

LEGAL ASPECTS OF THE PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA

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¹ This is an overview of certain legal issues drafted for the purposes of the Freedom of Religion and Belief project in late 2008 and early 2009. A more detailed and up to date book that covers some of the same issues discussed more briefly by the author in this paper will be published by Federation Press in early 2011

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1 INTRODUCTION AND EXECUTIVE SUMMARY

The protection of religious freedom in a given society depends on a range of factors, including the degree of political and popular commitment to the principle of religious freedom, and the legal and institutional arrangements for the protection of religious freedom. If political and popular commitment to religious freedom is strong, legal protections may not be as important as they would be in societies where religious liberty is contested, or religious sectarianism or discrimination is rife.

This background paper does not attempt to assess the level of political and popular commitment to religious freedom in Australia, or to draw a conclusion as to the extent or severity of problems that religious individuals or organisations experience on the ground. This is the role of the broader inquiry being undertaken for the Australian Human Rights Commission.² Instead, it focuses exclusively on the strength of the current forms of legal protection available to religious individuals and organisations in Australia, and on the way in which religion is treated in the Australian court system.³

1.1 SUMMARY OF REPORT

1.1.1 International Law

Australia is party to a number of international treaties that protect the right to freedom of religion or belief and prohibit discrimination on the basis of religion. These rights have been further fleshed out in a range of documents and cases. While this international law does not become part of the Australian law automatically, it is significant in at least three ways. First, Australia is bound by international law in international courts and tribunals, and should not lightly breach its international obligations. Secondly, international human rights law can influence the interpretation of legislation and the development of the common law. Thirdly, the Commonwealth Parliament has limited power to pass legislation. If it wishes to legislate in the area of religious freedom it will have to rely on the ‘external affairs’ power in the *Australian Constitution* to do so. This requires that any legislation that is passed by the Commonwealth Parliament be closely linked to the international treaties on freedom of religion or belief. At present, Australia has done very little to legally protect religious freedom in the form required by relevant international human rights treaties.

1.1.2 Constitutional Law

The *Australian Constitution* includes limited protection of religious freedom. Section 116 prohibits the Commonwealth Parliament from enacting legislation that would prohibit the free exercise of religion or establish a religion. This constitutional protection is, however, limited in many ways. It applies only to the Commonwealth and not to the States. It does not apply to all government action but only to legislation or actions taken under legislation. It does not, in its terms, protect beliefs that are not religious (although the High Court has interpreted it to extend to atheism and

² Although, for an important forerunner to the current inquiry and for evidence of problems with religious freedom in practice in Australia, see Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998).

³ I would like to thank the following people for their assistance with the research and editing of this report: Perry Herzfeld, Tiffany Wong, Harini Gayanika Amarasinghe and Jessica Qiu Chen Liang.

agnosticism at least). In addition, the High Court has interpreted s 116 very restrictively so that it has little force.

If more comprehensive constitutional protection would be desirable there are at least two forms it could take. It could extend the current provision to the States and Territories, to executive actions and to beliefs as well as religions. Alternatively, it could entrench a right to religious freedom based on international human rights treaties, rather than the current provision that only restricts Parliament's power. However, similar attempts at constitutional change have been rejected in the past and it would be undesirable to work towards a constitutional right to religious freedom outside the context of a more comprehensive bill of rights, given that religious freedom often conflicts with other rights and should not be given primacy over them.

1.1.3 Bills of Rights

Australia has no constitutional or statutory bill of rights that applies across the whole country. Both Victoria and the ACT do have human rights Acts that include protection of freedom of religion or belief and that prohibit discrimination on the basis of religion or belief. There is little case-law on these areas in Australia to date and so it is necessary to rely on case-law from other jurisdictions to predict what type of cases might arise if Australia were to introduce a bill of rights. Such a survey demonstrates that there are a variety of approaches that courts adopt to cases involving freedom of religion or belief. No court has found that religious freedom can never be limited or restricted — religious belief does not put a person or religious body above the law. However, the best dividing line between the religious freedom rights and other important rights and freedoms is a complex question, and one that has received different answers in different contexts. At present, however, Australians outside the ACT and Victoria do not have an effective forum where they can complain of breaches of their religious freedom. This is not in compliance with Australia's obligations in international law to protect freedom of religion or belief.

1.1.4 Discrimination Law

Discrimination law is relevant to freedom of religion or belief in two ways. First, many jurisdictions prohibit discrimination on the basis of religion in areas such as employment, accommodation, education and so forth. The Commonwealth does not prohibit discrimination on this basis and there are good reasons to say that it should. Secondly, exemptions to non-discrimination laws are often given to religious bodies in particular circumstances (for example, in relation to the operation of religious schools) or more generally. Some such exemptions are necessary as an element of religious autonomy and freedom but they also have the potential to undermine the aim of non-discrimination. The precise balance to be struck between these two important social goals is a matter of public policy, but there is an argument that the current exemptions are too broad and vague, and insufficiently linked to the goal of protecting religious freedom.

1.1.5 Religious Vilification Law

Laws that prohibit vilification of a person or people on the basis of their religion have been passed by several States but not at Commonwealth level or in the other States or Territories. Religious vilification or hate laws can play a role in protecting freedom of religion or belief, particularly for religious minorities. Vilification on the basis of

religion can prevent people from exercising their religion freely for fear of threats, intimidation or hostility. However, some concerns have also been raised with respect to the potential for such laws to be used to restrict vigorous criticism of religion and regarding their potential to intrude on the religious freedom of those whose religion requires them to condemn what they perceive as religious falsehoods. As with discrimination law, the precise balance to be struck between the two legitimate sets of interests is a matter of public policy rather than law. However, if such a law were to be introduced at the Commonwealth level, there are good reasons for adopting the international law conception of religious hate laws, rather than the definition used in State legislation in Australia.

1.1.6 Court Procedures and Practices

People of a wide variety of religions and beliefs participate in courts as judges, court officials, jurors, parties and witnesses. It is important that their religious beliefs be respected to the extent possible while also respecting the need to protect the right to a fair trial, open justice and the practical limitations of the court system. This report deals with three key areas in which court practices and procedure have the potential to impact on freedom of religion or belief: the taking of oaths, the wearing of religious apparel, and intra-faith disputes or disputes that require secular courts to take account of religious beliefs. Recommendations are made regarding a new approach by federal courts to the oath, and with respect to how these courts might deal with issues relating to appearance and intra-religious disputes.

1.2 COMMON LAW

One further possible source of protection that is sometimes raised by those who claim that the law currently provides sufficient protection for religious freedom is the common law. This can be dealt with briefly here, as the argument is a thin one and does not require additional elaboration in the report. First, the common law can be changed by a statute passed by any Australian parliament. It is a weak form of legal protection compared to that provided by legislation or the *Australian Constitution*. It would provide little defence against a government determined to limit religious freedom.

Secondly, the common law quite possibly does not protect religious freedom. In the *Grace Bible Church v Reedman* ('the *Grace Bible Church Case*'),⁴ the appellant (an unregistered, non-government Christian school) argued that there was 'an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament.'⁵ The appeal was dismissed unanimously by the Full Court of the Supreme Court of South Australia, with Zelling J commenting that such a claim would require 'a complete rewriting of history', given the numerous examples of intersection between law, government and religion in the United Kingdom at the time at which the common law was received in Australia.⁶ White J likewise concluded: 'The common law has always recognised the supremacy of Parliaments ... and has never purported to prevent the Parliament from asserting and exercising an absolute right to interfere with religious worship and the expression of religious

⁴ (1984) 36 SASR 376.

⁵ Ibid 377.

⁶ Ibid 379.

beliefs at any time that it liked.’⁷ Further, ‘the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression.’⁸

More recently, the Full Court of the Federal Court described ‘freedom of religious belief and expression’ as an ‘important freedom generally accepted in Australian society’, reflected in s 116 of the *Australian Constitution* and art 18 of the *International Covenant on Civil and Political Rights*.⁹ This implies that religious freedom has some status in the common law (in the context of this case, as a reasonable basis on which freedom of political communication might be limited) but does not amount to the recognition of religious freedom as a right protected by the common law.¹⁰

1.3 CONCLUSION

Australia has taken on international obligations to protect freedom of religion or belief and to prohibit discrimination on the basis of religion or belief. While there is some protection given to religious freedom in the *Australian Constitution*, it is far from comprehensive. Likewise, there is no comprehensive Commonwealth legislation that protects religious freedom or prohibits discrimination on the basis of religion or belief. There is a question mark over whether the common law does in fact protect religious freedom and, even if it does, it is a weak protection. In summary, then, Australia has only relatively weak constitutional and legal protection of freedom of religion or belief and prohibition of discrimination on the basis of religion or belief.

⁷ Ibid 385.

⁸ Ibid 388.

⁹ *Evans v New South Wales* (2008) 168 FCR 576, 596 [79] (French, Branson and Stone JJ).

¹⁰ See also *Aboriginal Legal Rights Movement Inc v South Australia [No 1]* (1995) 64 SASR 551 for a discussion of these issues.

2 INTERNATIONAL LEGAL PROTECTION OF FREEDOM OF RELIGION OR BELIEF

2.1 INTRODUCTION

There are numerous international treaties, declarations and other instruments relevant to the protection of religious freedom. Australia is a party to several such instruments and thus has an obligation in international law to comply with them. While the decisions of international bodies are not a substitute for thoughtful decisions within Australia about the appropriate way to protect religious freedom in the Australian context, they do provide a useful form of international benchmarking. In addition, international treaties have implications for Australian law. While they do not directly become part of Australian law, they do influence the interpretation of legislation and the development of the common law. In addition, and perhaps most importantly for the purposes of this report, they provide a basis which both permits the Commonwealth to legislate on matters relating to religion and also provides boundaries to the extent of that power.

2.2 INTERNATIONAL PROTECTION OF FREEDOM OF RELIGION OR BELIEF

2.2.1 Universal Declaration of Human Rights, 1948

While the regulation of religion, including some degree of religious toleration or liberty, has been included in international treaties for hundreds of years,¹ the modern approach to the protection of religious freedom traces its roots to the *Universal Declaration of Human Rights* of 1948 ('Universal Declaration').² The Universal Declaration was passed by the United Nations General Assembly and is thus not a binding treaty, but has become an important reference point for the protection of universal human rights and may have become customary international law.³

A number of the Universal Declaration's provisions are relevant to religious freedom, but the two most significant are arts 2 and 18. Article 2 prohibits discrimination on a number of bases, including religion (see the Appendix for the full text). The prohibition of discrimination on the basis of religion is reflected in a wide range of international treaties and other instruments.⁴

¹ For a useful overview, see Malcolm Evans, *Religious Liberty and International Law in Europe* (1997) 45–103.

² GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948).

³ For an overview of the debate over whether this has occurred or not, see Oscar Schachter, *International Law in Theory and Practice* (1991) ch 15.

⁴ See, eg, *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93, arts 1–2, 5 (entered into force 22 May 1962); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195, art 5(vii) (entered into force 4 January 1969) ('ICERD'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2, 4, 18, 20, 24, 26–7 (entered into force 23 March 1976) ('ICCPR'); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36 UN GAOR Supp (No 51), 36th sess, 73rd plen mtg, arts 1–8, UN Doc A/36/684 (1981) ('1981 Declaration'); *Declaration on Race and Racial Prejudice*, UNESCO Gen Conf Res 3/1.1/2, 20th sess, art 3, UN Doc E/CN.4/Sub.2/1982/2/Add.1, annex V (1982); *Convention on the Rights of the Child*, opened

Article 18 of the Universal Declaration is the key provision protecting freedom of religion or belief. It reads:

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

2.2.2 International Covenant on Civil and Political Rights, 1966

The Universal Declaration was followed by two treaties that created binding obligations on those states (including Australia) that became parties to them. The most relevant of these from the point of view of religious freedom was the *International Covenant on Civil and Political Rights* ('ICCPR'),⁵ which includes a non-discrimination provision in art 2 (see the Appendix) and a specific protection of religious freedom in art 18. While art 18 of the ICCPR is based on art 18 of the Universal Declaration, there are a number of distinctions that reflect the growing controversy in the international community over the scope of religious freedom between the drafting of the two instruments.

Article 18 reads:

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 18 is a more detailed provision for the protection of religious freedom than the provision in the Universal Declaration. Some points of particular note in the distinctions between the ICCPR and the Universal Declaration are as follows. The unambiguous protection of the right to 'change' religion in the Universal Declaration has been replaced with the less clear 'have or adopt' in the ICCPR, although the consensus among scholars working in this area is that this formulation still includes

for signature 20 November 1989, 1577 UNTS 3, arts 2, 14, 20, 29 (entered into force 2 September 1990) ('CROC'); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, annex, 47 UN GAOR Supp (No 49), arts 1–2, 4, UN Doc A/47/49 (1992).

⁵ ICCPR, above n 4. The other was the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

the right to change religion.⁶ In addition, a prohibition against coercion has been included. Both of these changes reflect some concern about missionary activities in developing countries and the first also reflects some controversy in certain Muslim countries about whether conversion out of Islam is permitted.⁷ If religious freedom is to be protected in Australian law, it would be preferable to use the unambiguous formulation referring to the right to change religion.

The ICCPR also explicitly protects the right of parents and guardians to ‘ensure the religious and moral education of their children in conformity with their own convictions.’ A similar formulation is found in the *European Convention on Human Rights*.⁸

2.2.3 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981

It was intended that the general protection of religious freedom in the ICCPR be followed by a more detailed treaty on religious freedom and non-discrimination. To date, however, there has not been sufficient international consensus or political will to allow for such a treaty to be drafted.⁹ Instead, the General Assembly of the United Nations has passed a non-binding declaration on religious freedom: the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* of 1981 (‘1981 Declaration’).¹⁰ The full text of the 1981 Declaration can be found in the Appendix.

Much of the 1981 Declaration overlaps with and repeats the provisions of art 18 of the ICCPR.¹¹ Sometimes it develops those rights, for example by including not only a right to non-discrimination on the basis of religion (art 2), but also creating a positive obligation on States to ‘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’ (art 4(1)). It further elaborates on the right of parents/guardians to have their children educated according to their religious beliefs and includes the right to organise family life according to religious beliefs (art 5(1)). However, it adds the limitation that ‘[p]ractices 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’ (art 5(5)).

⁶ See, eg, United Nations Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, [5], UN Doc CCPR/C/21/Rev.1/Add.4 (1993) (‘General Comment 22’).

⁷ For an overview of the debate, see Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection* (1996) 84–8. This debate was also played out, although to a different result, in the drafting of the Universal Declaration: at 73–7.

⁸ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, 213 UNTS 262, art 2 (entered into force 18 May 1954) (‘*Protocol 1 to ECHR*’). However, a somewhat different approach that emphasises the primacy of the child’s right to religious freedom is found in the CROC, above n 4, art 14 (see the Appendix).

⁹ Carolyn Evans, ‘Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination’ [2007] *Brigham Young University Law Review* 617, 625–7.

¹⁰ 1981 Declaration, above n 4.

¹¹ Evans, above n 9.

The most important development in the 1981 Declaration is that a more detailed list of manifestations of religion is set out in art 6 in addition to the traditional formulation of ‘worship, observance, practice, and teaching’ set out in the Universal Declaration and ICCPR. The manifestations set out in art 6 are inclusive, rather than comprehensive, and thus only represent a sub-section of the possible range of manifestations that are protected in international law. The manifestations set out are particularly focused on the rights of religious groups and organisations, including the right to autonomy in the selection of clergy (art 6(g)), the right to purchase and maintain places and objects of worship (art 6(c)), and the right to raise funds for religious purposes (art 6(b)). There is less detail on individual manifestations of freedom of religion or belief.

2.2.4 United Nations Human Rights Committee General Comment 22, 1993

The 1981 Declaration is, at least in part, an attempt to elaborate further the treaty obligations set out in art 18 of the ICCPR. Another attempt at elaboration of these obligations at an international level is *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)* (‘General Comment 22’) of the United Nations Human Rights Committee.¹² The Committee is a body of human rights experts from around the world with a number of responsibilities with respect to the ICCPR, including receiving and determining individual complaints. From time to time, they produce General Comments that set out their understanding of particular issues of interpretation arising under the ICCPR. Their views are not binding but are generally respected as an authoritative source in assisting in interpreting the ICCPR.

The key General Comment dealing with art 18 is General Comment 22 (set out in full in the Appendix). General Comment 22 is the best distillation of the international law obligation to protect freedom of religion or belief. It encapsulates the approach of both the Human Rights Committee and other international bodies, such as the European Court of Human Rights, in defining the right to freedom of religion or belief as:

protect[ing] theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.¹³

This *approach* to understanding the phrase ‘religion or belief’ is useful in that it makes clear that non-theistic and atheistic beliefs are covered by art 18 (something that is implicit but not express in the ICCPR) and also in recommending a broad approach to defining religious freedom that does not give improper preference to established or well-known religions. It is not, however, a *definition* of religion or belief insofar as it does not set out either a test for recognising religion or belief (as compared, for example, to a whim or preference or set of habits) or propose any limits for the sorts of behaviours that might be considered religious.¹⁴

¹² General Comment 22, above n 6.

¹³ Ibid [2].

¹⁴ This can be compared to the approach of the Australian High Court in defining religion which is discussed at 3.3.

