of many Australians.

*The international treaties and their application in Australia*¹²

There are a number of international treaties that are relevant to freedom of religion and belief in Australia, the more important are:

- the *International Convention on the Elimination of All Forms of Racial Discrimination*, 1966 (ICERD)

- the *International Covenant on Civil and Political Rights*, 1966 (ICCPR), and
- the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 1981 (the Religion Declaration).

Some of the key articles within ICCPR, the Religion Declaration, but also the *Universal Declaration of Human Rights*, and the *International Covenant on Economic, Social and Cultural Rights* (1966) are included in the appendix to this paper since they are frequently cited in submissions relating to the freedom of religion and belief consultations – although they are variously used to argue that existing laws are either adequate, inadequate, or require amendments.

Australia ratified ICERD in September 1975 and implemented its obligations immediately through the Commonwealth *Racial Discrimination Act* (RDA).¹³ The central prohibition against racial discrimination is contained in section 9(1) of this Act which provides for an unlawful act as follows:

"...any act involving a 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 any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."

As well as this general prohibition the RDA applies to businesses of all sizes, schools, local governments, state, territory and Commonwealth government agencies, and individuals. It makes racial discrimination unlawful in a range of areas such as employment, housing and accommodation, education and the provision of goods and services, access to facilities meant for use by the public, advertising, and trade union membership.

The RDA also prohibits both direct and indirect discrimination. An example of direct discrimination would be a refusal to serve a person of a particular race at a hotel. Indirect discrimination refers to conditions that unreasonably disadvantage people even if they are applied equally and appear to be equal. An example of indirect discrimination would be a company that requires night stackers to have high levels of English language competency, even though this is not required to be used when undertaking their duties as employees. There are, however, situations where this kind of discrimination might be reasonable if it has a demonstrable purpose. For example, if that same business had a position taking telephone orders then it might not be discriminatory to require that the employee have good English language skills.

Despite its broad application it is not against the law to make racial distinctions in private life (for example, an individual's choice of friends, or who they invite into their homes). The RDA also permits racial distinctions to be made if they are 'special measures', or those measures offering positive discrimination for racial groups who have been disadvantaged and who suffer from social and economic exclusion and require assistance to better enjoy their human rights at a level comparable to that of other Australians.

In addition to prohibiting racial discrimination, section 18C of the RDA prohibits public behaviour that is racially offensive or abusive. Examples include writing racist graffiti or placing racist posters in a public place, making racist speeches at a public event, making racially abusive comments, jokes, songs or gestures in public. The Act, nevertheless, recognises the need to balance rights and values, such as the right to communicate freely with the right to live free from racial vilification. To attempt to manage these potentially conflicted human rights, the racial vilification provisions only apply to an act done "otherwise than in private". Further, section 18D of the RDA provides exemption for acts done "reasonably and in good faith" such as:

- (a) in the performance, exhibition or distribution of an artistic work, or
- (b) in the course of any statement, publication, discussion or debate made or held for genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest, or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest, or

- (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Religious discrimination is not unlawful under the RDA although it does prohibit discrimination on the grounds of “ethnic origin”. This term has been interpreted to include certain religious groups such as Jews and Sikhs.

Under the *Human Rights and Equal Opportunity Commission Act* (1986) (the HREOC Act) discrimination or vilification of people on the basis of religion may be dealt with in two ways. The HREOC Act gives the Commission the function to inquire into, and attempt to conciliate allegations that, an act or practice of the Commonwealth (including things done “on behalf of the Commonwealth”) is inconsistent with any human right. This means the rights and freedoms recognised in the international instruments which are declared or scheduled to the HREOC Act; in the case of freedom of religion these are the ICCPR and Religion Declaration.

Under the HREOC Act, the Commission is also given the function to investigate and attempt to conciliate complaints of discrimination in employment or occupation on several specified grounds, including religion. This part of the HREOC Act has its basis in the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (1958) (ILO Convention 111) which defines discrimination to mean any distinction, exclusion or preference made on the basis of, amongst others, religion, and which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The definition of discrimination in section 3 of the HREOC Act, relevant to this function, is based on the definition in article 1 of the ILO Convention 111, although the HREOC Act definition also recognises that a distinction, exclusion or preference will not amount to discrimination when it is:

- based on the inherent requirements of a particular job, or
- in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and
- is a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

In addition to these various protections, the *Workplace Relations Act* (1996) prohibits discrimination in the area of federally regulated workplace agreements and terminations, the *Public Service Act* (1999) and the *Equal Employment Opportunity (Commonwealth Authorities) Act* (1987) also impose some obligations on Commonwealth authorities and public service agencies to combat race discrimination.

The freedom to hold religious and other beliefs is guaranteed by article 18 of the ICCPR, so bringing it under the ambit of enquiry of the Australian Human Rights Commission. The ICCPR also provides that:

- advocacy of religious hatred which amounts to incitement to discrimination, hostility or violence must be prohibited by law (article 20)
- everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of religion among other grounds (article 26), and
- minority groups are entitled to profess and practice their own religion (article 27).

The Religion Declaration outlines the right to freedom of religion and belief and elaborates on the ICCPR guarantees. This freedom is not inhibited by discrimination on the ground of religion or other beliefs (article 2) and some of the elements of the freedom to manifest one’s religion or belief are listed in article 6. These include the freedom to assemble for worship, to use the articles and materials related to rites or customs, to write and disseminate publications, and freedom to teach the religion.

Both community advocates and the Australian Human Rights Commission have previously recommended that a federal law be introduced making discrimination on the ground of religion or belief, and, vilification on the ground of religion or belief, unlawful. This could also be achieved through amendment of the RDA.¹⁴

Is Australia a secular society; is it a free society?

Two of the truisms often claimed for Australia is that it is a secular society¹⁵ and it is a free society. These often go uncontested and, while in some sense they are true, in others they are not.

The claim that Australia is a secular society is based on two premises. Firstly, those reflected in the statistics relating to religious affiliation, attendance, and numbers. As noted above, Australia may be trending towards greater secularism and, although there have been clear changes in the demography of religion over recent decades, we are not necessarily becoming more irreligious. The second premise, upon which the claim that Australia is a secular society is made, is based upon the legal and constitutional context.

Dealing with the second of these, section 116 of the Australian Constitution is regularly cited as the reason why Australia is considered to be a secular state. This section declares that the Commonwealth government cannot pass legislation:

"...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..."

This has been interpreted to mean that the Australian government cannot pass laws which:

- creates a religion
- endorses one specific 'state religion'
- requires particular religious observances, or
- prohibits the doing of an act done in the practice of religion.

Moreover, the Australian government cannot, whether by law or otherwise, require that a prospective holder of a public office be affiliated with any particular religious views.