General Comment 22 is more comprehensive than the 1981 Declaration in giving examples of manifestations that encompass both individual and organisational/group-related aspects of religious freedom. It sets out several examples of activities caught by the wording ‘worship, observance, practice, and teaching’, saying that they ‘include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.’¹⁵

General Comment 22 also sets out guidelines on the circumstances in which religious freedom may be limited. The internal aspect of freedom of thought, conscience and religion (sometimes known as the *forum internum*) may never be interfered with by the government, even in times of national emergency.¹⁶ The right to manifest a religion or belief may be limited but only if the state can show that this was both ‘prescribed by law’ and ‘*necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’ (emphasis added). The Committee rightly notes that these are the only grounds on which limitations are permitted and that any restrictions ‘must be *directly related and proportionate* to the specific need on which they are predicated’.¹⁷

General Comment 22 is the most comprehensive and detailed international law instrument giving substance to the protection of freedom of religion or belief under art 18 of the ICCPR. It represents the considered reflection of the group of human rights experts entrusted by the international community with interpreting the ICCPR and should be understood as an authoritative and persuasive, though not binding, overview of the obligations under the ICCPR.

2.2.5 Other Relevant International Instruments and Case-Law

A number of other international treaties, declarations and general comments refer to religion or the protection of religious belief, at least in passing. A number of these are set out in the Appendix and there is not space here to describe them comprehensively. Similarly, a comprehensive review of the international case-law interpreting these articles is not possible here.

However, several key points about their content can be made:

- The principle of non-discrimination on the basis of religion or belief is well established and is reiterated in almost all of the relevant instruments. If there is a part of the international law of religious freedom that can lay serious claim to being customary international law, it would be this protection of all people from discrimination on the basis of religion. (Although it should be noted that, despite its legal clarity, it is a principle that is hardly universally observed.)
- The right to freedom of religion or belief encompasses a wide range of both traditional and newer religions, and also beliefs such as atheism,

¹⁵ General Comment 22, above n 6, [4].

¹⁶ Ibid [1].

¹⁷ Ibid [8] (emphasis added).

agnosticism, and humanism. It also extends to certain other serious and cogent beliefs (for example, pacifism) but precisely what bounds there are to the types of beliefs covered is unclear.

- Freedom of religion or belief can be exercised both alone and with others; it has an individual and a collective aspect. It is for the individual, rather than the state, to decide whether to exercise the right individually and/or collectively.
- When individuals choose to exercise their religion within an organised religious group, the State must respect the autonomy of this group with respect to decisions ‘such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.’¹⁸ That does not mean that these elements of religious freedom can never be limited in compliance with the limitations provisions in the ICCPR, but rather is a recognition that the communal aspects of religious practice are important and can only be limited where necessary in a democratic society for one of the reasons set out in the ICCPR. Interference by the state in issues such as the selection of clergy and other central aspects of religious practice would require significant justification.
- Religious autonomy does not mean, however, that religious organisations are ‘above the law’ or that any restrictions or requirements on religious organisations are illegitimate. The precise boundaries of religious autonomy, and the extent to which respect for religious autonomy should apply to works of religious groups, such as running schools or hospitals, is still contested.
- Freedom of religion or belief has both an internal and an external aspect. The internal aspect (which includes freedom of thought, conscience and religion) should not be interfered with. External manifestations of religion or belief can be legitimately limited but only when ‘prescribed by law’ and ‘*necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’ (emphasis added). Restrictions must be proportionate to the end served.
- While international treaties recognise that freedom of religion may be limited because it interferes with the rights and freedoms of others, the determination as to when religious freedom should prevail over other rights has to be undertaken on a case-by-case basis. Human rights courts have been prepared to limit religious freedom for a wide variety of reasons in recent years.

¹⁸ Ibid [4].

2.3 THE RELEVANCE OF INTERNATIONAL LAW

There are three primary ways in which the international law on religious freedom is relevant to the protection of religious freedom in Australia:

1. The international treaties to which Australia is a party and the international customary law that binds Australia create legal obligations in the international sphere to which Australia is obliged to adhere. In the case of some of the treaties which protect religious freedom (for example, the ICCPR) individuals may bring complaints to international bodies if Australia fails to fulfil its obligations.
2. International human rights law may be relevant to interpreting Australian statutes or developing the common law in Australian courts.
3. International law may create both a basis on which the Commonwealth government can pass legislation to regulate religious freedom and also circumscribe the limits to that legislative power.

2.3.1 International Obligations

When Australia becomes a party to an international treaty, it takes on a legal obligation to act consistently with the treaty.¹⁹ This does not translate into an obligation on the government or rights of individuals that are directly enforceable in Australian courts.²⁰ It is sometimes said that international obligations require ‘transformation’ through a decision of the Australian legislature or courts before they become Australian law.²¹

Similarly, there are certain rules of customary international law that are binding on all members of the international community. Some of these have their basis in non-binding but politically and morally significant declarations of the General Assembly, such as the Universal Declaration. While these declarations do not create binding legal obligations in themselves, over time they may develop into customary international law if there is sufficiently significant state practice and a belief in the international community that they have become law.²² Customary international law must also undergo a process of transformation before it becomes Australian law, although there is some debate over its relationship with the common law.²³

Despite the fact that an obligation at international law cannot be directly enforced in Australian courts, it remains an obligation in the international sphere. International obligations must be adhered to and domestic legal — or even constitutional —

¹⁹ Ian Brownlie, *Principles of Public International Law* (7th ed, 2008) 13.

²⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J).

²¹ Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (2005) 406.

²² Brownlie, above n 19, 15.

²³ *Nulyarimma v Thompson* (1999) 96 FCR 153. See also Andrew D Mitchell, ‘Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*’ (2000) 24 *Melbourne University Law Review* 15.

arrangements do not provide an excuse for a failure to implement these obligations.²⁴ Some international treaties include provisions that allow for their enforcement in international institutions. Most notably in the context of religious freedom, the ICCPR allows for both other member states and individuals to bring complaints ('communications') to the Human Rights Committee if they believe that their ICCPR-protected rights (including freedom of religion) have been violated by Australia.²⁵ While communications brought by other States are rare, individual communications by Australians have become more common. The opinion of the Human Rights Committee is only advisory and there is no direct enforcement of the decisions of the Committee.²⁶ However, Australia suffers reputational loss when it loses these cases and its capacity to work to promote human rights in the broader international community is lessened if it is perceived that Australia ignores the rulings of expert, international human rights bodies.

2.3.2 Influence on Statutory Interpretation and the Common Law

There is a common law presumption that parliament does not intend to breach the international obligations entered into by the executive.²⁷ Therefore, if a statute can be interpreted so that it is consistent with Australia's obligations in international law, this interpretation is to be preferred to one that would lead to a breach of those obligations. Like all presumptions, this one can be displaced by a clear statutory intention to the contrary.²⁸ Thus, leaving aside constitutional limitations for the time being, if any Australian parliament chose to limit religious freedom in an Act it could do so and, if it did so sufficiently clearly, there would be no redress through interpretation or the claim that this statute breached Australia's international obligations. If, however, there were an Act that impacted on religious freedom if a provision were interpreted in one way but did not if it were interpreted in another, then the courts could choose the second interpretation on the basis of the presumption that parliament did not intend to breach international obligations to protect religious freedom.

International human rights protection can also influence the development of the common law (although, as discussed above, there may be particular concerns about the compatibility of religious freedom with the common law). There is also an argument that there is a legitimate expectation that Commonwealth government officials will comply with international obligations in making decisions, or at least give notice that they intend not to and provide an opportunity for people affected by the decisions to make representations about this issue.²⁹ While this has been accepted by the High Court, later cases have undermined the principle.³⁰

²⁴ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 27 (entered into force 27 Jan 1980).

²⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 1 (entered into force 23 March 1976).

²⁶ *Ibid*, art 5(4).

²⁷ See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

²⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 [33] (McHugh J), 643 [241] (Hayne J), 661–2 [297]–[298] (Callinan J).

²⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288–292 (Mason CJ and Deane J).

³⁰ See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1.

The role of international law in influencing statutory interpretation has been given additional force recently in the ACT and Victoria with their statutory protection of human rights, including religious freedom. In the ACT, courts may consider ‘international law, and the judgments of foreign and international courts and tribunals, relevant to a human right’ in interpreting human rights.³¹ In Victoria, in interpreting a statutory provision, courts may consider ‘international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right’.³² In both cases (in slightly different ways) courts are expressly invited to take international human rights law into account when interpreting statutes.³³ The impact of these human rights Acts is discussed in greater detail in chapter 5.

2.3.3 Constitutional Considerations

The Commonwealth Parliament has limited legislative power. It can only legislate in areas where it has been given power to do so by the *Australian Constitution* (known as ‘heads of power’). Religion is not one of these areas; nor is human rights. Therefore, if the Commonwealth intends to legislate to give greater protection to religious freedom or to regulate religious organisations, it must find a head of power that allows it to do so. While certain aspects of regulation of religion can be achieved through powers such as the corporations or taxation power, any more comprehensive protection of religious freedom at Commonwealth level would probably rely on the external affairs power.

Section 51(xxix) of the *Constitution* gives the Commonwealth Parliament the power to make laws with respect to ‘external affairs’. While this power has several dimensions, the most relevant for current purposes is that it allows the Commonwealth to pass legislation that implements a treaty obligation.³⁴ Thus any of the treaties relevant to religious freedom or the regulation of religion discussed above could be implemented into Australian law by the Commonwealth Parliament. It is not yet clear whether the declarations and other instruments, such as General Comment 22 of the Human Rights Committee, could form the basis for legislation.

While international treaties that protect religious freedom form a basis for Commonwealth legislation, they also inform the limits of the legislation. The fact that there is a treaty in existence that deals with religious freedom does not give the Commonwealth comprehensive power to deal with religious freedom as it wishes.³⁵ The power is only to implement the relevant treaty provisions. The Commonwealth does not have to implement the treaty comprehensively; partial implementation is permitted, so long as it does not undermine the purpose of the treaty.³⁶ It would therefore be within Commonwealth power to implement art 18 of the ICCPR, for example, without comprehensive legislation protecting all the rights protected in the ICCPR.

³¹ *Human Rights Act 2004* (ACT) s 31(1).

³² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

³³ Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) ch 3.

³⁴ *Victoria v Commonwealth* (1996) 187 CLR 416, 482–5 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (‘the *Industrial Relations Act Case*’).

³⁵ *Ibid* 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

³⁶ *Ibid* 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

The legislation does not need to repeat the precise words of the treaty. The test that must be met is whether the legislation is ‘appropriate and adapted’ to the purpose of implementing the obligations in the treaty.³⁷ This allows the Commonwealth some latitude in both the wording of the right and developing appropriate mechanisms for its protection. However, the power is not unlimited and legislation that cleaves as closely as possible to the treaty provisions is less likely to be subject to successful constitutional challenge than legislation that takes a more expansive approach. The Parliament, however, is given more scope to determine how best to *enforce* the protection of religious freedom (for example, through setting up a rights body or giving increased power to the Australian Human Rights Commission, imposing civil or criminal sanctions, forbidding certain actions by public servants, etc).

In order to form the basis of legislation, the treaty obligations must also be sufficiently precise and not merely aspirational.³⁸ While the key provisions of international treaties that protect religious freedom (eg art 18 of the ICCPR) are written in relatively broad language, it is likely that the courts would find the standard formulation for protection of religious freedom in international law to be sufficiently precise for constitutional purposes. This is particularly so given that similar language has been picked up in the constitutional or statutory protections of religious freedom in many countries, and there is now a considerable body of both domestic and international case-law that gives a more detailed account of how this protection is to be interpreted.

³⁷ Ibid 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

³⁸ Ibid 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

3 CONSTITUTIONAL PROTECTION OF RELIGIOUS FREEDOM

3.1 INTRODUCTION

Unlike most modern constitutions, the *Australian Constitution* does not contain a bill of rights. It does, however, include several provisions that protect particular rights to some degree. One of these is s 116:

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

Section 116 was based on the religion clauses of the *United States Constitution*,¹ although it modified their wording somewhat with respect to the non-establishment and religious freedom clauses, and it added prohibitions on imposing religious observances or religious tests for public offices.

3.2 WHAT LEVELS OF GOVERNMENT DOES S 116 APPLY TO?

There are a number of limitations to the scope of s 116. The first is that it only prohibits the *Commonwealth* from making certain laws. Section 116 would not prohibit the States from infringing on religious freedom, establishing a religion, imposing religious observance on some or all of the population, or barring people of a certain religion from the public service or other public offices.² Whether any such measures would be feasible politically is a distinct question; they would be constitutional and any claim as to the adequacy of the *Constitution*'s protection of religious freedom needs to recognise this significant limitation. Similarly, there is no obligation on local governments arising from s 116 that requires them to respect religious freedom or non-establishment principles. The position of the Territories is not yet settled.³

3.3 THE DEFINITION OF 'RELIGION'

In an early Australian case, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* ('the *Jehovah's Witnesses Case*'), Latham CJ referred to the problems of defining religion when he noted that: 'It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world.'⁴ His Honour also noted that s 116 'proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.'⁵

¹ The most comprehensive account of why and how s 116 was included is in Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (1976). See also Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207, 213–21.

² See, eg, *Grace Bible Church Case* (1984) 36 SASR 376, 379 (Zelling J).

³ Compare *Kruger v Commonwealth* (1996) 190 CLR 1, 60–1 (Dawson J), 141–2 (McHugh J) with 79, 85–6 (Toohey J), 122–3 (Gaudron J) ('*Kruger*').

⁴ (1943) 67 CLR 116, 123.

⁵ *Ibid.*

The most comprehensive discussion of the definition of religion by the Australian High Court was in the *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* ('the *Scientology Case*')⁶ in the context of a legislative provision giving a taxation exemption to 'religious institutions'.⁷ The Church of the New Faith, more commonly known as Scientologists, challenged the decision of the Commissioner of Pay-roll Tax who had held that Scientology was not a religion for the purposes of this exemption. The justices in the case, however, made clear that they intended their discussion of the definition of religion under the legislation to have a broader application, including to the constitutional definition of religion.⁸

Three different definitions of religion were given (although there is considerable overlap between them in practice). Mason ACJ and Brennan J set out a two-part test. A religion must consist of 'first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief'.⁹ A religion was not to be treated as fraudulent and outside the category of religion simply because there are allegations that the founder set it up as a 'sham' if there is evidence of the sincerity of believers.¹⁰

Wilson and Deane JJ adopted the approach of defining a religion by reference to indicia or guidelines 'derived by empirical observation of accepted religions'.¹¹ Such indicia will, according to their Honours, change over time and the relative importance of each criterion may differ depending on the particular case. In their judgment, they set out some of the more important indicia, including ideas and/or practices that involve belief in the supernatural. This criterion was said to be sufficiently important that their Honours doubted whether something can be a religion without it. Other indicia include ideas about man's place in the universe and relation to the supernatural, ideas about a code of conduct or standards, and an identifiable group that (though they were less certain about this) perceives itself as religious.¹²

Murphy J took an expansive approach to defining religion. His Honour rejected the notion that there is single criterion to determine a religion or a closed set of categories of religions. He said that it is better 'to state what is sufficient, even if not necessary, to bring a body which claims to be religious within the category'.¹³ This very vague language makes it difficult to determine what is necessary in order to determine whether a group is religious, especially given that Murphy J then went on to discuss a wide range of circumstances in which a body may be determined to be religious. One common theme to his Honour's examples is that the bodies must claim to be religious. In addition, it is sufficient if their 'beliefs or practices are a revival of, or resemble, earlier cults', if they 'believe in a supernatural Being or Beings' (including worship of a God, spirit, or the sun or stars), if they claim to be religious and offer 'a way to find

⁶ (1983) 154 CLR 120.

⁷ *Pay-roll Tax Act 1971* (Vic) s 10. The factual background to the case is outlined in the *Scientology Case* (1983) 154 CLR 120, 128–9 (Mason ACJ and Brennan J).

⁸ *Scientology Case* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

⁹ *Ibid* 136.

¹⁰ *Ibid* 141. See also Wilson and Deane JJ at 170, who held that it is irrelevant to the determination of religious status whether members are 'gullible or misguided or, indeed, that they be or have been deliberately misled or exploited.'

¹¹ *Ibid* 173.

¹² *Ibid* 174.

¹³ *Ibid* 151.

meaning and purpose in life’, or if they are indigenous religions.¹⁴ The vagueness of Murphy J’s definition is compounded by the fact that his Honour denied that a religion must involve belief in a god,¹⁵ that it must claim exclusive access to religious truth,¹⁶ that it must have consistently claimed religious status over time,¹⁷ that it must be involved with propitiation and propagation¹⁸ or that it must be accepted by the public.¹⁹ This definition is in some ways the most consistent with the very broad approach adopted in international law but not particularly useful in defining the boundaries of the definition of religion.

3.4 MEANING OF A ‘LAW’

Section 116 only prohibits the Commonwealth from making a ‘law’ prohibiting free exercise, establishing a religion etc. It is not a free standing *right* of an individual, but a *limitation* on the legislative power of the Commonwealth Parliament. One consequence of this is that the right to religious freedom cannot be asserted to protect an individual against actions by private individuals or organisations. Nor does s 116 create a positive obligation on the Commonwealth to take action to protect religious freedom; s 116 simply prohibits the Commonwealth from enacting certain laws.