As noted in his recent book, *The Statute of Liberty*, Geoffrey Robertson highlights the inherent contradictions within the Constitution concerning religion. Robertson reminds us that Australia is a Constitutional Monarchy and that the Head of State of the Commonwealth of Australia holds that position of authority based on a religious bias. Under the 1701 *Act of Settlement* an English Monarch (who is our Head of State) must be immediately dethroned if they hold communion with the Church of Rome or marry a Papist. While our current ruler, Elizabeth II of England, is female, this tends to mask the principle of primogeniture in English royalty. That is, fate has given us a long tenure of rule by a female Monarch, nevertheless, selection to this hereditary position is based on sexual discrimination: the male heir will always inherit the throne (and of course this has nothing to do with individual merit).¹⁶

These matters must remind us, says Robertson, of the fundamental discriminations built into the Australian Constitution – those discriminations on the grounds of religion and gender. Furthermore, other clauses within the Constitution also make it inherently racist as well.¹⁷

Some of the submissions received under the freedom of religion and belief project also touched upon the issue of secularity. For example, the Christian Democrats argue that Australia is not a secular state and that the Constitution, when framed, was a response to managing differences between Christian groups; they also claim that Australia is fundamentally Christian and must be preserved as such.¹⁸ Other organisations argue that the notion of the state/secular divide is arbitrary and inaccurate¹⁹ yet others defend the notion of secularity and claim that religion is entirely irrelevant to matters of governance.²⁰

The protection of fundamental rights of our citizens is something most Australians tend to take for granted. While most consider that a national character trait is one of individualism and the enjoyment of personal liberty, generally there is not a strong culture or understanding of human rights, nor is it realised that many of the freedoms people believe are their rights are neither protected in the Constitution or law since Australia is the only democracy in the world that has not implemented a national charter of rights. Although a number of laws do exist at the state level (for example, Victoria and the Australian Capital Territory have enacted human

rights legislation) as well as varying forms of protection against religious vilification, failure to do so with a national statute means the liberties of Australian citizens continue to be vulnerable and poorly outlined.

In the submissions received, the notion that religious freedom could be preserved under a legislated human rights charter was mixed with many Christian groups against, although others such as the Uniting Church were supportive²¹, along with other faith communities²² and non-religious organisations.²³

Why is freedom of belief such a controversial issue in a plural democracy?

Debate about freedom of religion and belief often segue into a number of concerns. For purposes of clarity five of the most commonly expressed of these concerns are listed as short statements – particularly those that have emerged during the freedom of religion and belief research consultations - and some of the issues related to them are then analysed.

(1) Redefining 'racism': The term 'race' and the concept of racial discrimination, and how this is reflected in law, is in need of review. Over recent decades racism has evolved into new forms; racism is no longer solely based on physiognomy but is often a mix of discriminations which may relate to faith, ethnicity, culture, as well as to race. How this might, or should, apply to religion is a contentious issue and one that has become part of the debate about the freedom of religion and belief.

Race discrimination is a term that applies to what are commonly understood as 'races', a form of taxonomy which divides humans by their physiognomy, for example the colour of their skin, eye shape, height, hair colour and the like. However, the idea that these divisions are meaningful has been contested by geneticists: human genetic inheritance is so confused that it is not really possible to genetically define people according to racial category.²⁴ Furthermore, with increasing infrequency, racial discrimination is based on physical appearance alone. Racism not only tends to be more covert, but also tends to combine a cocktail of dislikes. Physiognomy, religion, ethnicity, socio-economic status all may combine to invent targets of fear or subjects of ignorance. Racism, therefore, while it is now more than the old eugenicist obsessions, has morphed into a new form of human (and therefore social) classification that divides on a much wider range of differences.

Because an individual cannot change their physiognomy, race cannot be selected. This is sometimes seen as an argument that makes race discrimination less acceptable than discrimination on other grounds such as culture, ethnicity or faith where membership, or affiliation with such groups, means people are better able to disassociate themselves if they wish. In particular, it could be argued, religion like politics is a matter of opinion or choice. Many religious groups have argued, however, that people do *not* have choices because their acts relate to compelling demands of conscience and morality. Some, such as the Anglican Church, also agree that the discrimination laws that apply to 'race' are not easily applied to religion.²⁵

Nevertheless, distinctions between religious and racial discrimination or vilification are not always clear. Many groups identify themselves with a mixture of ethnic, cultural and religious characteristics. As noted above, when the group, or a member of the group, is discriminated against it is not always clear upon what grounds, and whether the person doing the discriminating is motivated by race, culture or faith, especially when a person's identity is enmeshed in a pattern of cultural and religious connectedness.

Some groups, such as Jews and Sikhs, have been classed as 'ethno-religious' under various legislation because the aspects of their religious and purported racial identity are so hard to disaggregate.²⁶ This has meant that other groups, who do not fall under the category of ethno-religious, are not protected by anti-discrimination laws even though they may have equal, or even greater, claim that they are being persecuted on grounds of both religion, race and also perhaps appearance, especially when this may be distinct from socially-conforming modes of dress. One challenge in Australia, as elsewhere, is that Muslims tend not to be seen as belonging to an ethno-religious group. However, especially since the events of September 11 and the subsequent increase in Islamophobia in many parts of the world, Muslims have often been victims of what must be described as discrimination and vilification that blends religious, cultural and racial hatreds.²⁷ Of

course, while they may have carried the brunt of the race/faith-based hate in recent years, this situation is not particular to Muslims but is applicable to other minority populations at risk of discrimination.

It has been argued that existing race discrimination laws need to be updated to accommodate new forms of ethno-religious discrimination. Furthermore, the argument goes, the idea that some religions can benefit from being classified as a race, but not others, is illogical, unfair and makes the current distinctions both meaningless as well as inherently (and ironically) racist.²⁸ These inconsistencies could be addressed in a number of ways. For example, the Australian Human Rights Commission has previously argued in favour of the introduction of a religious freedoms act.²⁹ This is an approach which has been variously criticised and supported by different faith and church groups.³⁰ Other alternatives could include, for example, amendments to the RDA to make an incitement to violence on the basis of religion a criminal offence or to amend the criminal code itself to include acts of, or incitement to, violence on the basis of religion.

(2) *Negotiating the public/private divide:* The tension between private belief or principles, and public responsibility or mainstream standards, are tensions that are as old as human civilization.³¹ They continue to be contested and questioned in the 21st century.