One question that arises is whether executive action falls within the prohibition of making a law. The answer appears to be that it does but only to some extent. When a member of the executive acts under a statutory power in such a way as to establish a religion or to prohibit free exercise then that executive action may be invalid. It is not invalid as directly breaching s 116 (because s 116 only deals with laws). Instead, it is invalid because the enabling statute cannot authorise action that is in breach of s 116 in most (although not necessarily all) circumstances.²⁰

However, executive power is not only statutory. The executive has a range of powers granted directly by the *Constitution* and prerogative or common law powers. These powers can be quite extensive (for example, in *Ruddock v Vadarlis* (‘the *Tampa Case*’)²¹ it was held that they extended to forcibly preventing the entry of those aboard the *MV Tampa* into Australia) and they include the powers of a legal person with respect to such things as entering into a contract, property ownership and control, and employment. These are areas where there is real potential for interference with religious freedom and they are not caught by the constitutional protection in s 116.

¹⁴ Ibid 151.

¹⁵ Ibid 154–6.

¹⁶ Ibid 160.

¹⁷ Ibid 156–7.

¹⁸ Ibid 158–9.

¹⁹ Ibid 159.

²⁰ *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 580–1 (Barwick CJ) (‘the *DOGS Case*’). See also *Kruger* (1997) 190 CLR 1, 86 (Toohey J), 131 (Gaudron J); *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 379 (Jackson J).

²¹ (2001) 110 FCR 491.

3.5 FREE EXERCISE OF RELIGION

3.5.1 Types of Actions Covered by Free Exercise

The free exercise clause of s 116 has been given a limited meaning. The tone for later cases was set in an early High Court case where Griffith CJ and Barton J dealt dismissively with an appellant who refused to attend the training required under the *Defence Act 1903* (Cth) on the basis that his Christian beliefs required him to be a conscientious objector. The Act required all resident male British subjects to train for defence work, although conscientious objectors were, as far as practically possible, to be accommodated in working in non-combat roles.²² The justices dealt with the case almost contemptuously, with Griffith CJ describing the appellant's position as 'absurd'²³ and Barton J declaring that the case was 'as thin as anything of the kind that has come before us.'²⁴ Griffith CJ dismissed the appeal stating:

To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.²⁵

Similar reasoning was used to dismiss a claim by a man who refused, on the basis of religious conviction, to pay the portion of his taxation that would be used to provide for abortions²⁶ and to dismiss a claim that a legal obligation to reveal the contents of a religious confession was a breach of s 116.²⁷

The courts have recognised, however, that the protection in s 116 extends beyond beliefs to encompass some forms of conduct. Indeed, given that the phrase 'free exercise' is used in s 116, such a conclusion would have been difficult to avoid.

Latham CJ in the *Jehovah's Witnesses Case* denied that the provisions of s 116 applied only to religious beliefs, especially given that the wording of the section explicitly refers to the free exercise of religion. Thus, his Honour concluded the section goes beyond the protection of beliefs and 'protects also acts done in pursuance of religious belief as part of religion.'²⁸ This connection was also noted by Mason ACJ and Brennan J in the *Scientology Case*. In coming to their Honours' definition of religion, they recognised that religion was more than a set of theological principles or a belief in the supernatural: 'Thus religion encompasses conduct, no less

²² *Defence Act 1903* (Cth) s 143(3).

²³ *Krygger v Williams* (1912) 15 CLR 366, 371.

²⁴ *Ibid* 373.

²⁵ *Ibid* 369. See also at 372 (Barton J): 'the *Defence Act* is not a law prohibiting the free exercise of the appellant's religion'.

²⁶ *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431 (Unreported, DeBelle, Sulan and Vanstone JJ, 7 December 2007) [12] (DeBelle J).

²⁷ *SDW v Church of Jesus Christ of Latter-Day Saints* (2008) 222 FLR 84, 94–5 [69]–[76] (Simpson J). This claim was described by Simpson J (at 95 [76]) as 'devoid of merit and entirely misconceived' with little reasoning, despite the potentially serious implications of the decision for certain religious groups.

²⁸ *Jehovah's Witnesses Case* (1943) 67 CLR 116, 124.

than belief.’²⁹ Their Honours described religious action in broad terms, noting that in theistic religions it will normally include some ritual observances but that, more broadly, religious actions are ‘[w]hat man feels constrained to do or to abstain from doing because of his faith in the supernatural’.³⁰ In order to prove that the canons of conduct that a person has set for him or herself fall within the immunity granted to religion, the believer must show a ‘real connexion’ between the conduct and the belief in the supernatural.³¹ Mason ACJ and Brennan J also observed that even traditional religious behaviour, such as worship, teaching or propagation, will need to pass this connection test (although one would assume that it would not be difficult for it to do so).³²

3.5.2 Types of Laws Prohibited

Despite this recognition, no successful claim has been made under the free exercise clause. This may be partly because of the very restrictive test used by the High Court, which essentially requires that it be the purpose of the legislation to restrict religious freedom and that this would usually be evident on the face of the legislation.

Earlier case-law of the High Court was less restrictive. It recognised that a law that, on its face, had nothing to do with religion (and might have not been intended to impact on religion) may none the less have had serious implications for free exercise. In the *Jehovah’s Witnesses Case*, Latham CJ recognised that the Commonwealth has no power with respect to religion and hence s 116 applied to all laws which ‘in some manner relate to religion’ and not only to laws dealing expressly with religion.³³ Gaudron J in the more recent *Kruger v Commonwealth* (‘*Kruger*’)³⁴ also recognised the problems in requiring a law to be directed at religion on its face or have the sole purpose of prohibiting free exercise. Too rigid a rule such as this, her Honour rightly noted, could allow governments to restrict religious freedom indirectly and was not consistent with religious freedom.³⁵

The test set out by the majority in *Kruger*, however, and which is broadly consistent with previous case-law, is that only a law which has a purpose of ‘achieving an object which s 116 forbids’ falls foul of the constitutional provision.³⁶ It is not enough for a plaintiff to show that the effect of the law is to restrict or even seriously undermine their capacity to freely exercise their religion of choice. As Toohey J put it, in the context of whether the removal of Aboriginal children breached s 116: ‘It may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory ... But I am unable to discern in the language of the Ordinance such a purpose.’³⁷ A similar analysis was given by Gummow J, who further noted that the objective or purpose of the

²⁹ *Scientology Case* (1983) 154 CLR 120, 135.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ (1943) 67 CLR 116, 122–3.

³⁴ (1997) 190 CLR 1.

³⁵ *Ibid.* 131.

³⁶ *Ibid.* 40 (Brennan CJ). See also at 60–1 (Dawson J), 86 (Toohey J), 160–161 (Gummow J).

³⁷ *Ibid.* 86.

legislation did not refer to the ‘underlying motive but to the end or object the legislation serves.’³⁸

It is thus fairly clear that a law that has the effect of prohibiting or restricting free exercise (and perhaps was even motivated in part by this end) but that does not reveal such a purpose on its face is unlikely to be struck down for inconsistency with s 116.

3.5.3 Limitations on the Right to Free Exercise of Religion

All of the justices who have considered the issue in Australia have recognised that the right to practise a religion is not absolute. The High Court has held that not every interference with religion is a breach of s 116, but only those that are, in the words of Latham CJ in the *Jehovah’s Witnesses Case*, an ‘undue infringement of religious freedom.’³⁹ It is interesting that, in the *Scientology Case*, after spending some time discussing the immunity conferred on religion (defined as both belief and conduct), Mason ACJ and Brennan J moved to the rather wide proposition that ‘general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them’.⁴⁰ This approach compares unfavourably to the more nuanced approach taken by Latham CJ in the *Jehovah’s Witnesses Case*, in which some of the dangers of an absolute test of this nature were discussed and the compromise formula of ‘undue infringement’ was settled on. Mason ACJ and Brennan J made it clear, however, that there may be constitutional problems with laws that ‘discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.’⁴¹

The restraints placed on religious freedom have, at times, proved very onerous without a breach of s 116 being found. The most important case in this regard is the *Jehovah’s Witnesses Case*. The case arose because the Governor-General declared the Jehovah’s Witnesses (along with several other groups) ‘prejudicial to the defence of the Commonwealth or the efficient prosecution of the [Second World] war.’ This declaration, which made the Jehovah’s Witnesses an ‘unlawful’ organisation, was made under the *National Security (Subversive Associations) Regulations 1940* (Cth). On the same day that it was made, an officer of the Commonwealth took possession of the Kingdom Hall in Adelaide (in which the Jehovah’s Witnesses met for religious purposes) and refused to allow the Adelaide Company of Jehovah’s Witnesses to use it. While parts of the regulations were found to be beyond power for other reasons, the Court unanimously found that they did not breach section 116.⁴² The case demonstrates the difficulty of ensuring religious freedom during times of national emergency and the extent to which provisions protecting rights can be read down by courts, especially when marginal religious groups are involved.⁴³

³⁸ Ibid 160 (citation omitted).

³⁹ (1943) 67 CLR 116, 131.

⁴⁰ (1983) 154 CLR 120, 136. See also *Kruger* (1996) 190 CLR 1, 160 (Gummow J).

⁴¹ *Scientology Case* (1983) 154 CLR 120, 136.

⁴² *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 132–4, 147 (Latham CJ), 149 (Rich J), 155 (Starke J), 156–7 (McTierenan J), 160–1 (Williams J).

⁴³ The Company of Jehovah’s Witnesses in Adelaide at the time had only around 200–250 members: ibid 117. The judgment of Williams J demonstrates the level of prejudice that could be found against the group, even within the ranks of the judiciary: at 158–60.

The case clearly established that the right to free exercise conferred by s 116 can be limited, as would be expected. The circumstances of the case being heard during war time and involving an assessment by the executive that a religious group put the defence of the Commonwealth in jeopardy meant that little analysis was given by the justices as to how the limits of religious freedom would apply in cases where the national interest was less weighty.

3.6 THE SCOPE OF NON-ESTABLISHMENT

The non-establishment clause of s 116 played little role in public life until a challenge to the constitutionality of a Commonwealth appropriation for education in the early 1980s.⁴⁴ In *Attorney-General (Vic) ex rel Black v Commonwealth*,⁴⁵ there was a challenge to the provision of funds by the Commonwealth to the States for use in subsidising religious schools. The case was brought by a group known as the Defence of Government Schools association (hence the case is often referred to, using an acronym, as ‘the *DOGS Case*’). The plaintiffs drew heavily on American case-law on establishment, which strictly prohibits government funding for religious schools. They argued that, given the similarity of the words in the First Amendment to the *United States Constitution* to those in s 116 of the *Australian Constitution* and the fact that the drafters of the *Australian Constitution* relied on the First Amendment when drafting s 116, the High Court should take a similar approach to the Supreme Court of the United States in interpreting the meaning of the non-establishment clause of s 116.⁴⁶

Only one of the five justices, Murphy J, supported that position. His Honour determined, based in large part on the American case-law, that financial aid to religious institutions was a form of establishment prohibited by s 116 of the *Australian Constitution*.⁴⁷

The six majority justices (who each wrote separate opinions) took a narrower approach to the issue of establishment. Rather than perceiving the clause as creating a right that required a broad interpretation, they held that it was a limitation on governmental power⁴⁸ and was therefore not to be construed liberally. Barwick CJ held that the word ‘for’ required that a law must have the objective of establishment ‘as its express and, as I think, single purpose.’ Each of the justices came to slightly different definitions of establishment. Barwick CJ held that it involves ‘the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case the Commonwealth, to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth’.⁴⁹ Expressing broadly the same opinion in briefer terms, Gibbs J held that the Commonwealth could only establish a religion if it was to ‘constitute a particular religion or religious body as a

⁴⁴ See generally Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 139, 143–5. See also a very prescient article, P H Lane, ‘Commonwealth Reimbursements for Fees at Non State Schools’ (1964) 38 *Australian Law Journal* 130.

⁴⁵ (1981) 146 CLR 559.

⁴⁶ Ibid 561–2.

⁴⁷ Ibid 624–33.

⁴⁸ Ibid 603 (Gibbs J), 605 (Stephen J), 652–3 (Wilson J).

⁴⁹ Ibid 582.

state religion or a state church.’⁵⁰ Similar definitions were given by Mason J⁵¹ and Wilson J.⁵² Stephen J also discussed establishment in terms of creating a state church,⁵³ but cautioned that the relationship of establishment is created by the ‘sum total’ of a range of laws and that no ‘single element of those relations, viewed in isolation, itself creates establishment.’⁵⁴ Aickin J agreed with Gibbs and Mason JJ.⁵⁵

While the details of each definition differ slightly, the majority justices were in no doubt that the indirect funding of religious schools fell far short of what was required for establishment.⁵⁶ They acknowledged that funding may sometimes be part of a scheme to create a state church⁵⁷ but were convinced that, in the case before them, no such establishment had occurred. Given the very high threshold set by the Court, it is highly unlikely that the establishment clause will play much further role in regulating church-state relations.⁵⁸

3.7 OBSERVANCE AND RELIGIOUS TESTS

There have been no cases to date on the prohibition of religious requirements for public office and only one case in which the question of a forced religious observance was put into question — and then only by a single justice. The case, *R v Winneke; Ex parte Gallagher*,⁵⁹ dealt with a Royal Commission being jointly operated by the Commonwealth and State governments. The case concerned the requirement to take an oath or solemn affirmation. Under the Commonwealth law, the *Royal Commissions Act 1902* (Cth), in order to be allowed to affirm, a witness had to explain why he or she declined to take an oath. Most justices dealt with this only as one manifestation of the argued contradiction between State and Commonwealth laws (as the State law did not allow for affirmation at all). Murphy J, however, held that the Commonwealth law was in breach of s 116 of the *Constitution* for the following reasons:

[The *Royal Commissions Act*’s] provisions which deal with oath-taking infringe the constitutional prohibition. The mandate against laws imposing any religious observance protects believers as well as non-believers ...

No law of the Commonwealth may compel a person to take an oath, whether his objections are conscientious or not. Whatever his reason, or even if he has no reason for declining to take an oath, he cannot constitutionally be required to do so. The

⁵⁰ Ibid 597.

⁵¹ Ibid 616.

⁵² Ibid 653.

⁵³ Ibid 605–6.

⁵⁴ Ibid 607.

⁵⁵ Ibid 635.

⁵⁶ Ibid 583–4 (Barwick CJ), 604 (Gibbs J), 610–11 (Stephen J), 618 (Mason J), 635 (Aickin J), 656–7 (Wilson J).

⁵⁷ See, eg, ibid 618 (Mason J).

⁵⁸ For a critique of the decision, see Wojciech Sadurski, ‘Neutrality of Law Towards Religion’ (1990) 12 *Sydney Law Review* 420, 447–51. One subsequent attempt to challenge legislation on the basis that it infringed the non-establishment provision was *Nelson v Fish* (1990) 21 FCR 430, in which a litigant in person failed in his attempt to argue that he should be allowed to be a registered marriage celebrant as a minister of his own religion. The Commonwealth keeps a register of recognised religions the ministers of which may solemnise marriages. While the applicant’s arguments were not well developed, the decision of French J was based on a rejection of the claims that this register was a form of establishment and that denying the applicant the right to celebrate legally recognised marriages was a denial of the free exercise of religion.

⁵⁹ (1982) 152 CLR 211.

provision in s 4 of the *Royal Commissions Act* which relieves a person from taking an oath if he conscientiously objects and makes an affirmation that he conscientiously objects therefore does not avoid the constitutional prohibition. It extends only to conscientious objection. Further, it requires the person (as a condition of being relieved from taking an oath) to affirm that he conscientiously objects. This interferes with the free exercise of religion. Consistently with s 116 no one can be required by any law of the Commonwealth to state or explain his reasons for declining to take an oath; his religious beliefs or lack of belief cannot be examined and he cannot be called upon to state, explain or justify them, as conscientious or otherwise.⁶⁰

The point is a significant one and the argument sound. It is perhaps a reflection of the marginal role that s 116 has played in Australian constitutional law that it was not central to the case.

3.8 IS CONSTITUTIONAL AMENDMENT NEEDED?

There are two broad approaches that could be taken to possible constitutional amendments to give greater protection to religious freedom. The first would involve extending the current provisions to include a wider range of government actions, while the second would be to reformulate the constitutional protection as a right.

3.8.1 Extending the Current Scope of s 116

The most obvious extension of the scope of s 116 would be to extend it to the States and Territories. While the interpretation of s 116 by the courts has tended to be narrow compared with similar jurisdictions, it at least provides a level of protection from egregious breaches of religious freedom or attempts to establish a religion.

Secondly, the protection could be extended to include a prohibition on ‘laws *or government action*’. As governments have extensive powers outside the legislative realm, the capacity for interference with religious freedom using non-legislative powers is a real threat.

Thirdly, the protection could be extended to ‘religion *or belief*’. This would be in line with Australia’s international obligations, and would perhaps help to expand the constitutional definition of religion beyond the current focus on belief in the supernatural/deity and make clear that the protection also extends to atheism, agnosticism, humanism and so forth. The current definitions of religion strain with these concepts, although the High Court has recognised that freedom of religion includes a right to reject a religion. This, however, may not be as appropriate as recognising such beliefs in their own right, rather than simply as the negative of religion.

3.8.2 Shifting to a Constitutional Right to Religious Freedom

An alternative approach to constitutional reform would be to reformulate the provision away from a limitation on legislative power and into a positive, individual right similar to that in the ICCPR. The benefit of such a change, from the point of view of religious freedom, is that it creates a more expansive field of protection, including potentially a positive obligation on the government to take steps to protect

⁶⁰ Ibid 229.

the religious freedom of individuals or organisations. Such a change may also encourage the High Court to take a more expansive approach to interpreting religious freedom, as some of the narrowness of interpretation has been justified on the basis that s 116 is a limitation on legislative power and should therefore be read narrowly.