The moral boundaries between the responsibilities of, and to, the individual and state are associated with this tension. An extreme example of such conflict is the Nuremberg defence: that the directives of the state override private morality. This was the claim made by Nazi war criminals who attempted to justify their crimes against humanity on the grounds that they were 'just following orders'. Such claims suggest that a person's obligations to the state over-ride all matters of private morality and that individual will and ethical principles cannot contest those of higher secular authorities. Clearly, this defence was a product of those who had experienced the coercive power of the ideological stage at its apogee of influence in the mid 20th century. Those with strong religious or ideological commitments thus argue that they cannot suspend their private values (indeed, they inquire why should they *should* be asked to suspend these values given the various protections under ICCPR and the Religion Declaration) on the grounds of either societal expectations or the demands of government;³² such expectations would also be inconsistent with freedom of speech.³³

This matter has become perhaps even more complex in recent years, particularly with the increase in the outsourcing of government programs or those that are delivered by public servants. For example, the Commonwealth's employment services used to be government operated. The Howard government effectively transferred management of these services to non-government organisations. There were a number of reasons for this transfer including financial efficiency as well as belief there would be greater responsiveness to client need. However, there may also have been other motivations which could be termed 'neo-liberal', the principle being that because private enterprise (including religious enterprises) can do a job equally well as government, it should therefore be allowed to function without market interference (that is, market presence) on the part of government.³⁴

Many of the agencies that took responsibilities for former government services were not-for-profit, including those that were Church-based. With this transfer often came moral ambiguity.³⁵ For example, Christian organisations were contracted to provide settlement services, clients of which often included those arriving in Australia who were escaping from persecution, torture and trauma, and were often from non-Christian backgrounds. Such arrangements, in effect, put all the parties in compromised situations: those who were the object of proselytising (even when indirect), those who felt it was their 'mission' to do so, as well as those who criticised government policy, but then faced the consequences of so doing by having their funding cut.³⁶

The strong mission of public service that often accompanies the Christian mission (although common across faiths, in Australia that is primarily Christian because it is the most widespread faith, as noted above) while essentially good in itself, nevertheless may be also accompanied by the conflicts of obligation.³⁷ Is the greater obligation to the individual, to God and the Faith, or to government? Indeed, it could be argued that the ideological intent of governments to shift the service paradigm, as a principle, has only managed to establish different conflicts of principle that leave the new service provider more ethically exposed to new, albeit

different, forms of compromise. This moral obligation on the part of those who have a faith (as an obligation which over-rides those of contractual requirements) have been clearly stated by religious organisations.³⁸

An often-cited example raised in the current consultations, and which relates to Australia's experience navigating the conflicting human rights relevant to freedom of belief, is drawn from Victoria's recent abortion law. In a well-intentioned attempt to ensure that the human rights of women were protected (to information, choice and sympathetic services), the rights to certain conscientious objection, it has been argued, were not.³⁹ The law, passed in 2008, requires that women seeking a termination must (mandatorily) be referred by a medical professional who has a conscientious objection to abortion to *another* medical practitioner who is known to have no such objection.

This has been criticised (amongst others) by the Catholic church on the grounds that practicing Catholics will not conduct pregnancy terminations, but that the legal requirement that they either do so, or refer a woman seeking a termination to a known medical professional who will, is putting Catholics into a position of conflict where they must either break the law or their own moral and religious convictions which are also a human right.⁴⁰

This contentious issue, highlighted by a single section (8) in the legislation,⁴¹ does not invalidate human rights. Questions of ethics have always been associated with certain issues and human rights do not necessarily make intractable moral dilemmas more or less easy to solve. What the Victorian abortion law demonstrates is that legislative drafting that fails to consider *all* the human rights implications runs the risk of making laws difficult to implement. The consequence is that they then may either become unworkable, or will require amendment at a later date to minimise any unintended (or deliberately inciting) effects. These effects may be contestable as infringements to human rights even if they may not, directly, seem related to the legislation in question.

This case in Victoria has snowballed into a substantial body of criticism from the Churches who have been concerned that it illustrates how religious freedom and anti-vilification laws, even if designed to uphold human rights pertaining to religion and belief, could have perverse effects. For example, the submission from the Catholic Archdiocese of Sydney lists 16 examples of scenarios where such laws may make the application of religious conscience contentious.⁴²

(3) Freedom of speech: Given the strength of peoples' convictions what, if any, are reasonable boundaries around freedom of speech? If freedom of thought and conscience are human rights, then surely the individual has the right to express their views about the opinions of others? If they do not have this right does it represent a contradiction in principles and a denial of freedom? In the case of religion and belief the parameters around acceptable commentary is blurred and subjective. While it may generally be considered a necessary freedom to be able to criticise certain scriptural interpretations, or even cultural practices associated with religious ritual, the incitement to hatred and violence is generally not considered reasonable – and that with rights in a civil society, also come responsibilities. At what point in this spectrum of critique, from the genteel to the vituperative, is the line of 'acceptability' drawn; can such a line be drawn at all?

Again, this issue poses complex moral questions and ambiguities. On the one hand representatives of more conservative Christian groups (both at the freedom of religion and belief consultations and in their submissions) have categorically claimed that existing laws and the Constitution in its current form offer adequate protections and should not be amended in any way, either in relation to laws guaranteeing freedom of religion, or to protect people from religious vilification.⁴³

On the other hand, this view has been contradicted in the context of real cases. For example, an individual in North Sydney had, over a number of months, displayed a billboard on their private property containing a sequence of statements such as "Jews make fantastic lampshades" and "Jews are good at (crucifixion)". The Jewish community, appealing to various authorities such as the Anti-Discrimination Board and Community Relations Commission, found there was no legal remedy to this very public display of racism, even though it was a matter raised in debate in the NSW state parliament.⁴⁴ This situation was deemed to be unacceptable

by Christian group representatives at one consultation who agreed such actions should be covered through amendments to criminal law relating to incitement to hatred and violence on the grounds of religion.

Submissions have shown that religious groups which could be described as more progressive, as well as secular representatives, appear more inclined to support legislative change in this area.⁴⁵ The limitations of the existing Commonwealth laws, notably the RDA, can be illustrated by the case *Jones v Toben*⁴⁶ which commenced in 2002. Under this case Jeremy Jones (representing the Executive Council of Australian Jewry) argued that Frederick Toben (a member of the Adelaide Institute) had breached section 18C of the Act by publishing material on a website that included Holocaust denial.

The trial judge, Justice Branson, held that placing material on a website which is *not* password protected is an act to which section 18C of the RDA applies because it is understood to be done in public.⁴⁷ Justice Branson further held that the material was offensive and was done because of the applicant's ethnic origin, namely because he was Jewish. The judge ordered Toben to remove all reference on the Adelaide Institute site which both denied the Holocaust, or were offensive to Jewish people. However, this was not the end of the matter. As recently as 2009 Toben had been sentenced to three months jail for contempt of court for continuing to refuse to either remove the offensive material, by immediately replacing it, or including it on his site under alternative names. Seven years have passed and Toben (as of July 2009) is still not in jail because he is appealing this latest sentence.⁴⁸

While it could be argued that this case demonstrates Australia's capacity to manage, through the courts, religious hatred, this may have only been possible because Judaism is considered to fall within the category 'ethnic origin', and hence is classified as a 'race' under the RDA. This is problematic as noted above. The case also demonstrates that the RDA does apply, in a limited way, to racist material placed on websites. The racial vilification provision may not, however, apply to racist comments, images or language sent by text messages, emails, or placed on websites that are password protected.⁴⁹

As a general observation, for an environment such as the internet and other vectors of new communications, the RDA does not appear in its current form to be sufficiently responsive. While defenders could argue that it does work (although after seven years of court battles in the *Jones vs Toben* case this is questionable) for such dynamic media as the internet, it is hardly viable. Indeed cyber-racism is one of the vectors of new forms of race hate and the RDA, which was drafted before the rise of the internet, could be amended to better deal with the new phenomena of web-based racism.⁵⁰

One of the secular participants at the research consultations⁵¹ suggested a way to address this problem of the slow responses to cyber-racism and related forms of religious hate: use remedies that exist under the *Trade Practices Act* (1974) (TPA) as a model. Under the TPA a judge can issue, on a recommendation from the Australian Competition and Consumer Commission that a firm is acting in an anti-competitive manner, a 'cease and desist' order, thus stopping a certain conduct until such time as it can be examined by the courts. A similar position was proposed in the submission of the Executive Council of Australian Jewry to the freedom of religion and belief consultations,⁵² in that it proposes that section 18C of the RDA be amended to allow the issuing of a 'cease and desist' order to stop offensive conduct until such time as a court can decide whether it is in breach of the RDA. This may be an effective way to respond to the dilemma of sluggish responses to acts of religious and racial hate, particularly on the internet.

Generally, while many participants at the freedom of religion and belief consultations expressed some reservations about the efficacy of new legislation pertaining to religious freedom and religious vilification, these were largely due to concerns that such laws might unsettle the status quo, or the often-uneasy tolerance between some members of some faith groups. This was based on the premise that the public sphere of religious discourse is also a civil space. However, much of this discourse is not doctrinal – the interpretation of holy texts – but one of vilification between representatives of a number of different religions, or between some of the more conservative individuals and organisations that are associated, broadly, with particular religions.

This describes a kind of a 'market place' of religious ideas (enticements); new entrants (converts); competition (proselytising) and product (revealed truths).⁵³ This view is not meant to be disrespectful of religious views, it

is merely an attempt to describe a competitive environment of often-contrary claims about transcendental verities, morality, personal commitment to and practice of faith, and the infrastructure of religion (such as institutions and the body of associated writings, such as holy texts and their exegesis). Furthermore, this is *not* an attempt to reduce, or compare, religions (and all their associated values and practices) to that of business; it is an attempt to argue that the public discourse and public competition between different religious groups is one that can be regulated in the same way (albeit much more moderately) than that of business.

What many members of faith communities posit is, in effect, that this 'market' should be exempt from the rules that apply to other types of market. The comparison with private enterprise is a good example. Australia has one of the most rigorous, competitive, transparent and efficient business environments in the world. Enterprises can compete, spruik, compare products, grow their business – and no reasonable commentator would say that the legislative environment is designed to curtail business activity even if certain reporting requirements can at times be onerous, as this is necessary for consumer protection, and it is not perfect (as it never can it be in a dynamic context).

Can the same apply to the domain of religious competition? If regulation in the business sector only helps market players and helps free enterprise to actually function efficiently and equitably, then could limited legislation in the realm of religious vilification have a similar effect? Such legislation should *not* curtail criticism, competition and growth, but it should be designed to help maintain a civil public space where the discourse avoids incitement to hatred, or the dissemination of deliberate inaccuracies or untruths. The Australian Christian Lobby's submission argues that if such legislation were to be introduced restrictions should be limited to ICCPR article 18(3) and the scope of article 20, and that failures in existing legislation have occurred when they have been drafted in a such a way that do not adhere to the International Covenant.⁵⁴

(4) Exemptions - the right to discriminate: Groups, whether based around religion, sexual orientation, disability or ethnicity, as examples, often make certain demands, in particular those that grant them equity in terms of collective human development or human rights (effectively affirmative action). Some of these should be relatively straightforward to meet, such as being treated with respect, or having the same access to government programs as other groups. But how are these rights reasonably upheld if they conflict with the rights of others, cannot be justified on the grounds that they aim to equalise systemic bias, or they unfairly privilege certain groups?

While human rights have been critiqued as being overly focused on the individual, human rights are also concerned with group rights (such as cultural rights) and inter-generational rights (such as the right of future generations to an inhabitable natural environment). Some groups insist that anti-discrimination laws have perverse effects in that they force those who may wish to maintain a collective cultural or faith-based identity, to include those who are not part of their 'in' community, thus compromising their group's integrity or unity. Such groups request that their institutions be exempt from laws that help eliminate discrimination generally, arguing that such exemptions are necessary for their group survival.

As a principle, the notion of exemptions is clearly reasonable, up to a point. For example, it is reasonable that the Catholic Church be allowed to only appoint male, Catholic priests as members of their clergy (until such times as this may be changed by the Church itself). Claims of discrimination from those who do not fall under this description would thus be seen as frivolous and would not be covered by anti-discrimination laws. Some submissions have argued that exemptions are essential, but have done so focusing upon those activities that are confined to religious activities⁵⁵ this approach, however, avoids the fact that many services for which exemptions are sought, do not fall under this category.

At what point do matters cease to be exemptionable and become morally and procedurally contentious, especially if public monies or contracts are associated with a service for which exemptions have been sought and a faith-based organisation is engaged in activities exogenous to the specific activities associated with religion? This is an issue not unrelated to that discussed above relating to the public/private divide. It

highlights the conflicts between what is reasonable or ethically right for a particular group, but may not be right for another.

This situation is particularly ambiguous when Commonwealth revenue is used to fund the preferences of specific interests, given that the public purse is drawn from the taxes of all citizens (and businesses) which comprise the full range of ethical, political, sexual and other opinions, often in conflict. When some groups may have an identity or conduct certain practices that may offend other groups in society this may be a recipe for conflict. In such scenarios, activities or beliefs that fall outside normative notions of 'acceptable standards' or 'core Australian values', for example, may be criticised. Sometimes such subjective criticisms are justifiable (for example, the condemnation of organised paedophiles, or of female genital mutilation), other attacks may be less easy to justify and a society, as a whole, may be required to examine whether freedoms to certain beliefs and/or practices should be accepted, or at least tolerated, as norms (for example, accepting certain practices associated with pagan belief systems).⁵⁶

At one of the group consultations in the freedom of religion and belief project a particular case was cited as an example of discrimination laws that had got "out of control".⁵⁷ The speaker, from a conservative Christian group, described a situation where a "man of God" also happened to own a rental property which was a source of additional income. This person felt strongly, as a landlord, about who could live in this property and, when a young heterosexual couple wished to rent the accommodation, he refused on the grounds that they were self-evidently living in a sexual relationship that was being conducted out of wedlock. On refusal, the couple complained to the appropriate state authorities that they had been discriminated against on the basis of their marital status. This complaint was upheld and the landlord was required to pay a fine and to allow the couple to rent the property.