However, there is a real question-mark over whether it would be appropriate to create a positive right to religious freedom in the *Constitution* in the absence of a more comprehensive constitutional bill of rights. Religious freedom is an important right and one that would be integral to any bill of rights, but it also comes into conflict at times with other important rights. To give religious freedom an elevated constitutional status by including it in the *Constitution* without setting it in the context of a broader range of rights and freedoms seems questionable.

3.8.3 Practical Problems with Constitutional Change

History would suggest that constitutional changes are not easily achieved. In 1988, a proposal for changing the *Constitution* to extend the provisions of s 116 was made. The proposal sought to extend the provision to apply to the States and Territories, and also to all government acts, rather than just legislation.⁶¹ The proposal failed. Only 30.8% of voters voted in favour of the amendment and the proposal did not achieve a majority in any State.⁶² While this is a particularly poor result, the outcome is typical of referenda in Australia more generally.⁶³ Another similar proposal that also dealt with religious freedom failed in 1944.⁶⁴ In the absence of evidence, it is difficult to tell whether the rejection of the changes to s 116 reflected a community concern with constitutional protection of religious freedom, or with rights more generally, or simply an inherent conservatism about constitutional change.⁶⁵

One complicating factor with the 1988 referendum is that it proposed to replace the phrase ‘shall not make any law for establishing any religion’ with ‘shall not establish any religion’.⁶⁶ This raised serious concerns, particularly in the Catholic community, that the new formulation might increase the scope of the establishment clause in such a way as to prohibit government funding to religious schools. For several of the justices in the *DOGS Case*, the distinction between the use of ‘respecting’ in the formulation of the non-establishment clause of the *United States Constitution* was a critical factor in concluding that the Australian courts should not follow United States case-law in defining establishment. This seemingly innocuous proposed change in wording in the 1988 referendum led to concern by those who supported religious schools that their funding might be threatened. How significant this concern was to the eventual result of the referendum is not clear, but it certainly serves as a warning that any future proposed constitutional changes will need to deal more explicitly with this issue.

⁶¹ Constitutional Alteration (Rights and Freedoms) Bill 1988 (Cth) cl 4.

⁶² See Commonwealth, *Constitutional Referenda in Australia*, Parl Paper No 2 (1999), Table 1.

⁶³ Enid Campbell, ‘Southey Memorial Lecture 1988: Changing the Constitution — Past and Future’ (1989) 17 *Melbourne University Law Review* 1.

⁶⁴ See Constitutional Alteration (Post-war Reconstruction and Democratic Rights) Bill 1944 (Cth).

⁶⁵ Commonwealth, *Constitutional Referenda in Australia*, Parl Paper No 2 (1999) discusses the reasons given for the failure of constitutional proposals and the lack of empirical research in this area.

⁶⁶ Constitution Alteration (Rights and Freedoms Bill) 1988 (Cth) cl 4.

3.9 CONCLUSION

For the time being, the protection of religious freedom under the *Australian Constitution* is far from comprehensive. Both the terms of the *Constitution* itself and the way in which it has been interpreted allow for significant scope for government interference with religious freedom. Constitutional change, however, even simply to expand the scope of the current protection, may prove difficult at present. It may be easier and better to supplement the current protection of religious freedom in the *Constitution* with statutory protection. This is discussed further in chapter 5. However, it should be noted that only constitutional protection of religious freedom would be effective to invalidate Commonwealth laws that infringe religious freedom or to apply comprehensively to State government action as well as Commonwealth government action. Any Commonwealth statutory bill of rights or protection of religious freedom will not be able to achieve these ends.⁶⁷

⁶⁷ While, by virtue of s 109 of the *Constitution*, a Commonwealth law protecting religious freedom could apply to most actions of State governments and could invalidate State laws ‘to the extent of [their] inconsistency’ with the Commonwealth law, certain areas of core State functions cannot be overridden by Commonwealth legislation. See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185.

4 DISCRIMINATION LAWS AND RELIGION

4.1 INTRODUCTION

Discrimination laws intersect with religious freedom in two key ways.¹¹⁶ First, in some Australian jurisdictions, they protect individuals against discrimination on the basis of their religion. As discussed above, the principle of non-discrimination on the basis of religion is one of the clearest principles of international human rights law in this area.

The second way in which discrimination laws intersect with religious freedom is when religious groups or individuals claim that they should be exempt from certain aspects of discrimination law. Religious groups may wish to engage in discrimination (on the basis of religion or other bases such as sex, marital status or sexuality). Most religious groups believe that it is essential that they maintain autonomy when it comes to issues such as selection of clergy or other key religious appointments. This autonomy is an important element of religious freedom, impacts on a relatively small number of people and would be hard to justify removing. However, religious groups may wish to be permitted to discriminate in other areas in which they are active, for example in relation to admissions to religious schools, employment in religious organisations or the types of groups to whom they rent property. In such cases, the religious freedom of individuals or groups can come into conflict with the right of other individuals not to be discriminated against. In most Australian jurisdictions this tension is dealt with by a partial exemption to some discrimination laws for religious bodies. The precise nature and scope of these exemptions differs between different jurisdictions.

4.2 AUSTRALIAN JURISDICTIONS THAT PROHIBIT DISCRIMINATION ON THE BASIS OF RELIGION

4.2.1 Commonwealth Legislation

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) does not make discrimination on the basis of religion unlawful as such (as it does with discrimination on other bases, such as race and sex). However, the President of the Human Rights Commission has power to attempt a conciliation of a breach of any right under the ICCPR (which includes the prohibition of religious discrimination).¹¹⁷ The President also has specific powers of conciliation regarding discrimination on the basis of religion with respect to employment or occupation.¹¹⁸

More specific legal protection is given to non-discrimination on the basis of religion in the *Workplace Relations Act 1996* (Cth), which prohibits the *termination* of

¹¹⁶ These are the two areas that will be focused on in this paper. However, other provisions of discrimination law can be relevant to religious freedom. For a useful discussion of the exemptions to discrimination laws, including how they can impact on religious groups, see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Options Paper* (2009).

¹¹⁷ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 3, 8(6), 11(1)(f)(i).

¹¹⁸ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 3, 8(6), 31(b)(1).

employment on the basis of religion,¹¹⁹ although this does not prevent an employer discriminating against a job applicant *before* the employment relationship comes into being. The Workplace Authority Director also has responsibility to check workplace agreements lodged with a view to, amongst other things, eliminating religious discrimination.¹²⁰ There are more expansive protections in the *Fair Work Act 2009* (Cth),¹²¹ which will replace the *Workplace Relations Act*. The new provisions also extend the prohibition of termination of employment on the basis of religion to ‘adverse action’ against an employee *or prospective employee* on the basis of religion.¹²² Adverse action is defined to include such things as dismissing an employee or refusing to employ a prospective employee.¹²³

4.2.2 State Legislation

While most Australian jurisdictions prohibit discrimination on the basis of religion, two State jurisdictions do not make discrimination on the basis of religion unlawful. The New South Wales government rejected the recommendation of its own Law Reform Commission to introduce laws prohibiting discrimination on the basis of religion.¹²⁴ South Australia has likewise not introduced legislation prohibiting discrimination on the basis of religion, despite considerable debate about it in South Australia.¹²⁵

Discrimination on the basis of religious belief or activity is prohibited in at least some circumstances in the ACT, the Northern Territory, Queensland, Tasmania, Victoria, and Western Australia.¹²⁶ While the precise details of the legislation differ, discrimination on the basis of religion is generally prohibited in such jurisdictions with respect to: employment,¹²⁷ the provision of goods and services,¹²⁸

¹¹⁹ *Workplace Relations Act 1996* (Cth) s 659(2)(f).

¹²⁰ *Workplace Relations Act 1996* (Cth) s 150B(2)(d).

¹²¹ *Fair Work Act 2009* (Cth) ss 153(1), 194(a), 195(1), 351(1), 578(c), 772(1)(f).

¹²² *Fair Work Act 2009* (Cth) s 351(1).

¹²³ *Fair Work Act 2009* (Cth) s 342(1).

¹²⁴ New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report No 92 (1999).

¹²⁵ South Australian Attorney-General’s Department, *Discussion Paper: Proposal for a New Law Against Religious Discrimination and Vilification* (2002).

¹²⁶ *Discrimination Act 1991* (ACT) s 11; *Anti-Discrimination Act* (NT) s 19(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o), (p); *Equal Opportunity Act 1995* (Vic) s 6(j); *Equal Opportunity Act 1984* (WA) s 53(1).

¹²⁷ *Discrimination Act 1991* (ACT) ss 10–17; *Anti-Discrimination Act* (NT) ss 31–37A; *Anti-Discrimination Act 1991* (Qld) ss 15–36; *Anti-Discrimination Act 1998* (Tas) s 22(1)(a); *Equal Opportunity Act 1995* (Vic) ss 13–15, 30–1; *Equal Opportunity Act 1984* (WA) ss 11–17.

¹²⁸ *Discrimination Act 1991* (ACT) s 20; *Anti-Discrimination Act* (NT) s 41; *Anti-Discrimination Act 1991* (Qld) ss 45–51; *Anti-Discrimination Act 1998* (Tas) s 22(1)(c); *Equal Opportunity Act 1995* (Vic) s 42; *Equal Opportunity Act 1984* (WA) s 20.

accommodation,¹²⁹ education,¹³⁰ membership of clubs and participation in sporting activity,¹³¹ and provision of government services.¹³²

Again, while the precise definitions of religious discrimination differ between jurisdictions, religious discrimination can usually be either 'direct' or 'indirect'. Direct religious discrimination involves treating someone less favourably than another person in the same position because of their religion. Indirect discrimination involves imposing a term, condition or requirement that a person of a religious group is less likely to be able to comply with than the population as a whole.

Examples of religious discrimination (or closely associated) claims in Australia include:

- A man who successfully claimed religious discrimination against the petrol refinery that employed him when it took actions against him, culminating in terminating his employment, for refusing to contribute to a union fund on the basis that it was against his religious beliefs to do so.¹³³
- A Muslim prisoner who successfully claimed he was discriminated against because the prison refused to provide him with halal meat.¹³⁴
- An Orthodox Jew who was unsuccessful in claiming it was discriminatory for the relevant authority to fail to provide him with a house within walking distance of a synagogue, but who succeeded in his claim that his refusal of other accommodation should not be deemed to be 'unreasonable' by the authority.¹³⁵
- A successful claim against the refusal of public transport concession cards to children who were schooled outside the school system because

¹²⁹ *Discrimination Act 1991* (ACT) s 21; *Anti-Discrimination Act* (NT) ss 38–9; *Anti-Discrimination Act 1991* (Qld) ss 82–4; *Anti-Discrimination Act 1998* (Tas) s 22(1)(d); *Equal Opportunity Act 1995* (Vic) ss 49–52; *Equal Opportunity Act 1984* (WA) s 21–21A.

¹³⁰ *Discrimination Act 1991* (ACT) s 18; *Anti-Discrimination Act* (NT) s 29; *Anti-Discrimination Act 1991* (Qld) ss 38–9, 41; *Anti-Discrimination Act 1998* (Tas) s 22(1)(b); *Equal Opportunity Act 1995* (Vic) ss 37–8; *Equal Opportunity Act 1984* (WA) s 18.

¹³¹ *Discrimination Act 1991* (ACT) s 22; *Anti-Discrimination Act* (NT) s 46; *Anti-Discrimination Act 1991* (Qld) 94–5; *Anti-Discrimination Act 1998* (Tas) s 22(1)(e); *Equal Opportunity Act 1995* (Vic) ss 59–60; *Equal Opportunity Act 1984* (WA) s 22.

¹³² *Anti-Discrimination Act 1991* (Qld) ss 101–2; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Equal Opportunity Act 1995* (Vic) s 67.

¹³³ *Petroleum Refineries (Australia) Pty Ltd v Marett* [1989] VR 789. Nathan J held that this action constituted religious discrimination even though the objective that the employer sought to achieve was industrial peace. The employer achieved this end by religious discrimination and the legislation did not allow for a trade-off between religious discrimination and economic effects.

¹³⁴ *Queensland v Mahommed* [2007] QSC 18 (Unreported, Lyons J, 9 February 2007); (2007) EOC ¶93-452 (digest).

¹³⁵ *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 (Unreported, Santow, Ipp and Basten JJA, 15 December 2006). Mr Azriel was an Orthodox Jew who could not drive or travel by public transport on the Sabbath.

of their parents' religious beliefs.¹³⁶

- An unsuccessful claim by an employee who was asked to remove a notice to hold a prayer service during work hours in a secular workplace.¹³⁷

4.2.3 Definition of Religion in Discrimination Acts

The definition of 'religious belief or activity' (or equivalent phrase) in the discrimination acts tends to be minimal. For example, in Victoria, the *Equal Opportunity Act 1995* (Vic), s 4(1) provides:

religious belief or activity means—

- (a) holding or not holding a lawful religious belief or view;
- (b) engaging in, not engaging in or refusing to engage in a lawful religious activity;

In the ACT, s 11 of the *Discrimination Act 1991* (ACT) is a somewhat more detailed provision. For the purpose of prohibiting discrimination against an employee on the grounds of religious conviction by refusing permission to the employee to carry out a religious practice during working hours, it defines 'religious practice' as

a practice—

- (a) of a kind recognised as necessary or desirable by people of the same religious conviction as that of the employee; and
- (b) the performance of which during working hours is reasonable having regard to the circumstances of the employment; and
- (c) that does not subject the employer to unreasonable detriment.¹³⁸

With the partial exception of the ACT provisions, these definitions do not, in themselves, define religious activity or belief with any real precision. What is clear from them is that *not* holding a religious belief or engaging in a religious activity is protected equally to having or acting on a religious belief. Thus, atheists and agnostics are included within the definitions and non-discrimination provisions. People are protected both in having their own beliefs, on one hand, and not being pressured to change beliefs or to adopt religious beliefs when they have none, on the other.¹³⁹

The Supreme Court of Queensland has held that an amendment to the *Anti-Discrimination Act 1991* (Qld) so as to include express mention of the right not to

¹³⁶ *Christian Family Schools Association of Australia v Public Transport Corporation* (1990) EOC ¶92-300.

¹³⁷ *D'Urso v Peninsula Support Service Inc* [2005] VCAT 871 (Unreported, Member Davis V-P, 11 May 2005).

¹³⁸ See also *Equal Opportunity Act 1984* (WA) s 54(3).

¹³⁹ See, eg, *Ciciulla v Curwen-Walker* (1998) EOC ¶92-934. This case dealt with discrimination on the basis of private life, which is defined to include religion. The employers in the case subjected their employee to multiple invitations to their church, required her to attend a religious service, criticised things such as her coffee drinking as an addiction, and allowed their pastor to regularly give her religious pamphlets and invitations to the service during her working hours.

engage in a religious activity was simply an explanation of the proper meaning of ‘religion’ in the previous provision and not a change to the legal position.¹⁴⁰ The implication of this decision is that any reference to non-discrimination on the basis of religion would also include non-discrimination on the basis of not having a religion or refusing to be actively involved in a religion.

4.3 PROHIBITIONS OF RACIAL OR ETHNIC DISCRIMINATION

While not all Australian jurisdictions make discrimination on the basis of religion unlawful, all prohibit discrimination on the basis of race and some prohibit discrimination on ethno-religious or ethnic origin grounds.

At the Commonwealth level, the *Racial Discrimination Act 1975* (Cth), for example, makes it ‘unlawful for a person to do 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.’¹⁴¹ In some circumstances, the prohibition of racial or ethnic discrimination provides a degree of protection to some religious groups.

Discrimination on the grounds of ethnicity (or even ethno-religious origin, as in New South Wales),¹⁴² however, does not make it unlawful to discriminate on the basis of religion as such. In *A obo V & A v Department of School Education*,¹⁴³ for example, the New South Wales Administrative Decisions Tribunal considered whether discrimination on the grounds of religion was made unlawful by the addition of ‘ethno-religious origin’ to the definition of ‘race’ in the *Anti-Discrimination Act 1977* (NSW). The Tribunal concluded that the purpose of the amendment was to qualify certain ethno-religious groups as a race and not to extend the Act to include discrimination on the basis of religion; inclusion of a prohibition against discrimination on the grounds of ethno-religious origin did not render discrimination on the grounds of religion unlawful.¹⁴⁴

However, certain groups, where religion plays a part in the creation of the group, such as Jews and Sikhs, have been accepted as being racial or ethnic groups for the purpose of the legislation.¹⁴⁵ Such provisions may also give protection to some Aboriginal

¹⁴⁰ *Dixon v Anti-Discrimination Commissioner* [2005] 1 Qd R 33.

¹⁴¹ *Racial Discrimination Act 1975* (Cth) s 9(1).

¹⁴² *Anti-Discrimination Act 1977* (NSW) s 4(1) defines ‘race’ to include, among other things, ‘ethno-religious or national origin’.

¹⁴³ [1999] NSWADT 120 (Unreported, Members Bartley, Edwards and Luger, 12 November 2009); (2000) EOC ¶93-039 (digest).

¹⁴⁴ Note, however, that this case involved a claim against a government school, not a religious school. The discrimination alleged was the holding by the school of Christmas and Easter activities and the reciting of a school prayer — essentially the imposition/exposure of Christian religious practices on non-Christian students.

¹⁴⁵ See, eg, *Jones v Scully* (2002) 120 FCR 243, 271–2 [110]–[113] (Hely J) (Jews in Australia are a group of people with an ‘ethnic origin’ for the purposes of the *Racial Discrimination Act 1975* (Cth)); *Haider v Combined District Radio Cabs Pty Ltd t/as Central Coast Taxis* [2008] NSWADT 123 (Unreported, Members Layton, Nemeth de Bikal and Schneeweis, 24 April 2008) [50] (‘Middle

groups. In a case dealing with racial vilification, for example, the Human Rights and Equal Opportunity Commission held: ‘The Nyungah elders are an ethnic group in that they have a shared history, separate cultural tradition, common geographical origin, descent from common ancestors, a common language and *a religion different to the general community surrounding them.*’¹⁴⁶ Other groups, including Christians and Buddhists, whose membership is made up of a variety of ethnic groups, are not covered by race or ethnicity. There is some question over whether Islam is covered by these provisions. While the issue has been contested, it is now reasonably clear that Islam is neither a race nor an ethno-racial category for the purposes of discrimination or vilification laws.¹⁴⁷ These distinctions between race, ethnicity and religion can be very difficult to maintain, and lead to people in seemingly similar situations being given different levels of legal protection.¹⁴⁸

4.4 EXEMPTIONS FROM NON-DISCRIMINATION LAW FOR RELIGIOUS ORGANISATIONS AND INDIVIDUALS

In all non-discrimination legislation, certain exemptions are given for religious bodies to discriminate on at least some bases (including sex, sexual orientation and religion) if certain pre-conditions are met. It is these exemptions that allow, for example, religious schools to give preference to co-religionists in enrolment or some religious employers to discriminate against same-sex couples in employment. The precise scope of exemptions for religious organisations and individuals from non-discrimination law differs from jurisdiction to jurisdiction.

At the Commonwealth level, for example, religious belief is not a ground for exemption from the *Racial Discrimination Act 1975* (Cth). Under the *Sex Discrimination Act 1984* (Cth), however, there are a number of religiously based exemptions. For example, in relation to accommodation, discrimination against a person on the basis of that ‘person’s sex, marital status, pregnancy or potential pregnancy’ is unlawful, but an exemption is given for ‘accommodation provided by a religious body’.¹⁴⁹ There are also several more general exemptions for religious organisations from many of the prohibitions on discrimination. Thus, the prohibition of discrimination does not apply to the training, ordination or appointment of priests, religious ministers and members of religious orders, or those involved in religious observances.¹⁵⁰ This is relatively confined. More general, however, is the exemption in s 37(d) for

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

Eastern Muslim’ is a ‘race’ within the definition in s 4 of the *Anti-Discrimination Act 1977* (NSW) as ethno-religious origin).

¹⁴⁶ *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* (2001) EOC ¶93-147, 75 482 (Commissioner Innes) (emphasis added).

¹⁴⁷ *Khan v Commissioner, Department of Corrective Services* [2000] NSWADT 72 (Unreported, Members King P, Farmer and Nemeth de Bikal, 8 June 2000) [10]; *Ekermawi v Harbour Radio Pty Ltd, Ekermawi v Nine Network Television Pty Ltd* [2010] NSWADT; *Trad v Jones & anor* (No. 3) [2009] NSWADT 318; *Kunhi v University of New England* [2008] NSWADT 333.

¹⁴⁸ Katherine Gelber, ‘Hate Speech in Australia: Emerging Questions’ (2005) 28 *University of New South Wales Law Journal* 861, 862–3.

¹⁴⁹ *Sex Discrimination Act 1984* (Cth) s 23.

¹⁵⁰ *Sex Discrimination Act 1984* (Cth) s 37(a)–(c).

religion.¹⁵¹

There are also particular exemptions for discrimination by a person in the context of ‘an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.’¹⁵² Voluntary organisations are also given an exemption, both with respect to membership and provision of services.¹⁵³

4.4.1 Who is Entitled to the Benefit of the Religious Exemptions?

Most exemptions do not apply to *individuals* who believe that their religion requires them to discriminate. In *Burke v Tralagga*,¹⁵⁴ for example, the New South Wales Equal Opportunity Tribunal upheld a complaint of discrimination against Christian landlords who would not rent out their premises to unmarried couples because of their belief that sexual conduct outside marriage was immoral. The tribunal ruled that only religious *bodies* set up to propagate religion had the benefit of the relevant exemption and that it did not apply to individuals motivated by religion.

There seems to be a lack of clarity or consistency regarding the definition of a ‘religious body’. In a Victorian case, for example, it was held that the North Eastern Jewish War Memorial Centre was a religious body for the purposes of the relevant exemption.¹⁵⁵ In Queensland, however, it has been held that the Society of St Vincent de Paul was not a religious body for the purposes of the equivalent provision to s 37(d) of the *Sex Discrimination Act 1984* (Cth).¹⁵⁶ It was, rather, ‘a Society of lay faithful, closely associated with the Catholic Church’¹⁵⁷ with both spiritual and welfare objectives. These were insufficient to make it a religious body. Likewise, the fact that the President of a conference of St Vincent de Paul had certain limited religious obligations (such as saying prayers at the start of meetings), among many other obligations, did not mean that her duties involved religious practices or observances.¹⁵⁸ If followed, this decision could seriously limit the number of religious organisations able to rely on the exemptions.

Further complications arise because many religious entities have complex administrative and legal structures, that may not be ‘bodies’ in the legal sense, and which can make it difficult to identify who the respondent should be in any discrimination claim. Nevertheless, such structures will not necessarily prevent an entity other than a legal person from being a ‘religious body’.¹⁵⁹

¹⁵¹ *Sex Discrimination Act 1984* (Cth) s 37(d).

¹⁵² *Sex Discrimination Act 1984* (Cth) s 38.

¹⁵³ *Sex Discrimination Act 1984* (Cth) s 39.

¹⁵⁴ (1986) EOC ¶92-161.

¹⁵⁵ *Hazan v Victorian Jewish Board of Deputies* (1990) EOC ¶92-298.

¹⁵⁶ *Walsh v St Vincent de Paul Society Queensland [No 2]* [2008] QADT 32 (Unreported, Member Wensley, 12 December 2008); (2009) EOC ¶93-522 (digest).

¹⁵⁷ *Ibid* [76].

¹⁵⁸ *Ibid* [77].

¹⁵⁹ See, eg, the discussion of the complicated series of relationships between entities in *OV v QZ [No 2]* [2008] NSWADT 115 (Unreported, Members Britton D-P, Nemeth de Bikal and Schneeweiss, 1 April 2008) [35]–[60], [65]; (2008) EOC ¶93-490 (digest).

4.4.2 How Far Do the Exemptions Extend?

While the exemptions for religions are quite broad and have been applied widely in certain fields (for example, in appointment of clergy and religious discrimination in school enrolment) they have been interpreted more narrowly in other contexts, particularly in employment.

Some examples of cases in which attempts to use the exemption for religious bodies have failed include:

- A case in which a school teacher was dismissed by a Catholic school after she took maternity leave for a child born outside marriage. It was held that it was never made clear at the time of employment, nor would a reasonable person have been aware, that ‘detailed conditions of lifestyle’ would be demanded of her.¹⁶⁰
- A case in which a high profile advocate for gay and lesbian rights was refused classification as a teacher in Catholic schools on the basis that she could not uphold the ‘doctrines, tenets, beliefs or teachings’ of the Church. The Church’s attempt to rely on the exemption was rejected, it being held that this discrimination was contrary to the teachings of the Church and not in compliance with them, and that any offence to parents was not an injury ‘to their religious susceptibilities but an injury to their prejudices’.¹⁶¹
- A foster care agency run by a Church that refused its services to a homosexual couple who wanted to foster a child.¹⁶²

This final case, relating to a welfare agency run by the Uniting Church, included a discussion about the meaning of the phrases ‘doctrines ... of [a] religion’ and ‘necessary to avoid injury to the religious susceptibilities’ of a religious adherent in s 56(d) of the *Anti-Discrimination Act 1977* (NSW). The New South Wales Administrative Decisions Tribunal first held that the religion in question was Christianity and that the Uniting Church was merely a denomination of Christianity.¹⁶³ (The logic of the decision would likely extend to any Christian denomination.) The exemption therefore only extended to something that was a doctrine accepted by all Christians. As there was debate about homosexuality in the Christian religion, there were no grounds for saying that there was specific Christian doctrine in this area.¹⁶⁴ The argument that the consequence of such reasoning would be to make it almost impossible to claim the benefit of the exemption, because almost all matters of doctrine were disputed to some degree, was dismissed by the Tribunal on the basis that legislation sometimes has unexpected consequences.¹⁶⁵

¹⁶⁰ *Thompson v Catholic College, Wodonga* (1988) EOC ¶92-217.

¹⁶¹ *Griffin v The Catholic Education Office* (1998) EOC ¶92-928. This is quite a startling decision, particularly the notion that a secular tribunal is competent to determine the real teachings of a Church.

¹⁶² *OV v QZ [No 2]* [2008] NSWADT 115 (Unreported, Members Britton D-P, Nemeth de Bikal and Schneeweiss, 1 April 2008); (2008) EOC ¶93-490 (digest).

¹⁶³ *Ibid* [88]–[119].

¹⁶⁴ *Ibid* [126]–[128].

¹⁶⁵ *Ibid* [117].

Secondly, with respect to the religious sensibilities limb of the exemption, the Tribunal noted: ‘It is common ground that “injury” requires more than mere offence (see *Hozack v The Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441) and “necessity” connotes a higher test than merely convenience or reasonableness (see *Hazan v Victorian Jewish Board of Deputies* [1990] EOC 92-98).’¹⁶⁶ It went on to hold that it would not be possible to claim the benefit of the religious sensibilities limb of the exemption unless a consistent response was likely from members of the religion.¹⁶⁷ Again, it is difficult to see this being made out in practice very often.

This case was subsequently appealed to the Appeal Panel of the Tribunal and the decision has not been handed down yet. It is therefore not appropriate to say any more than to note that if such an interpretation of the exemption provision were to become widespread, it may well render it a dead letter.¹⁶⁸

While discrimination on the basis of religion is generally prohibited, imposing a condition that is a genuine/inherent requirement of the relevant position is not discriminatory even if it disadvantages people of one or some religious beliefs more than others. For example, a man who claimed that he was unable to continue to work for a radio station, because the station’s requirements that he understand popular culture and work on some Sundays conflicted with his religious beliefs, was unsuccessful in his discrimination claim because it was clear that it was an inherent requirement of the position that he be able to do both these things.¹⁶⁹ In *Walsh v St Vincent de Paul Society Queensland [No 2]*,¹⁷⁰ the President of the St Vincent de Paul Society was forced to resign because she was not Catholic. The Anti-Discrimination Tribunal of Queensland held that there was no genuine occupational requirement that she be Catholic. The relevant test was two part: the first an ‘objective’ determination of whether being a Catholic was a genuine occupational requirement, and the second as to whether the complainant was capable of fulfilling the genuine occupational requirements.¹⁷¹ The Society failed on the first ground, with Tribunal holding that, despite theological evidence to the contrary, it was possible for a non-Catholic to carry out the functions of President of a conference, even if it might be more desirable for a Catholic to do so.¹⁷² (The fact that the complainant had carried out the role for some time, despite it being widely known that she was not a Catholic, was further evidence of this.¹⁷³)

¹⁶⁶ Ibid [135].

¹⁶⁷ Ibid [140]–[144].

¹⁶⁸ This case can be contrasted with *Goldberg v G Korsunski Carmel School* (2000) EOC ¶93-074, where the Western Australian Equal Opportunity Tribunal was prepared to distinguish between Orthodox Jews and other Jews according to the belief system of the Orthodox Jews who operated the school in question.

¹⁶⁹ *Coulson v Austereo Pty Ltd* (2003) 173 QGIG 1034; (2003) EOC ¶93-294 (digest).

¹⁷⁰ [2008] QADT 32 (Unreported, Member Wensley, 12 December 2008); (2009) EOC ¶93-522 (digest).

¹⁷¹ Ibid [88]–[89]. Further, the onus was on the Society to demonstrate that it was a genuine requirement: at [80].

¹⁷² Ibid [123]. Being a Catholic was ‘not essential and indispensable to carrying out the duties of president, although it may well be desirable, and I think that the position, overall, would be essentially the same if there were no requirement that a president be Catholic’: *ibid*.

¹⁷³ Ibid [124].

4.5 ARE AMENDMENTS TO THE DISCRIMINATION LAWS REQUIRED?¹⁷⁴

The Commonwealth is one of the few jurisdictions in Australia not to prohibit discrimination on the basis of religion or belief. The protection of individuals against discrimination on the basis of religion or belief is one of the clearest elements of international human rights law relating to religious freedom. The lack of a Commonwealth prohibition of discrimination on the basis of religion has several unfortunate consequences:

- Individuals can face outright discrimination on the basis of their religion without effective recourse.
- Individuals living in the States or Territories that have protection against religious discrimination have greater protection than those who live in the States that do not prohibit discrimination on the basis of religion. There is no national 'safety-net' for such people.
- Courts and tribunals need to work with subtle distinctions between religion, ethnicity, ethno-religious origin and race that are difficult to maintain. This can also be confusing to employers, schools, sporting bodies and other groups that are required to adhere to the laws.
- People of religions that have a close association with an ethnic group have better protection against discrimination than those whose religion is not as closely associated with a particular ethnicity. Those who are discriminated against on the basis that they are humanists, atheists or agnostics are similarly without protection.

There are relatively few arguments for a complete failure to protect individuals from discrimination on the basis of religion. The most common argument (setting aside those arguments that are essentially an attempt to give preference to majority religions

¹⁷⁴ Note: Since the time of writing of this paper exemptions in Victorian anti-discrimination law have been altered as summarised by the Victorian Equal Opportunity and Human Rights Commission:

The new EOA 2010 has narrowed the grounds on which religious bodies can discriminate against people to religious belief, sex and sexual orientation, as these attributes may be connected to particular religious doctrines. Religious bodies and schools will have to demonstrate why the discrimination is reasonably necessary to avoid injury to the religious sensitivities of adherents of a religion. In employment, religious bodies will have to demonstrate why having a particular attribute, for example, being of a particular faith, is an inherent requirement of a job offered by that body. In determining what an inherent requirement is, the nature of the religious body and religious doctrines, beliefs or principles of that body must be taken into account. : <http://www.equalopportunitycommission.vic.gov.au/projects%20and%20initiatives/ea2010.asp>, accessed 22 October 2010

or to treat certain minorities unequally) is that this prohibition would undermine religious freedom by limiting the autonomy of religious groups that seek to favour co-religionists. However, this is really an argument for *exemptions* to a prohibition of religious discrimination, rather than an argument in favour of not prohibiting religious discrimination even in circumstances which have no impact on religious freedom.

For these reasons, it would be appropriate for the Commonwealth to make discrimination on the basis of religion or belief unlawful in a similar manner to discrimination on grounds such as race or sex.

The question of the extent to which religious groups should be exempt from discrimination laws in order to protect religious freedom, particularly religious autonomy, is a controversial and complex one. Many Australians are employed in organisations with some religious affiliation; religiously affiliated education and healthcare services alone employ large numbers of employees. In Victoria alone, for example, the Catholic Church is 'involved in 482 schools (378 primary, 87 secondary, 15 combined and 2 special schools), 11 hospitals, 40 nursing and convalescence homes, and 12 children's welfare institutions.'¹⁷⁵ Too wide an exemption for religious groups has the potential to undermine the effectiveness and scope of any non-discrimination regime, and to leave such people without legal protection. At present, the exemptions are drawn rather widely and include quite vague terms, such as 'religious susceptibilities', that are only loosely connected with religious freedom. It has been argued that it would be possible to create more nuanced exceptions without significant additional interference with religious freedom (for example, allowing for discrimination on the basis of sex, sexual orientation or marital status for employment and termination but prohibiting discrimination on these bases during the term of employment). Others have suggested that discrimination laws should apply to all but the core functions of religious bodies or that religious bodies should not be allowed to discriminate with respect to services for which they receive public funding. Yet others have recommended a narrowing of the concept of an 'inherent requirement' of a job so as to require that, to take advantage of this exception, religious organisations must make clearer why they need to discriminate.¹⁷⁶

Eliminating religious exemptions altogether, however, would put in danger core areas of religious autonomy, including the choice of religious leadership, religious educators and other core employees. Eliminating or significantly reducing exemptions may make it difficult for religious organisations to contribute distinctively religious services (for example, in areas such as education). It may even lead some religious organisations to withdraw from some fields of service provision if they feel that they are either required to behave in a manner that contravenes their religious beliefs or that the religious rationale for operating such services has been undermined. Some religious groups have argued for broader exemptions (or a wider reading of current exemptions) to give protection to the wide range of activities in which religious bodies and individuals are engaged, and to ensure that these activities can be operated in a way that they find consistent with their religious beliefs and practices.¹⁷⁷

¹⁷⁵ According to a submission made by the Catholic Church to the Scrutiny of Acts and Regulations Committee: see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Options Paper* (2009) 116.

¹⁷⁶ Ibid 112–18.

¹⁷⁷ Ibid 118–19.