This, it was argued, was unreasonable and the landlord should have been allowed to discriminate because the couple were acting in a way that offended his moral standards. In the same consultation another participant, who was a member of a different Christian denomination, argued against this claim stating that the landlord, firstly, had the choice whether or not to be a landlord at all (nobody was compelling him to own and rent a property for profit) and, secondly, that the nature of the contract between renter and owner was a commercial one and people's private morality should have no bearing upon the nature of that contractual agreement.⁵⁸ If such principles (of personal preferences being legitimate grounds upon which to discriminate) were extended to public life generally, it was argued, it would be impossible to live in a civil society. For example, how would Christians feel if they were prevented from conducting certain business transactions by people of different religious faith, solely because of their Christianity? This case illustrates the different ways that Christian groups may strongly differ on many matters⁵⁹, including discrimination laws. This difference in interpretation is not, of course, unique to Christianity. Similarly conflicting views will be expressed by conservative Muslims and Jews, for example, and their more liberal co-religionists.

More common is the request from faith groups that institutions should be allowed to discriminate, albeit within a carefully regulated context of exemptions. The issue of exemptions can be considered as sitting upon a continuum: at one end this is flexible and accommodating, and at the other inflexible and unaccommodating. For example, at one consultation a representative from the Catholic church argued that the closer the duty of care (for example, to the custodianship of children) the greater the scrutiny of staff, and the greater the care needed to ensure people of the best moral character. This care could be more lax the further staff are from the object of care. Such an approach is more accepting of diversity within the whole-of-school environment. Other groups take a firmer line, arguing that all staff (for example, even the part-time gardener) should be a member of the faith community. Going further, they argue that even this is inadequate. For example, community members who may be homosexual, or have been known to be unfaithful in their marital relationship are morally questionable by group standards and, in terms of employment, should also be excluded on those grounds. This leaves little of any kind of diversity, and discrimination is irrelevant in an argument that claims no deviation from the expected standards will be tolerated.

While the notion of group values and 'culture' should be respected – up to a point – in this context, the fact that such institutions are also demanding that public money be used to do so, is clearly contentious and unacceptable to advocates of the public education system as well as to secular organisations.⁶⁰ Liberal

secularists generally accept the point that some exemptions are allowable, the more groups are self-funded the more that exemptions should be allowed, and the more purely 'religious' the function, the more allowable. However, they have argued in consultations that if groups are willing to take public revenue, they should accept the rules of law relating to discrimination and that exemptions should only be allowable in the most limited of situations.

Minority ethnic communities in Australia tend to be identified as those who have arrived as immigrants or humanitarian entrants; some of these communities maintain high visibility, while others are much less visible. As a general rule, the more visible, the more likely groups and their individual members are to be singled out for discrimination or criticism.⁶¹ The principle of the right to freedom of religion and belief tends to protect minority communities, in theory. In practice, however, minority communities often do experience exclusion and discrimination, albeit disguised, and there may also be perverse forms of competition between minority groups as to which is the most minoritised. Although often coming from very different perspectives, the views of some faith communities are thus somewhat similar to the views of ethnic communities in relation to the integrity and maintenance of group identity, and the challenges to the state and civil society generally that may arise from self-selected social, cultural and religious exclusion. This can even extend into economic and political exclusion, or appearance of exclusion, as is the case, for example, with the Exclusive Brethren.⁶²

(5) *Combating the defamation of religions:* This issue is closely associated with the notion of free speech, but is wider. In particular, it is an issue pushed at the international level, especially through some United Nations institutions⁶³, and poses a number of ethical and legal challenges, not to mention the way it contests the level of 'tolerance' that may be accommodated in multicultural democratic states.

The notion of the defamation of religions, it has been argued, is that religions can be defamed and states should take action to prohibit such defamation from occurring. Those states that have put forward this proposition have been mainly Islamic states, and this view is one that appears to denote a different approach towards religion and religious vilification. Most religious groups believe that individuals can be defamed because of their religious beliefs, or may be libelled if their claims associated with their religion are denied.⁶⁴ With the exception of Islam, which tends to reverse this view (that is, individual defamation in relation to matters of faith is not as problematic as directly criticising the faith) it is generally not considered reasonable to claim that a body of religious belief can itself be 'defamed'.

A number of Muslim states, however, have argued that Islam (the religion itself) can be so defamed. This has potential and serious ramifications. It lends weight to the concern that religious freedom legislation could be perversely applied to uphold such a claim and, ironically, that human rights remedies could be used to curtail many human rights in practice. The ambiguity associated with this notion of defamation becomes particularly clear when its application is considered and groups as diverse as conservative Christians and atheists have expressed concerns about the defamation of religions.⁶⁵ During the freedom of religion and belief consultations, although the defamation of religions was not raised as an issue in the discussion paper, nevertheless it has elicited special mention in the submissions of many organisations.⁶⁶

As examples of the confusion that may arise in association with the defamation of religions, an academic could examine certain texts within the Qur'an and question its interpretation or meaning, or may question the provenance of certain faith-related practices based upon some traditional understanding of the Qur'an. In another situation, a journalist could enquire into certain cultural practices associated with an ethnic group which belongs to a particular branch of Islam, and question whether such cultural practices infringe human rights (such as the rights of the child, or of women).

Would these examples represent a defamation of the religion? It could easily be argued that they do, since they *may* question the divine revelations of the Prophet as *interpreted* by the religious leaders of a *specific* group. But who, then, decides whether this *is* actual defamation? Some scholars, certain Imams, or different Islamic sects may strongly disagree with each other, thus making the arbiter of the matter of defamation highly contested. Even considering such an approach possible, how could the courts (secular institutions and, in non-Muslim countries, inept in issues pertaining to Islam) determine the validity of claims of such types of

defamation and so make an informed judgement? Clearly, for secular, multi-faith, multi-ethnic democracies, this form of defamation of religions is both unrealistic, inappropriate and is contrary to freedom of speech, not to mention academic, artistic, journalistic freedoms, as well as the rights of non-believers.