The balance between religious freedom and non-discrimination, and the way in which this balance is reflected in exemptions for religious groups, is a matter of public policy, rather than one that can be resolved through the simple application of legal principle. Any solution that simply exempted religious bodies from all aspects of discrimination law *or* which allowed no exemptions for religious groups at all would be problematic, as it would undermine important human rights principles.

5 RELIGIOUS FREEDOM AND BILLS OF RIGHTS

5.1 INTRODUCTION

In most countries comparable to Australia, freedom of religion or belief is protected in a statutory or constitutional bill of rights. In the United Kingdom and New Zealand, for example, there are statutory human rights Acts, while in Canada and the United States, religious freedom is protected by their respective constitutions. In Australia, however, there is no comprehensive bill of rights in either form. At the time of writing this report, the National Human Rights Consultation on a bill of rights was underway. Given this process, and the fact that the Australian Human Rights Commission already has a clear position in favour of a bill of rights, the arguments for and against such statutory protection of rights in general will not be rehearsed here. Instead, the current rights to religious freedom in Australia will be briefly outlined. Then, a sample of cases from foreign courts looking at religious freedom will be discussed, to give some sense of the ways in which introducing a right to religious freedom, as part of a broader bill of rights, might change the legal protection of religious freedom in Australia. Of course, as it is not yet clear whether there will be a bill of rights in Australia or what its shape might be, let alone how it will be interpreted by the courts, this discussion is somewhat speculative.

5.2 THE RIGHT TO FREEDOM OF RELIGION OR BELIEF IN THE STATES AND TERRITORIES

There are three States or Territories in Australia in which religious freedom is explicitly protected by law (leaving aside the *Australian Constitution*). Tasmania has a provision in its *Constitution Act 1934* (Tas), which reads:

46. Religious freedom

- (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

Despite the fact that s 46 has been a part of the *Constitution Act* since its enactment in 1934, there has never been a case brought under this provision.

More recently, both the ACT and Victoria have introduced human rights Acts: the *Human Rights Act 2004* (ACT) ('the ACT Act') and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Victorian Charter'). These Acts require courts, where possible, to interpret all legislation consistently with the human rights protected by the Acts.¹ Where that is not possible, certain courts can make declarations that a

¹ *Human Rights Act 2004* (ACT) s 30: 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.' *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1): 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

provision cannot be interpreted compatibly with human rights.² This does not invalidate the law (as it can with a constitutional bill of rights), but it does require an explanation to be given to parliament as to what response the government has to the declaration.³ In addition, it is unlawful for public authorities to breach rights⁴ and some remedies are available when they do so.⁵

Both the Victorian Charter and the ACT Act prohibit discrimination on the basis of religion (among other characteristics) and also set out a right to religious freedom. In Victoria, the right to freedom of thought, conscience, religion and belief is set out in s 14 of the Victorian Charter:

- (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

This right to freedom of religion or belief is subject to the general limitation provision in s 7, which provides that '[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom', taking into account certain listed factors. One difference between the Victorian Charter and international law is that *any* aspect of freedom of religion or belief is subject to limitations under the Victorian Charter, whereas under the ICCPR only manifestations of religious freedom can be limited — the right to believe itself cannot be restricted. That being said, it is highly unlikely that any direct infringement of the freedom to have a religion would be held to be a reasonable limitation under s 7 of the Victorian Charter.⁶

The ACT provision, in s 14 of the ACT Act, is almost identical to s 14 of the Victorian Charter, other than using the language of 'everyone', rather than 'every person' (as in the Victorian Charter), and only stating that no-one may be 'coerced' in a way that would limit his or her religious freedom, rather than 'coerced or restrained' (the wider formulation used in the Victorian Charter).

² *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

³ *Human Rights Act 2004* (ACT) s 33; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 37.

⁴ *Human Rights Act 2004* (ACT) s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

⁵ *Human Rights Act 2004* (ACT) s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39. In both cases, however, it is very difficult to obtain damages for breach of a right protected under the Act.

⁶ See Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008) 188–9.

While the Victorian provision is clearly based on the ACT provision, neither is directly taken from either relevant international treaties or the bills of rights in comparable countries. For instance, freedom to ‘manifest’ religion or belief (used in international instruments) has become freedom to ‘demonstrate’ religion or belief. This may simply be an attempt to use a plainer term, but it may raise questions as to whether the change affects the meaning and thus the relevance of international case-law. The prohibition on coercion is wider than the international law equivalent in two ways. First, as regards the Victorian Charter, it includes ‘restrained’, a much lower threshold than ‘coerced’. Secondly, both jurisdictions prohibit coercion in relation to manifestations of religion, as well as the right to have a religion or belief. While this might be reasonable insofar as coercion is concerned, the notion that any restraints on freedom to manifest a religion are prohibited goes further than international law and there is little justification for this extension.

To date there have been no court decisions regarding s 14 of the Victorian Charter or s 14 of the ACT Act.⁷

5.3 A BRIEF COMPARISON WITH OTHER JURISDICTIONS

As there are no decisions regarding the right to religious freedom under the statutory bills of rights in Australia to date, some idea about how such a right might influence Australian law and practice can be obtained from looking at the experience overseas. Australian courts would, most likely, also be influenced by the way in which provisions of the *Australian Constitution* have been interpreted (particularly on such issues as the definition of religion). However, as the High Court has been clear that s 116 of the *Australian Constitution* is a limitation on legislative power, not a free-standing right to religious freedom, it is likely that a statutory protection of religious freedom would be interpreted more expansively.

There have been a variety of cases brought under the religious freedom protections found in bills of rights in comparable jurisdictions. These have included:

- A successful challenge to the *Lord’s Day Act*⁸ that mandated Sunday as a day of rest for overtly religious reasons;⁹ but the upholding of a Sunday rest law that had a secular basis of providing a standard day of rest to retail workers.¹⁰
- A successful challenge to a refusal by a Canadian College of Teachers to approve an evangelical teachers college for full teacher training. The evangelical teachers college listed homosexuality as a ‘sexual sin’ that was ‘biblically condemned’, which its students were prohibited from committing, but there was no evidence that teachers trained in the

⁷ Although s 14 of the Victorian Charter was raised in a disciplinary hearing regarding a dentist who told a patient suffering from a mental illness that she was afflicted by evil spirits and that she should attend his church to be cured. The reliance on s 14 was unsuccessful, in part because the Victorian Charter was not in force at the time the original decision was made. See *Dental Practitioners Board of Victoria v Gardner (Occupational and Business Regulation)* [2008] VCAT 908 (Unreported, Judge Harbison, Members Dickinson and Keith, 14 May 2008).

⁸ RS C 1970, c L-13.

⁹ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

¹⁰ *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.

institution would not treat homosexual students equally and in accordance with the law.¹¹

- An unsuccessful challenge to the use by the prosecution of evidence of a pastor in a murder trial. It was held that there was no general privilege at common law for religious communications or confessions, but that in some circumstances it would not be appropriate to allow the use of religious confessions in evidence.¹²
- An unsuccessful challenge to drug laws by a Rastafarian who distributed marijuana for religious purposes.¹³
- An unsuccessful challenge to an order to slaughter a temple bull suspected of being infected with bovine tuberculosis.¹⁴
- An unsuccessful challenge to prohibitions on corporal punishment in a private religious school.¹⁵

Two examples of the more common types of cases are outlined in a little more detail below.

5.3.1 Religious Apparel Cases

In several jurisdictions, the issue of whether religious clothing (or certain types of religious clothing) or religious appearance can be banned or restricted has been raised. This issue commonly arises in the context of public schools, although it can also arise in other government-controlled institutions, such as prisons or the public service. (The issue of religious clothing in courts is covered at 7.3.) There has not been a uniform response to these claims. In some circumstances, courts have found that the restriction on religious apparel in question is justified, and in others, courts have found that it is not. Two examples demonstrate the types of issues that the court might consider and the variety of outcomes.

In *R (SB) v Governors of Denbigh High School* ('the *Denbigh High Case*'),¹⁶ the House of Lords upheld the uniform policy of a public school that introduced a requirement to wear a uniform that did not allow a student to wear the type of clothing that she believed was required of a young Muslim woman (a jilbab). The school had consulted widely with the local Muslim community and had developed a version of the school uniform (a shalwar kameeze) that incorporated elements of Muslim clothing which satisfied most Muslim members of the community and which the student had accepted for a period of time. However, after her first two years at the school, the student rejected this uniform and began wearing a jilbab instead.¹⁷

¹¹ *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772.

¹² *R v Gruenke* [1991] 3 SCR 263.

¹³ *R v Taylor* [2002] 1 Cr App R 37. See also *R v Anderson* [2004] NZCA 95 (Unreported, Glazebrook, Paterson and Doogue JJ, 23 June 2004).

¹⁴ *Surayanda v The Welsh Ministers* [2007] EWCA Civ 893 (Unreported, Pill, Thomas and Lloyd LJ, 23 July 2007).

¹⁵ *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

¹⁶ [2007] 1 AC 100.

¹⁷ *Ibid* 119 [44]–[46] (Lord Hoffmann).

While the Court of Appeal found against the school, the House of Lords overturned the decision and found that the policy did not breach the *Human Rights Act 1998* (UK). Their Lordships noted that this was not a judgment about every restriction on religious clothing in schools but rather a case concerning ‘a particular pupil and a particular school in a particular place at a particular time.’¹⁸ Several judgments held that there was no breach of the student’s rights because she had been fully informed of the uniform policy at the time of admission and had the option of attending other schools that would let her wear her preferred form of clothing.¹⁹ Not all of their Lordships agreed with this analysis, but they all concluded that the policy of the school was not in breach of the *Human Rights Act*. Relevant factors included the trouble that the school had taken to consult about and develop a school uniform that was respectful of Muslim requirements regarding apparel, the expertise of the school on the extent to which the uniform helped to promote cohesion and contributed to the improved performance of the school, and the concerns that some Muslim students had expressed about being pressured into wearing a jilbab if the school included them in the uniform.²⁰

In contrast, in *Multani v Commission scolaire Marguerite-Bourgeois*,²¹ the Supreme Court of Canada found against a school that prohibited a Sikh schoolboy from attending school because he was wearing a kirpan (the ceremonial dagger carried by Sikh men). Carrying the kirpan breached the policy against weapons and dangerous objects in schools. While the school board and the schoolboy’s parents agreed on an accommodation that would allow the boy to carry the kirpan if it was sealed and sewn up inside his clothes, this agreement was rejected by the school’s governing board and, on appeal, by the relevant commission, which required him to wear a kirpan made of a substance other than metal.²² The boy refused to do so and eventually left the school for a private school.²³ The Court held that this was an interference with religious liberty. While the object of maintaining a reasonable standard of safety in schools was a legitimate one, there was no evidence of a kirpan being used as a weapon in the 100 years that Sikh children had been attending schools in Canada, the likelihood of it being used as a weapon under the conditions agreed to were low, and there were all sorts of dangerous objects in schools (such as scissors, baseball bats and cafeteria knives) that were permitted while creating a higher risk to students.²⁴ Other justifications were likewise held to provide an insufficient basis for refusing to accommodate a serious religious belief.

Thus, it is not simply a matter of saying that bills of rights do or do not allow public institutions to limit the wearing of religious clothing. It will depend very much on the

¹⁸ Ibid 107 [2] (Lord Bingham of Cornhill).

¹⁹ Ibid 114 [25] (Lord Bingham of Cornhill), 120–1 [50] (Lord Hoffmann), 131 [87] (Lord Scott of Foscote). The fact that other options are open to students was applied again in *R (on the application of X) v Headteachers and Governors of Y School* [2007] HRLR 20; [2008] 1 All ER 249.

²⁰ *Denbigh High Case* [2007] 1 AC 100, 117 [33]–[34] (Lord Bingham of Cornhill), 125 [65]–[67] (Lord Hoffmann), 132–5 [94]–[99] (Baroness Hale of Richmond) (who was particularly interested in the issue of women’s rights and their relationship with religious covering).

²¹ [2006] 1 SCR 256.

²² Ibid [3]–[5] (Charron J). McLachlin CJ, Bastarache, Binnie and Fish JJ concurred with the judgment of Charron J.

²³ Ibid [40] (Charron J).

²⁴ Ibid [56]–[67] (Charron J).

particular context. While the House of Lords permitted the uniform policy in the *Denbigh High Case*, the reasoning in that decision was subsequently applied in the context of a school that prohibited a Sikh student from wearing a kara (a small bangle that is religiously significant). In that case, the court disallowed the prohibition.²⁵ However, in another case, a no jewellery rule was permitted to be applied to a girl who wanted to wear a ‘Silver Ring Thing purity ring’ as a symbol of her decision to remain a virgin until marriage due to her Christian beliefs.²⁶

5.3.2 Property Rights and Religion

Minority religious groups sometimes suffer discrimination when trying to get permission to build places of worship. In less liberal countries, this may include outright refusal of permission. In liberal democracies, however, it more commonly includes long delays in permission being granted and greater difficulties in getting permission to build.

In a Canadian case, for example, the Jehovah’s Witnesses claimed that they were unable to buy land for a place of worship within the area zoned for places of worship in a particular municipality (although this fact was contested by the municipality).²⁷ The Jehovah’s Witnesses first bought land in a residential zone and applied for re-zoning. Their request was denied because of the costs of doing so and the tax burden that this would place on rate payers. They then purchased a different lot in a commercial zone and applied twice for re-zoning to allow them to build a place of worship. These requests were denied without any reasons being given. The process took over four years. A majority of the Supreme Court of Canada held that refusing to give reasons or engage in a proper process with respect to the second and third applications for permission to build was a breach of procedural fairness. In coming to this conclusion, the right to ‘freely adhere to a faith and to congregate with others in doing so’ was of ‘primary importance’.²⁸ The Court ordered that the second and third decisions be set aside and that the municipality make the decision again in a procedurally fair way, including giving reasons.²⁹

In another Canadian case on the intersection of religion and property rights, several orthodox Jews were prohibited by the by-laws of the building in which they lived from setting up succahs on their balconies.³⁰ The succahs were small, temporary dwellings that the appellants believed they were biblically required to live in during the nine days of the festival of Succot. A majority of the Supreme Court of Canada held that, so long as the appellants were conscious of access to emergency exits and

²⁵ *R (on the application of Watkins-Singh) v Aberdare Girls’ High School Governors* [2008] EWHC 1865 (Admin) (Unreported, Silber J, 29 July 2008).

²⁶ *R (on the application of Playfoot) v Governing Body of Millais School* [2007] HRLR 34.

²⁷ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)* [2004] 2 SCR 650.

²⁸ Ibid [9] (McLachlin CJ). Iacobucci, Binnie, Arbour and Fish JJ concurred.

²⁹ Ibid [31]–[33] (McLachlin CJ). Note that this was no guarantee of a decision in favour of the Jehovah’s Witnesses: they were not entitled to a favourable decision, simply to proper consideration and process. For an example of the way in which the Victorian Charter is beginning to influence planning decisions, see ‘Hobsons Bay Planning Scheme Amendment C58 & Application for Permit A0613422 Blenheim Road Mosque & Public Park: Panel Report’, September 2008 <[http://www.dse.vic.gov.au/Shared/ats.nsf/4f257bdd04da3313ca256d100005e401/2c8ee5d347a98937ca2574e10072d5d0/\\$FILE/Hobsons%20Bay%20C58%20Panel%20Report.pdf](http://www.dse.vic.gov.au/Shared/ats.nsf/4f257bdd04da3313ca256d100005e401/2c8ee5d347a98937ca2574e10072d5d0/$FILE/Hobsons%20Bay%20C58%20Panel%20Report.pdf)>.

³⁰ *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.

aesthetics in setting up their succahs, the property rights of other residents in the building were only minimally impaired for a short period of time. The refusal to allow them to fulfil this religious obligation, by contrast, was a significant infringement on religious freedom.³¹

5.4 SHOULD RELIGIOUS FREEDOM AND NON-DISCRIMINATION BE PROTECTED IN A COMMONWEALTH BILL OF RIGHTS?

If Australia were to adopt a statutory bill of rights, it would almost certainly include a protection of the right to freedom of religion or belief. It would, however, be more appropriate if this protection were modelled on one of the leading international law instruments (the Universal Declaration or ICCPR, in particular) rather than the existing provisions in the Victorian Charter or ACT Act. In particular, such a protection would be clearer if it adopted the approach of the Universal Declaration, which sets out the right to freedom of religion or belief, including the right to change religion, in unambiguous terms. Consideration should be given to whether the right to freedom of thought, conscience and religion (though not their manifestations) should be absolute, as it is in the ICCPR but not the Universal Declaration.

The cases from other jurisdictions discussed above demonstrate the wide range of ways in which religious freedom can be limited — from zoning laws, to school uniforms, to the destruction of animals. In Australia there is no right to bring a case based solely on a breach of religious freedom (rather than raising religious freedom in a case brought on another basis, which can be done under the Victorian Charter or ACT Act). Courts may sometimes take issues of religious freedom into account through, for example, the interpretation of laws consistently with human rights as discussed in chapter 2. However, the extent to which any particular court or tribunal will choose to take religious freedom into account in making decisions is a matter of discretion in many cases. Religious minorities will usually find it more difficult to have their interests or concerns taken into account when general laws, policies or rules are adopted that might impact on their religious belief. They are likely to be particular beneficiaries of a right to take direct legal action to enforce their rights. In addition, such statutory protection may increase the awareness of the impact of such laws, policies and rules on religious groups, and encourage negotiated solutions to cases in which religious freedom is impacted.

³¹ Ibid [82]–[90] (Iacobucci J). McLachlin CJ, Major, Arbour and Fish JJ concurred.

6 RELIGIOUS VILIFICATION / HATE SPEECH LAWS

6.1 INTRODUCTION

Laws that prohibit religious vilification or religious hate speech of various kinds have a complicated relationship with religious freedom. On one hand, if religious groups or believers are subject to vilification, it can have deeply hurtful personal effects, create fear within religious communities and potentially intimidate people out of attending religious services or practising their religion (eg through the wearing of clothes or symbols). At its worst, speech demonising and dehumanising groups has been a preparatory basis for the most serious crimes, including genocide, against those groups. On the other hand, particularly when they are drawn too widely, religious vilification laws can have a chilling effect on religious speech and suppress legitimate criticism of religion.

While racial vilification laws are common in Australia, only Queensland, Tasmania and Victoria have prohibited religious vilification, although other jurisdictions have considered it.¹ For the same reasons as discussed above at 4.3 in relation to discrimination law, the definition of ‘racial’ in racial vilification laws can extend to groups that share a common religious tradition as part of their ethnicity (such as Sikhs and Jews).² Thus, racial vilification laws give some protection to some groups that might also be considered to be religious. However, this protection is not comprehensive and is not a protection from religious hate speech as such.

The Commonwealth does not prohibit religious vilification. However, the *Criminal Code* (Cth) contains a sedition-based offence of ‘urg[ing] a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or groups (as so distinguished)’ which would threaten the peace, order and good government of Australia.³ This offence has a limited overlap with religious vilification laws.

International law requires states to prohibit some forms of hate speech. The ICCPR, for example, in art 20(2) states: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Australia, however, has entered a reservation to this provision that states:

Australia interprets the rights provided for by articles 19, 21 and 22^[4] as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interests of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.

¹ Lawrence McNamara, ‘Salvation and the State: Religious Vilification Laws and Religious Speech’ in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) 145, 146.

² See, eg, *Jones v Scully* (2002) 120 FCR 243; *Toben v Jones* (2003) 129 FCR 515; *Miller v Wertheim* (2002) EOC ¶93-223 (all dealing with racial vilification of Jews under the *Racial Discrimination Act 1975* (Cth)).

³ *Criminal Code* (Cth) s 80.2(5). For a discussion of this offence, see Simon Bronitt, ‘Hate Speech, Sedition and the War on Terror’ in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) 129.

⁴ Freedom of expression, assembly and association, respectively.

6.2 CURRENT AUSTRALIAN LEGISLATION PROHIBITING RELIGIOUS VILIFICATION

As noted above, Queensland, Tasmania and Victoria are the only Australian jurisdictions which have introduced religious vilification laws. The laws have two main components: the prohibition (usually including both a civil and criminal element) and exceptions that make clear that certain types of speech do not fall within the prohibition.

6.2.1 The Prohibition

The scope of the prohibition of religious vilification is similar in all three jurisdictions, although there are some important differences on the extent to which the alleged vilification must be public.⁵ The Victorian law, the *Racial and Religious Tolerance Act 2001* (Vic), has given rise to the most extensive criticism and case-law, so its provisions are set out in more detail here, but similar provisions are included in s 124A of the *Anti-Discrimination Act 1991* (Qld)⁶ and s 19 of the *Anti-Discrimination Act 1998* (Tas).

Section 8(1) of the *Racial and Religious Tolerance Act* provides:

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.⁷

It is also prohibited to request, instruct, induce, encourage, authorise or assist another person to contravene s 8(1).⁸ Employers may be vicariously liable for conduct of their employees which contravenes s 8(1) unless, on the balance of probabilities, the employer took reasonable precautions to prevent the employee from contravening s 8(1).⁹

6.2.2 Exceptions

Section 11 of the *Racial and Religious Tolerance Act* provides:

- (1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—
 - (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, or any other conduct engaged in, for—
 - (i) any genuine academic, artistic, religious or scientific

⁵ McNamara, above n 1, 147.

⁶ *Anti-Discrimination Act 1991* (Qld) s 131A also makes it a criminal offence to engage in 'serious' religious vilification, ie religious vilification in a way that includes threatening physical harm to person or property or inciting others to do so, but the criminal provisions are almost never used because of difficulties with proof and certain procedural hurdles.

⁷ *Racial and Religious Tolerance Act 2001* (Vic) s 8(2) provides that conduct can be a single instance or multiple instances.

⁸ *Racial and Religious Tolerance Act 2001* (Vic) s 15. See also *Anti-Discrimination Act 1998* (Tas) s 21; *Anti-Discrimination Act 1991* (Qld) s 122.

⁹ *Racial and Religious Tolerance Act 2001* (Vic) ss 17–18. See also *Anti-Discrimination Act 1991* (Qld) s 133. There is no equivalent provision in the *Anti-Discrimination Act 1998* (Tas).

- purpose; or
- (ii) any purpose that is in the public interest; or
 - (c) in making or publishing a fair and accurate report of any event or matter of public interest.
- (2) For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.

Unlike the *Anti-Discrimination Act 1991* (Qld) and the *Anti-Discrimination Act 1998* (Tas), the *Racial and Religious Tolerance Act* does not contain an exemption for the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation.¹⁰ However, it does contain an exemption for conduct engaged in for a genuine *religious* purpose, which is not included in either of the other Acts. The *Racial and Religious Tolerance Act* does not define what a ‘genuine religious purpose’ is, although this has been considered in a case discussed below.

6.3 CASE LAW

While there are many cases on racial vilification, there are not many Australian cases on religious vilification and some of the cases that exist have been dismissed very quickly.¹¹

6.3.1 Catch the Fire

The most well known and legally significant of the religious vilification cases is *Islamic Council of Victoria v Catch the Fire Ministries Inc* (‘the *Catch the Fire Ministries Case*’),¹² in which the Islamic Council of Victoria (‘ICV’) lodged a representative complaint against the Catch the Fire Ministries Inc (‘Catch the Fire’), an evangelical Christian church. The church had conducted a seminar, published a newsletter, and published an article on the church’s webpage, each of which the ICV claimed attacked the Islamic faith and breached s 8 of the *Racial and Religious Tolerance Act*.

Catch the Fire claimed that its statements were accurate, that its actions were reasonable and undertaken in good faith, and that the seminar and publications were conducted and published for a genuine religious purpose and in the public interest. On this basis, it defended the claims of religious vilification.

The Victorian Civil and Administrative Tribunal upheld the ICV’s complaint, finding that the cumulative effect of the statements and publications was hostile, demeaning and derogatory to Muslims and their faith, and that they were likely to incite others to religious hatred, contempt and ridicule. Catch the Fire successfully appealed the

¹⁰ *Anti-Discrimination Act 1991* (Qld) s 124A(2)(b); *Anti-Discrimination Act 1998* (Tas) s 55(b).

¹¹ See, eg, *Fletcher v Salvation Army Australia* [2005] VCAT 1523 (Unreported, Member Morris P, 1 August 2005) [18], where the President of the Victorian Civil and Administrative Tribunal recommended that consideration be given to requiring that people seek leave to bring a religious vilification case so as to ensure that the reputation of the legislation is not undermined by baseless claims.

¹² [2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2004); (2005) EOC ¶93-377 (digest); appeal allowed (2006) 15 VR 207.

decision to the Victorian Court of Appeal, which set aside the orders of the Tribunal and remitted the decision to be heard by a different Tribunal member. Ultimately, the matter was settled by the parties in an out of court settlement, leaving the key question of whether the conduct amounted to vilification unresolved after many years and a lengthy process of litigation.

The key principles for interpreting the *Racial and Religious Tolerance Act* which emerged from this case included that:

- incitement includes words and actions that actually incite others, and also those that are calculated to encourage incitement but do not have that effect in practice;¹³
- the Act does not ‘prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons’ — that which incites hatred is distinct from that which is offensive;¹⁴
- some account may be taken of the audience when determining if a particular statement is likely to incite¹⁵ and the effect of the statement on an ordinary member of the audience is the relevant test;¹⁶
- for the purposes of the ‘genuine religious purpose’ defence: both proselytism and religious comparativism are religious purposes; conduct is genuine if it is really undertaken for one of these purposes; the requirement that it be in good faith is a subjective test; and the requirement that it be reasonable is an objective test, taking into account the standards of an ‘open and just multicultural society’.¹⁷

There were areas of disagreement between the judges which have still not been resolved. Perhaps the most significant of these is whether ridicule or contempt expressed towards a *religion*, as compared to religious believers, is sufficient for the purposes of the Act. Nettle JA considered that the two were distinct, while recognising that there may be circumstances in which attacks on a religion might amount to religious vilification. Neave JA put less emphasis on the distinction. Ashley JA did not decide the issue.¹⁸

Nettle JA held that the conduct need not be motivated by an intention to incite hatred, contempt etc. on the basis of religion. He considered that it is enough that the ‘conduct incite hatred or other relevant emotion towards a person or group of persons which is based on their religious beliefs’. Neave JA, however, thought that there must

¹³ *Catch the Fire Ministries Case* (2006) 15 VR 207, 211–12 [14] (Nettle JA), 254 [154] (Neave JA).

¹⁴ *Ibid* 212 [15] (Nettle JA).

¹⁵ *Ibid* 212 [16] (Nettle JA).

¹⁶ *Ibid* 249 [132] (Ashley JA), 254–5 [158]–[159] (Neave JA), though see Nettle JA at 212–13 [16]–[19] that some degree of reasonableness may be assumed for most, although not all, audiences.

¹⁷ *Ibid* 240–2 [90]–[98] (Nettle JA).

¹⁸ *Ibid* 218–19 [32]–[34] (Nettle JA), 249 [132] (Ashley JA), 258 [176] (Neave JA).

usually be some link, although, for practical purposes, there usually would be, so the distinction may not be relevant in most cases.¹⁹

Nettle JA also took the view that the Tribunal erred in criticising the views about Islam expressed by the relevant church minister as unbalanced and untrue, and in failing to take proper account of the exhortations of the minister to love, minister to and attempt to convert Muslims, as creating greater balance and less likelihood of incitement. Neave JA held that some account could be taken of both truth and balance. Ashley JA noted the problematic way in which the arguments before the Tribunal turned in part on whether certain claims made about Islam were objectively true — a matter which he correctly noted is not susceptible to determination by a secular tribunal.²⁰

6.3.2 Case-law on Constitutional Constraints

The scope of religious vilification laws is limited by the *Australian Constitution*, particularly the implied freedom of political communication.²¹ In *Deen v Lamb*,²² a pamphlet prepared by a candidate for the seat of Moreton in the federal election made a series of derogatory remarks about Muslims and the Koran. While the Queensland Anti-Discrimination Tribunal held that the pamphlet incited hatred and serious contempt for Muslims as a whole, it was not unlawful because it was within the exception in s 124A(2)(c) of the *Anti-Discrimination Act 1991* (Qld) relating to public acts done reasonably and in good faith for a purpose in the public interest, including public discussion or debate and exposition of any matter. As the pamphlet was concise and there was no evidence that it had been published other than in the electorate, the Tribunal was not prepared to conclude that the candidate had not acted reasonably and in good faith. The Tribunal referred to the implied freedom of political communication in coming to this conclusion:

But for the presence of the exception in s 124A(2)(c), it would be plain that s 124A would be invalid insofar as it infringed upon the freedom to communicate upon political matters. At the very least, in order to preserve its validity, it would have to be construed so as to have no application to such cases. In my view, s 124A(2)(c) is effective to ensure that, *inter alia*, provided a candidate in an election publishes words in good faith and acts reasonably, he or she is free to make statements of a political character without fear of offending s 124A and despite the fact that those statements otherwise have the prohibited tendency.²³

6.4 DOES THE COMMONWEALTH NEED RELIGIOUS VILIFICATION LAWS?

There seems little doubt that members of some religious groups experience vilification that is both personally hurtful and may also impair their capacity to

¹⁹ Ibid 214 [24] (Nettle JA), 253 [150]–[152] (Neave JA).

²⁰ Ibid 219–20 [36], 233 [73] (Nettle JA), 247 [121] (Ashley JA), 259 [178]–[179] (Neave JA).

²¹ Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287. See also *Catch the Fire Ministries Case* (2006) 15 VR 207, 246 [113] (Nettle JA), 264 [203] (Neave JA), who held that the *Racial and Religious Tolerance Act 2001* (Vic) did not breach the constitutional prohibition.

²² [2001] QADT 20 (Unreported, Member Sofronoff P, 8 November 2001).

²³ Ibid p 8.

engage in public life, including religious practice.²⁴ The Australian Human Rights Commission has called for Commonwealth legislation that prohibits religious vilification. It has done so on the basis of the numerous concerns about the level of religious vilification that occurs in Australia, and that leads to a sense of being excluded and alienated from Australian society by those who experience it.²⁵

There are at least two key concerns about responding to this problem with vilification laws. The first is that such laws will have a chilling effect on speech about religions. Even if the laws are interpreted relatively narrowly (and that is not guaranteed), those with legitimate criticisms to make of particular religious groups, practices or beliefs may be intimidated out of making such comments because of the potential for actions to be brought against them. In addition, some religious groups are concerned that they will not be able to speak out to condemn other religions as false and their own as exclusively true without being in danger of action being taken against them. This threatens both religious freedom and freedom of expression.²⁶ While freedom of expression is not an absolute value, it should only be limited for good reason.

The second concern is that religious vilification laws may be ineffective or even counter-productive. There is little evidence that countries that have religious vilification laws experience less religious vilification than those which do not (nor that those Australian States which have such laws are less prone to religious vilification than those which do not). The *Catch the Fire Ministries Case* gave a great deal of profile (both nationally and internationally) to the comments the subject of the case that were derogatory of Islam — far more than they would have received had there been no such case.²⁷ It is unclear whether the case helped or harmed the development of greater religious tolerance in Victoria, or Australia more generally, or created an atmosphere which lessened the risk of physical or mental harm to religious minorities.²⁸

The question of whether religious vilification laws are necessary and an appropriate way of dealing with religious vilification is a complex one. If such laws are adopted, it is important that they be drafted in a manner that is alive to the potential of such laws to restrict freedom of religion or belief as well as freedom of expression. The prohibition set out in the ICCPR ('Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited

²⁴ Human Rights and Equal Opportunity Commission, *Isma'īl – Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2003) chh 2 and 3. See also Raymond Chow, 'Inciting Hatred or Merely Engaging in Religious Debate? The Need for Religious Vilification Laws' (2005) 30 *Alternative Law Journal* 120.

²⁵ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) iii, ix, ch 5.

²⁶ John Perkins, 'Religion and Vilification' (2005) 17 *Dissent* 53; Joel Harrison, 'Truth, Civility, and Religious Battlegrounds: The Contest Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71.

²⁷ Hanifa Deen, *The Jihad Seminar* (2008) 262 describes the way in which the media coverage of the case allowed 'vilification through the back door' day after day.

²⁸ There is no empirical evidence to support the claim that religious vilification laws lessen vilification against religious minorities or any of the other harmful consequences of vilification. Professor Baker has argued that in some circumstances such laws may prove counter-productive and put minorities at greater risk, although there is no evidence to support this position either: see Edwin Baker, 'Autonomy and Hate Speech' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (2009) 139, 150–5.

by law’) is narrower, and more focused on clearer and more clearly dangerous outcomes, than the current State laws. This is also the formulation accepted by the Human Rights and Equal Opportunity Commission in its report on religious freedom, in which it rejected modifying the current racial vilification laws to include religious vilification, on the basis that they were too broad for the purposes of religious vilification.²⁹

²⁹ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) 136–7.

7 RELIGION IN THE AUSTRALIAN COURTS: SOME KEY ISSUES

7.1 INTRODUCTION

One forum in which religious freedom is at stake is the court system. People may be compelled to play a part in the court system, as parties or witnesses, and the traditions and practices of the courts may create tension with the religion or belief of those who participate. Further, in a multi-religious society, it is important that those who play official roles in court — as judges, lawyers, jurors or court officials — should be able to carry out those roles without inappropriate constraints on their religious freedom. This chapter briefly explores three key areas of potential tension between religious freedom and the court system: the taking of oaths, the wearing of religious apparel and the role of the courts in intra-religious disputes.

7.2 OATHS / AFFIRMATIONS

One way in which individuals' religion or belief can come into conflict with the court system is in being required to take an oath (which, for the purpose of this report, is defined as involving a religious element, as opposed to a secular affirmation). Some of the contexts in which Australians might be required to make an oath or affirmation include:

- giving evidence in court;
- acting as an interpreter in court;
- becoming a citizen; and
- taking on certain public offices, such as a member of parliament or a judge.

This section will focus on oaths being used by witnesses in court, but also has some relevance to other circumstances in which a person is required to take an oath. The requirement to take an oath in order to take up a public office is one that should be treated with care and not used in a way that excludes certain people from office on the basis of their religion or belief. One oath is prescribed by the *Australian Constitution* (in s 42, which requires all members of the Commonwealth Parliament to take an oath or affirmation of allegiance in the prescribed form before taking office) but all others are prescribed by statute and thus can be changed.¹

The requirement to take an oath or to take an oath in a form associated with a particular religion is a breach of religious freedom. It should never be a precondition for public office that a person swears an oath that associates that person with a

¹ See, eg, the form of judicial oath or affirmation set out in the Schedule to the *High Court of Australia Act 1979* (Cth).

religion against that person's will.² Australia has a generally good track record in this respect.