With the exception of only some advocates of the Muslim faith, the defamation of religions does not appear to be a significant issue in Australia, although it casts a pall of concern over the issue of freedom of religion and belief. That is not to say, however, that many are distressed by attacks on their faith that are either direct (which tends to come from other religious groups), or indirect, which is more likely to occur through the insensitivities of the non-religious, or the indifference or ignorance of governments and businesses. The experience of the Buddhist community illustrates this latter problem.⁶⁷

Conclusion

Freedom of religion and belief, in many regards, pose fundamental questions about society, human freedom and identity, to human rights, and to the role of governments and the law. They are complex philosophically, ethically, intellectually, legally, and even theologically. They relate to issues about which there is often much consensus, but occasionally complete disagreement both between and within religions. This does not, however, mean that the issues should not be debated and examined, even if the opinions of either the religious or non-religious are sometimes challenged.

There appear to be contradictions around a number of important issues relating to these freedoms: there is a stated desire for more respectful dialogue and the acceptance of the reality of Australian faith diversity, yet concerns about how this is best to be done.

To put it crudely, in relation to this dilemma of freedom of speech, what is good for the goose should be good for the gander (although it does not always work this way). Claims that vilification on the grounds of faith should not be legislated sometimes comes from those who have been known to vilify, are more likely to express loud reservations about the views and beliefs of others, and indignation about inferences against their own rectitude. Although there is a vibrant and active inter-faith movement in Australia, and much constructive work occurs between groups such as, for example, the Australian Partnership of Religious Organisations, the National Dialogue of Christians, Muslims and Jews, the World Conference of Religious for Peace, and the Women's Inter-faith Network, there can also be rather venomous exchanges between some groups which degenerate into long and painful disputes, as illustrated by the *Islamic Council of Victoria versus the Catch the Fires Ministries* case.⁶⁸

These disputes are not necessarily restricted to conflict between different faiths, but may also occur within faiths as well, in particular, between conservative and liberal religious groups. For example, the Uniting Church in its analysis of religious extremism, outlines its concerns regarding the manner in which its members have been sent vilifying material as well as the conduct of extreme Christian groups including those who purport to be 'Christian'.⁶⁹

What is, or should be, the role of governments in these issues? Many representative religious bodies say none at all: government authorities (or at least the judiciary under a constitution that respects the separation of powers) and religion do not, and should not, mix. Yet, it could be questioned whether some "doth protest too much". Religious organisations regularly petition and make requests of governments as is entirely their right. They are also beneficiaries of government spending: billions of dollars of government revenue each year are expended on the health services, schools, aged care, housing services, charities and the like that religious institutions operate, and through which religious institutions are bound by legal contracts, ethics and tradition. Many of these services are used by those who are not part of the service provider faith community, thus putting a duty of care upon the provider which may not always be compatible, or consistent with, certain religious principles. If religious institutions are willing to accept government (public) revenue, this then comes with moral obligations that may conflict with religious mission or values.

As has been demonstrated in recent research⁷⁰ members of parliament are, increasingly, not only making public their religious views and are using such views as justifications for various policy decisions (even if these may be contrary to those stated by the leaders and institutions of the faith that they claim to belong) but there is also intense faith-based factional lobbying occurring within political parties.⁷¹ Again, while it could (and has) been argued that this is all reasonable, it must be questioned whether it is also reasonable to assert that government has no role in religious affairs. Already, they are and they do. Furthermore, as noted in an earlier part of this paper, claims that Australia is a secular country and, as such, there is a clear separation between church and state, is open to some question by a number of submission authors. Even if this is desirable as claimed by many secularists, it is not necessarily true. For example, for a nation so certain of its secularity, to question the status, let alone the nature, of the religious observance at the opening of each session of Commonwealth Parliament, or to query the reference to 'God' in the Constitution's Preamble, would immediately demonstrate evidence to the contrary.⁷²

Fundamentally, the role of government is to regulate the affairs of state, in particular the defence of the realm and the maintenance of a well-ordered civil society, by ensuring decisions are made for the public good. As noted in one of the submissions, "In short, the state exists for civil society, not the other way around."⁷³ Despite the trends in religiosity in Australia, which demonstrate both shifts away from conventional religion, but also a persistence in religious and spiritual belief, the role of religion and the relationship between different faith communities are fundamental to the maintenance of civil society.

In an age when the persistence, if not resurgence, of religion has been amply demonstrated (sometimes in negative ways) this should compel governments to accept the reality that they have responsibilities:

- to intervene when religious practices harm individuals and communities
- for the good governance of inter-religious relations, and
- to maintain civil society from acts of violence or forms of religiously-motivated extremism.

These are issues upon which a number of faith groups agree: that governments *do* have such moderating roles. This role is *not* the governance of religion, but moderation of the public sphere in which faith communities necessarily come in contact with each other. How this role is fulfilled is, of course, an important question, and inevitably a highly sensitive area in which to operate. But sometimes, as in other domains of human interaction where they have a legitimate role, the hand of government, even if gentle and gloved, may be required to ensure the public good. This is why, after all, governments exist.

The views expressed in this paper are those of the authors and not necessarily those of the Australian Human Rights Commission.

APPENDIX

Clauses from international treaties relevant to the freedom of religion and belief

From: *Universal Declaration of Human Rights* (1948)

Article 18

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.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

From: *International Covenant on Civil and Political Rights* (ICCPR) (1966)

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 18

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.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;

- (b) For the protection of national security or of public order (order public), or of public health or morals.

Article 20

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.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

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.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

From: *International Covenant on Social, Cultural and Economic Rights* (ICSCER) (1966)

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Article 13

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

From: Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the Religion Declaration) (1981)

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.
2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

Article 6

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

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

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ENDNOTES

¹ The Commission received \$4.4million over four years under the *National Action Plan to Build on Social Cohesion, Harmony and Security* (NAP). This is a Council of Australian Governments initiative to address potential radicalisation (and hence risk of terrorism) within the Muslim community. The freedom of religion and belief research is one of 8 projects funded by the Commission under the NAP, for more information see: <http://www.humanrights.gov.au/partnerships/projects.html>

² This is well illustrated in the comparative tables on religious affiliation, over time and between countries, in Bouma, G. *Australian Soul*, pp.75-76

³ Australian Human Rights Commission *Face the Facts*, pp.34-35

⁴ Bouma, G. *Australian Soul* p.78

⁵ *Ibid*, 5ff

⁶ Cahill, D. et al *Religion, Cultural Diversity and Safeguarding Australia* p.6

⁷ Micklethwait, J. and Wooldridge, A. *God is Back*, p.12

⁸ As discussed in Appleby, R.S. *The Ambivalence of the Sacred*, 207ff

⁹ See HREOC *Article 18* at: http://www.humanrights.gov.au/pdf/human_rights/religion/article_18_religious_freedom.pdf

¹⁰ The research project is treating with respect non-belief as a belief structure. However, notions about belief and non-belief are contentious as noted in Vickers *Religion and Belief Discrimination in Employment – the EU Law*, part IV, pp.31

¹¹ Much of this is detailed on the Commission's website at: <http://www.humanrights.gov.au/frb/index.html>

¹² This following section is largely drawn from a report previously prepared by the author for the Australian Human Rights Commission at <http://www.humanrights.gov.au/partnerships/religiousdefamation/index.html>, section 2.1

¹³ Although Australia made a reservation to ICERD, reserving its right not to legislate regarding article 4: to "declare an offence punishable by law all dissemination of ideas based on racial superiority...etc"

¹⁴ For example: Australian Human Rights Commission (then HREOC), *Ismaξ- Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), p.129; HREOC's report *Article 18* recommends that religious discrimination should be made unlawful under a religious freedoms act; the National Human Rights Network of the National Association of Community Legal Centres Australian Non-Governmental Organisations' Submission (<http://info.humanrights.curtin.edu.au/pdf/NGOExecSumm2005.pdf>) to the Committee on the Elimination of Racial Discrimination (2005) recommends that both the Commonwealth and state/territories enact legislation to prohibit discrimination and vilification on the grounds of religion, and criminalises such activity; and FECCA, *Submission on Australia's compliance to the UN International Convention on the Elimination of all Forms of Racial Discrimination*, 2008 (http://www.fecca.org.au/Submissions/2008/submissions_2008003.pdf)

¹⁵ Space precludes detailed analysis of the notion of 'secularity' in this paper. It is, however, worth noting that secular means "concerned with the affairs of this world, worldly, not sacred, not ecclesiastical" (Oxford Dictionary). Secularism, therefore, really means a focus on matters separate to the religious; it does not necessarily mean irreligious, opposed to religion, that religion may not have legitimate opinions about (or even a role to play) in secular affairs. However, discourse about the secular state can sometimes start from unnecessarily ambiguous premises about what this actually means.

¹⁶ Robertson, G. *Statute of Liberty*, chapter 3, especially 55ff

¹⁷ As recently explained by Professor George Williams in his article in the *Sydney Morning Herald* (7 April 2009), rather than offering protection, the Constitution is a document that allows the state to discriminate on the grounds of race (section 25 and section 51 (xxvi)).

¹⁸ Christian Democratic Party submission (CDPS) pp.4-5

¹⁹ Cameron, A. on behalf of the Standing Committee, Synod of the Anglican Church Diocese of Sydney (ACDSS) 3ff.

²⁰ Ives, R. on behalf of Council of Australian Humanist (CAHSS), p.2

²¹ Corkin, T. on behalf of Uniting Church in Australia National Assembly (UCAS) p.22

²² Mobini-Kesheh, N. on behalf of Australian Baha'i Community (ABCS) p.10

²³ CAHSS, p.3

²⁴ "...the consensus among most scholars in fields such as evolutionary biology, anthropology, and other disciplines is that racial distinctions fail on three counts - that is, they are not genetically discrete, are not reliably measured, and are not scientifically meaningful." See Smedley and Smedley (2005)

²⁵ ACDSS, p.9

²⁶ See Australian Human Rights Commission (2008), op cit, section 2.1.2

²⁷ As noted in the submissions from the Muslim Women's National Network of Australia.

²⁸ see Bloul, R. *Islamophobia and anti-discrimination laws: ethno-religion as a legal category in the UK and Australia* who argues that while the 'ethno-religious' category is seen to benefit the Jewish community, its roots as a concept are anti-Semitic and reflect an essential racist bias in the wording of the race discrimination legislation.

²⁹ Australian Human Rights Commission (then HREOC) *Article 18*, p.V

³⁰ For example, this is supported by the Anglican Church of Australia's Standing Committee of the General Synod (ACAGSS) p.6 (albeit with the reservation that it fully adheres to ICCPR); as well as the Uniting Church (UCAS, p.19) and ABCS, p.6

³¹ For example, as illustrated in the ancient Greek tragedy by Sophocles, *Antigone*, in which Antigone insists on burying her brother (Polynices) according to ritual but who has been declared an enemy of the state by the King, Creon. Antigone's actions are based on her private morality (responsibility to her brother) rather than public edict.

³² ACDSS pp4-6; UCAS pp5-8

³³ Justice and Peace Office, Catholic Archdiocese of Sydney (CASS-1) pp.4-5

³⁴ For example as discussed in Mulgan, R. *Government accountability for outsourced services*.

³⁵ Ibid, 7ff.

³⁶ For example, see Kissane, K. *Agenda – Church Inc.* who discusses some of the moral conflicts, and consequences, for faith-based organisations when they receive government contracts.

³⁷ Catholic Archdiocese of Sydney (CASS-2) argue that separating a person's moral and religious convictions from their work has two consequences: it denigrates the works of service, failing to recognise that this is often religiously inspired, and, it diminishes the importance of religion, p.3. "...approaches which minimise or misunderstand the indivisibility of faith and service distort the meaning of freedom of religion and belief, and create a tendency to understand and apply it as a limited measure of toleration rather than as a fundamental human right" p.4. "Freedom of religion and belief is not a second-order right but one of the first importance" p.5. These views captures some of the ambiguities associated with this situation: religious organisations repeatedly cite human rights instruments to legitimately advocate for freedom of religion and belief, yet simultaneously, often reject the notion of strengthening human rights laws.

One Christian organisation, the Major Issues and Theology Foundation (MITFS) acknowledges these challenges: "The risks attending these relationships are that either the government agenda of social care distorts or influences the religious identity or agenda of these bodies, or that the religious agenda of these bodies distorts or influences the proper interest of the government service delivery, or compromises the rights of clients", p.10. Like other Christian submissions, MITF notes the history as well as value within Australia of the relationship between government and religious organisations as service providers, while emphasising the need to better understand the potential conflicts in the relationship and to define the "... implied 'social contract' involved when government and religious bodies work together towards common ends."

³⁸ For example, as concisely expressed "No state authority can stand between a person and God" ACDSS, p.3

³⁹ UCAS 10ff and Family Voice Australia (FVAS) pp.9-10

⁴⁰ See: <http://www.theage.com.au/national/archbishop-in-abortion-law-threat-20080922-4lsl.html?page=-1>.

⁴¹ See:

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/BB2C8223617EB6A8CA2574EA001C130A/\\$FILE/08-58a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/BB2C8223617EB6A8CA2574EA001C130A/$FILE/08-58a.pdf).

⁴² CASS-2, pp13-14. Of these examples, most are easily addressed (for example, the use of decorations to celebrate religious festivals in public institutions, does not pose particularly complex moral challenges). Some are more complex, such as whether a nurse would be penalised by offering to pray for a patient (if it is public but done with the patient's consent it should not be, but these are also work supervision issues and different workplaces will have different policies on such matters). It is primarily the examples of adoption services and the hiring of school teachers where the issues get more contentious. Religious schools are often resistant to hiring those who are of a different faith or sexuality. On the one hand, it is reasonable that schools are wary of such staff who may see this difference as an opportunity to actively promulgate values at variance to that of the faith. On the other hand, if such staff are prepared to keep their views or preferences private and to respect the community and professional environment in which they are working (and are subject to some form of contractual penalty if they do not) this may be sufficient to allay some religious concerns.

⁴³ For example, the CDPS p.6; FVAS p.8; Exclusive Brethren, p.3

⁴⁴ See statement by Peter Debnam on 25 June 2004, in:

<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansart.nsf/V3Key/LA20040625025>

⁴⁵ For example, MITFS supports (with minor reservations) outlawing religious and racial vilification, as well as a Charter of Rights p.3, p.5.

⁴⁶ [2002] FCA 1150.

⁴⁷ Ibid [74].

⁴⁸ As quoted in *The Australian* newspaper on 2 June 2009:

<http://www.theaustralian.news.com.au/story/0,25197,25575578-2702,00.html>

⁴⁹ The RDA provision only applies to acts done other than in private, and these may be held to be done in private. See Australian Human Rights Commission, *Combating the Defamation of Religions*, 4 July 2008, section 2.4, at:

<http://www.humanrights.gov.au/partnerships/religiousdefamation/index.html>

⁵⁰ See Gershevitch, C. "Cyber-racism: the silent threat to human rights" *Equity Newsletter*, February 2008.4 pp.12-15 at:

http://www.multicultural.online.wa.gov.au/cgi-bin/dpms/dvl.cgi/1245794915/eccwa/83/2101856597/EXPLORER7/Equity_feb08.pdf

⁵¹ ACT-based, face-to-face interview, 31 March 2009. Under the terms of the ethics guidelines for the research, the source of this comment must remain anonymous.

⁵² See Executive Council of Australian Jewry (ECAJS) submission, dated 12 January 2009.

⁵³ This notion, within the modern plural state of a religious market-place, is also referred to in Micklethwait and Woodridge, op.cit. pp.356-357

⁵⁴ ACLS pp4-8. Similarly, ACAGSS p.3 endorses the close adherence to all of article 18 of ICCPR should a Religious Freedom Act be introduced.

⁵⁵ For example, ACDSS 11ff which mounts a sound argument, but does not address the potential conflicts that may arise when a faith-based service is funded to assist clients who are not of the faith community. FVAS p.4 claims that "...all anti-discrimination or equal opportunity legislation should be amended to give a comprehensive exemption (a) to all bodies established for a religious purpose... and... (b) to all individuals for any act done in order to comply with the person's genuine religious beliefs or principles" which would, effectively, make all such laws impossible to apply.

⁵⁶ The vilification as well as institutional discrimination directed towards Pagans is outlined in the submission from the Pagan Awareness Network Inc, for example, pp.4-8. An example of the continuing antipathy towards Paganism can be found in CDPS, p.9 "... Migrants of different religious beliefs such as Hinduism, Buddhism, Judaism etc have recognised they live in a peaceful, Christian nation that respects the beliefs of religious minorities. However, beliefs such as paganism... should not receive the same tolerance and legal recognition."

⁵⁷ Held in Melbourne in May 2009. Under the terms of the ethics guidelines for the research, the source of this story must remain anonymous.

⁵⁸ This case study raises some similar issues to those that were experienced by a same-sex-attracted group of young people who wished to book a venue in Victoria for an information session, but were refused on grounds that the venue owners were unable to accommodate such a group. Exemption laws allowed this refusal because the owners (associated with a Christian church) cited religious objections. This, it has been argued, is a use of exemptions that is not about religious freedom but an exploitation of laws (that permit religious accommodation) with the purpose of deliberately discriminating, see Ball, R. *Love thy neighbour*. Macintosh and Wilkinson also note "... schools may teach values that are inconsistent with the welfare of the general community. Government reliance on religious institutions to provide core government services also gives these institutions a greater ability to influence public policy. For example, they may be able to refuse to provide services to homosexuals, single mothers and people from certain faiths.." pp.63-64

⁵⁹ As noted in UCAS, p.40

⁶⁰ For instance, as stated in the Atheist Foundation of Australia's submission, p.6

⁶¹ As a general comment (since this is a theme directly stated or inferred in numerous submissions such as that of the Christian Democratic Party, 9ff) while Christian organisations frequently demand their rights to exemptions on the grounds of religious freedom, they just as vehemently argue that 'minorities' - such as the Islamic community - should integrate themselves into the Australian cultural norms (whatever these norms may be).

⁶² As discussed by McDermott on the ABC Four Corners program that reports on Exclusive Brethren political activities.

⁶³ United Nations General Assembly resolution 62/154 of 18 December 2007, as well as United Nations Human Rights Council Resolution 7/19 of 27 March 2008.

⁶⁴ For example, the case of the Jewish community where Holocaust denial is considered a form of libel about those who are Jewish, although not on religious grounds. The libel is based on the notion that Holocaust claims of Jews have only been invented to gain a form of advantage, or that those who state that the Holocaust is an historical fact, are liars.

⁶⁵ For example, see Hitchens, C. *Push to Criminalise Criticism of Islam* The Australian 9 March 2009.

⁶⁶ For example, it was raised in submission from ACLS pp20-21 and ACDSS pp8-9

⁶⁷ For example (although drawn from Indonesia, this was the subject of lobbying from within Australia as well) protests over the naming of the "Buddha Bar", see: <http://www.theaustralian.news.com.au/story/0,25197,25144640-12377,00.html>

⁶⁸ see Deen, H. *The Jihad Seminar*. Continuing concern about this issue, especially claims that the Victorian legislation allowed an unreasonable attack on religious freedom to occur is reflected in a number of submissions, such as ACLS 13ff; FVAS p.6, although UCAS p.18 supports the act with amendments.

⁶⁹ UCAS, p.18 (relating to Islamophobic material sent to members), and pp.31-36 outlining the activities of extreme Christian and (claimed) Christian-affiliated groups.

⁷⁰ See Crabb, A. *Invoking religion in Australian politics*

⁷¹ For example, as discussed in the recent article by Coorey, P. "Holy warriors pitch for Liberal seats" which describes branch pre-selection conflicts between moderate and religious 'hard right' factions.

⁷² The former federal member of parliament, Carmen Lawrence, has recently criticised the continuing practice of parliamentary prayers in her article of 2 July 2009. Cahill et al, op.cit., recommend in their report on religion and cultural diversity that each parliamentary day commence with a prayer drawn from Australia's various faith traditions (although concluding with "Our Father") p.124 – this proposal has been attacked by a number of church groups.

⁷³ CASS-2, p.10.