A variety of people have reasons for not wishing to swear an oath, including people who have no religious faith and those whose religious faith precludes oath-taking altogether or in particular contexts. While it may be appropriate to give people a choice between taking an oath and affirming, it is not consistent with religious freedom to require people to give reasons for preferring one option or the other, as was once the case in Australian law.³ Nor should any inference be drawn about the credibility of a person based on the option that they select; such an inference is not permitted by Australian law.⁴ At present, however, it is permissible in limited circumstances to cross-examine a witness about why they chose not to swear an oath;⁵ it is questionable as to whether this is compatible with religious freedom or indeed the right to privacy. (For example, a Muslim woman may not want to swear an oath while she is menstruating but may also be embarrassed to discuss this reason in public.⁶)

The question of whether even having the *option* of swearing a religious oath is a breach of religious freedom because it 'forces' the witness to reveal their religion has arisen in a number of contexts. In a Canadian case, the Court considered that the fact there were a variety of alternative approaches available (including affirmation) and that the witness did not need to reveal his reasons for selecting one option rather than another meant that there was no infringement of religious freedom.⁷ However, a number of commentators and commissioners in Australia, and other countries, continue to suggest that using an oath is an outdated practice that should be replaced by a single, solemn affirmation to tell the truth that could be taken by people of all religions or no religion. It is argued that this puts all witnesses on an equal footing, simplifies the process of swearing, and takes an inappropriate religious element out of

² *Buscarini v San Marino* (2000) 30 EHRR 208, in which the European Court of Human Rights upheld a complaint by parliamentarians who were forced to take their oaths of office by swearing 'on the Holy Gospels'. The Court held (at 219 [34]) that this 'required them to swear allegiance to a particular religion' in breach of art 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('the *European Convention on Human Rights*'), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). The same position was taken by the Supreme Court of the United States in *Torcaso v Watkins*, 367 US 488 (1961), under the First Amendment to the *United States Constitution*.

³ For a history of the oath in Australia, see Morris Forbes, 'The Truth, the Whole Truth and Nothing but the Truth' (2005) 43(3) *Law Society Journal* 72; Mark Weinberg, 'The Law of Testimonial Oaths and Affirmations' (1976) 3 *Monash University Law Review* 25. These historical reviews make clear the extent to which the taking of oaths has historically been used in a manner incompatible with religious freedom.

⁴ This is currently the case in Australia. See, eg, *Evidence Act 1995* (Cth) s 21(5): 'Such an affirmation has the same effect for all purposes as an oath.'

⁵ *Kamm v The Queen* [2008] NSWCCA 290 (Unreported, Giles JA, Latham J and Matthews AJ, 10 December 2008), although this case also makes clear that significant constraints apply to doing so. See also *R v VN* (2006) 15 VR 113.

⁶ *R v Mehrban (Razia)* [2002] 1 Cr App R 40, discussed in D C Ormerod, Case Comment, 'Trial: Oath — Witness' Decision to Affirm Rather Than Swear' [2002] *Criminal Law Review* 439. In the same case, a man explained that he could not swear on the Koran because he was unclean, as he was unable to wash himself.

⁷ *R. v Anderson* [2001] 7 WWR 582; see also *R. v Robinson* [2005] 191 Man R (2d) 156.

what should be a secular court system.⁸ Others have argued that the ability to take the oath in religious form is an aspect of religious freedom and that it enables the court to bind the conscience of religious people in a way that a secular affirmation does not.⁹ It is clear that the capacity to take the oath in religious form is very important to at least a group of people. In New Zealand recently, an inquiry into modernising the oath decided against removing the option of including a religious element.¹⁰

Those who choose to take an oath should be able to do so in compliance with their own religious traditions and beliefs. Some allowance is made for this in the federal courts. Pursuant to the *Evidence Act 1995* (Cth), most people giving evidence in a federal court (such as the High Court, Federal Court or Family Court) and court interpreters must first make an oath or affirmation, which must be in the form set out in the Schedule to the Act or something similar.¹¹ The oath for a witness set out in the Schedule is: ‘I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by his or her religion*) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.’ In the alternative, a person may affirm by saying: ‘I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.’¹²

While a variety of forms may be used for taking the oath, the standard form of the oath is more consistent with Christianity than most other religions. The alternative to the term ‘Almighty God’ in the Schedule to the *Evidence Act* refers to ‘a god’ recognised by the witness’s religion. First, this formulation of the rule assumes a monotheistic tradition (or at least that it is appropriate to select a single god by whom to swear). Secondly, it assumes a religion that is theistic (as compared, for example, to some forms of Buddhism). Finally, the use of the capital in ‘Almighty God’ and the lower case in ‘a god recognised by [the witness’s] religion’ is also reflective of Christian tradition, rather than religiously neutral. This may be compared to a form of the oath taken in the United Kingdom, which states: ‘I swear by [substitute Almighty God/Name of God (such as Allah) or the name of the holy scripture] that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.’¹³ While this is very similar in form to the Australian standard form, it pays more respect to the equality of a variety of religious belief systems. (It is not, however, the official form

⁸ For a criticism of the single, secular affirmation, see Michael Bennett, ‘The Right of the Oath’ (1995) 17 *Advocates’ Quarterly* 40. He argues (at 44) that it might be an aspect of a fair trial to ensure that witnesses’ consciences are bound by the best method possible.

⁹ Weinberg, above n 3, 40; Criminal Law Revision Committee, *Eleventh Report: Evidence (General)*, Cmnd 4991 (1972) 163ff.

¹⁰ While the Bill implementing the oath modernisation process, the Oaths Modernisation Bill 2005 (NZ), is yet to be passed, in the First Reading Speech to the Bill, the Minister for Justice noted that ‘there was clear support from public submissions for retaining the current values and beliefs, particularly loyalty to the Queen, reference to religious belief, and promises as to how an office or role should be carried out’: New Zealand, *Parliamentary Debates*, 17 May 2005, 20 647 (Phil Goff). See also New Zealand Ministry of Justice, *Review of Oaths and Affirmations: A Public Discussion Paper* (2004).

¹¹ *Evidence Act 1995* (Cth) ss 21–22.

¹² These provisions are taken up in template form in New South Wales, Tasmania and Norfolk Island, and will shortly also be picked up in Victoria.

¹³ See Judicial Studies Board, *Equal Treatment Bench Book* (2008) 3-11 [3.2.3]. See also at 3-12–3-15 [3.2.3], which also gives details about the way in which a variety of religious groups might wish to make an oath.

set out in the *Oaths Act 1978* (UK), which is even more closely aligned to the Judeo-Christian practices than the Australian standard form.¹⁴⁾

The way in which divergences from the standard form are handled by courts in practice can make a difference to how real the right of minorities to use an alternative form is (particularly when it requires such things as alternative holy books). In the Federal Court, for example, the onus on informing the court if ‘special arrangements’ are needed for taking an oath is placed on the legal representatives of the parties (with no guidelines for those who are not represented) and must be given at least 24 hours before the witness is due to give evidence.¹⁵ This change to previous practice was undertaken to provide the possibility of witnesses taking the oath in a variety of forms, while recognising that the diversity of religions may be such that the courts would not be able to provide for them all without notice. The Federal Court does in practice have copies of the Bible, Koran and the Tanach available for those who wish to swear on them and the registry staff assist those who have other needs that are drawn to their attention.

This approach may be contrasted to that recommended as best practice in the United Kingdom. The Judicial Studies Board in the United Kingdom has developed an *Equal Treatment Bench Book*,¹⁶ which sets out a range of useful information about different religious beliefs, including information on what types of oaths or affirmations might be appropriate for different religious groups, while recognising that there is a diversity of opinion within religious groups. It also sets out useful advice to judges and court officials as to dealing with oaths in a manner that treats all religions equally and with appropriate respect. These include:¹⁷

- Keeping religious books covered when not in use so that they are not touched directly by court staff and ensuring that such books are stored appropriately.
- Making available facilities to allow those who wish to wash (including washing their feet) before swearing and ensuring witnesses are given time to wash if that is required.
- Recognising that in some religions those who are swearing may need to remove their shoes or cover their heads.
- Witnesses should be told in advance that they can either swear or affirm and it should be made clear to them that these are equally valid choices.
- ‘If they do wish to swear an oath, witnesses should be informed about the availability of different scriptures in court, in order to reassure

¹⁴ *Oaths Act 1978* (UK) s 1(1): ‘The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words “I swear by Almighty God that”, followed by the words of the oath prescribed by law.’

¹⁵ Federal Court of Australia, *Practice Note No 16: Oaths and Affirmations* (30 April 2001) [4].

¹⁶ Judicial Studies Board, *Equal Treatment Bench Book* (2008).

¹⁷ *Ibid* 3-10-3-11 [3.2.2].

them that asking for a particular scripture is not an inconvenience. They should not be persuaded to swear an oath on the New Testament for the sake of convenience.’ If the relevant scriptures or books are not available, they should be encouraged to bring their own copies to court.

This proactive approach to ensuring that people understand their options, and have the best opportunity to take an oath in a suitable form, may be better practice than simply asking a witness if they wish to swear or affirm once they are in the court room and hoping that their legal representatives (if they are a party) or the legal representatives of the party calling them to give evidence (if they are not) have informed them about their options. It should be noted, however, that there are concerns that a more proactive approach by the courts might be considered to be intrusive and this is one reason that the Federal Courts rely on legal representatives.

While there has been considerable reform of the law of oaths from the times when people were effectively excluded from giving evidence because of their religious beliefs (or lack of religious beliefs) the time may be right to reflect on whether the current system best serves Australia’s multi-religious society. Consideration should be given as to whether a single, non-religious affirmation might better protect the equality of witnesses, regardless of their religious beliefs, and simplify the process in a multi-religious society, where it may be difficult to ensure that all religious forms of oath-taking are able to be administered in all courts. In the alternative, better provision should be made for all witnesses to be informed in advance about their options regarding the oath or affirmation and for the needs of religious minorities to be catered for.

7.3 RELIGIOUS APPAREL AND APPEARANCE IN COURT

Some religious traditions require or encourage the wearing of particular forms of clothing and/or the maintenance of particular forms of appearance. This may include:

- wearing a head-covering of some kind — this may extend to cover much or all of the face;
- having a beard or long hair;
- wearing clothing that completely covers the arms and legs (and, in some instances, hands);
- wearing particular forms of jewellery around the throat, arms or legs, or a ceremonial knife; or
- having certain skin markings, including tattoos and ritual scarring.

It would be impossible to regulate to resolve all the problems which people from minority religions may experience in the court system regarding apparel and appearance, as many decisions need to be made on a case-by-case basis. Judicial training and awareness of religious differences may be important to ensure that the religious dimensions of decisions are understood by judges. For example, judges who

would normally expect men to remove headwear when entering a court room should not do so if a man is wearing a head-covering in compliance with his religion (for example, a Jewish yarmulke or Sikh turban).¹⁸ However, there may be some occasions on which it is not appropriate to allow some aspect of religious apparel in courts. For example, a Canadian judge's decision to forbid a Sikh defendant from wearing his kirpan (a ceremonial knife) was upheld as not breaching the *Canadian Charter of Rights and Freedoms* in circumstances where the defendant was accused of a violent assault and there was good reason to be concerned for the safety of others in the court room.¹⁹ The same logic would not apply to a Sikh juror or lawyer who posed no such threat.

It is important that judges be conscious themselves and, where appropriate, assist the jury to be conscious of not relying on stereotypes that certain religious clothing or appearance may evoke and to ensure that a case is judged on its merits.

One issue that has not yet been the subject of reported cases in Australia, but will most likely require a legal solution, is the right of those participating in the court system to wear religious clothing that completely covers or obscures the face. In most cases this will be a Muslim woman claiming the right to wear a covering such as a burqa or niqab that covers her face. Relatively few Australian Muslims do wear such comprehensive facial covering, so the issue is not likely to arise with any regularity, but it is included here for the sake of completeness.

Women who cover their faces may participate in the legal system as judges, lawyers court officials or witnesses. There seems to be little reason to require a *lawyer* or *court official* to uncover their face, unless there are questions about their identity (which can probably be resolved quickly and outside of open court in most cases). The only problem that may arise is whether they can be heard clearly and this should be able to be resolved by using appropriate microphones. Whether complete face covering is compatible with *judicial* office is a more complicated question and one that is not addressed in detail here, as it is not currently likely to be in issue in Australia.

The area of greatest contention likely to arise in Australian courts is whether a woman should be permitted to *give evidence* with her face covered if she wishes to do so for religious reasons. There may be a number of legitimate reasons that the opposing party in a case may wish to have a witness remove her head-covering. (There is also the illegitimate reason of wanting to intimate or shame the witness out of giving evidence. The danger of this occurring must be kept in mind.) First, there may be the question of identity — is the witness who she claims to be and/or do other people recognise her as, for example, the person who was present at a crime scene? Secondly, there may be the need to assess the level of physical injury done to a witness. This may require the removal of the head-covering or other items of clothing to demonstrate physical injuries. Finally, there is a question as to whether the judge or

¹⁸ In *R v Laws* (1988) 41 OR (3d) 499, the Ontario Court of Appeal held that a trial judge had breached the *Canadian Charter of Rights and Freedoms* by excluding members of the public from the court room for wearing headdresses for religious reasons. The Court of Appeal held that he had erred in holding that the *Charter* only applies to 'major, recognizable religion[s]'.
¹⁹ *Hothi v The Queen* [1985] 33 Man R (2d) 180.

jury will be able to assess the credibility of the witness properly in the absence of being able to form judgements based on demeanour/facial expression.

The first two of these issues may be able to be dealt with in a way that is fair to all the parties involved without the woman being required to remove her head-covering in court. It may be possible for an identity process to take place outside the court room in a single-sex environment to ensure that the person giving evidence is who she says that she is. A more complicated issue arises if there is a question as to whether that person can be recognised by other witnesses. The court may need to think creatively about the best way of ensuring that this evidence is tested while not exposing the witness to any more intrusion to her religious freedom than is strictly necessary. This may be able to be achieved by the use of photographs, a video link, clearing the court of all but those essential to the particular evidence, etc. What is appropriate in all the circumstances will depend on the importance of the evidence, the beliefs of the particular witness and other relevant factors, including the facilities available in a particular court. As with several other areas discussed in this report, this is a case in which religious freedom needs to be balanced against other important interests, particularly the right to a fair trial.

The issue of whether the credibility of a witness can be properly tested if her face is covered has arisen in New Zealand, in the District Court of Auckland case *Police v Razamjoo* ('Razamjoo').²⁰ Two witnesses for the informant wished to wear burqas 'covering the entire face and body', so that the only visible part of the face was a narrow slit in the head-covering through which the eyes could be seen. The facts of the particular case meant that the credibility of the two witnesses would be an important issue.²¹ The judge recognised the religious significance of wearing the burqa to the witnesses and the distress that they could be caused if they were required to appear in a public court room without it. After listening to one of the witnesses giving evidence, while wearing a burqa, about its importance to her, the judge said that evidence given in this fashion would 'consciously or unconsciously, be accorded less weight'.²² In addition, while accepting that there were real problems with using demeanour to assess credibility, the judge did point out several situations in which seeing facial expressions could be important to determining credibility, for example an abrupt change in facial expression, a change from making eye contact to refusing to do so and 'even a look of downright hatred at counsel' when a particular question was asked.²³ The judge also took into account the need for criminal trials to be public to maintain the confidence of the public and to ensure the identity of the person giving evidence.

In the circumstances, the judge held that, while the relevant witnesses could wear scarves or hats which covered their hair, they would need to show their faces. Screens were used so 'that only Judge, counsel, and Court staff (the latter being females) [were] able to observe the witness's face. Appropriate ancillary arrangements [were]

²⁰ [2005] DCR 408.

²¹ Ibid [12] (Judge Moore).

²² Ibid [71] (Judge Moore). At [69], listening to the witness was described as 'slightly unreal' and not giving a full sense of the person.

²³ Ibid [78] (Judge Moore).

to be made so that when the witness [was] entering and leaving the courtroom the intent of [the] decision [was] not defeated.’²⁴

This type of approach demonstrates that courts do have the capacity to come to creative solutions that balance the right to religious freedom and the right to a fair trial in particular cases. That being said, it is important for courts to be cautious about placing too much weight on demeanour when making these decisions. Despite the comments of the learned trial judge in *Razamjoo* about the ways in which demeanour can be important to judging credibility, there are serious questions, as Kirby J has noted in another context, about the extent to which judges are capable of evaluating ‘credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of a courtroom’ — in particular, culture can affect judgments about demeanour.²⁵ In any event, many questions of demeanour (for example, silences, delays in responding to questions) do not require the judge to see a witness’s face.

Given the serious distress that removing a face covering in a public place can cause to a woman who usually covers herself, and given the intrusion on religious freedom involved in requiring a woman to take off her veil, courts should give serious consideration to whether evidence can properly be taken with the woman’s face covered. They should not assume that the veil must be removed whenever a woman gives evidence.²⁶ In New Zealand, the *Evidence Act 2006* (NZ) allows witnesses to give evidence ‘in an alternative way’ on the grounds of, among other things, the ‘linguistic or cultural background or religious beliefs of the witness’.²⁷ Such a provision might well be helpful in Australian law to encourage judges to think seriously about ways in which evidence can be given while minimising the intrusion on the religious freedom of witnesses. As the United Kingdom Judicial Studies Board notes:

It is important to acknowledge from the outset that for Muslim women who do choose to wear the niqab, it is an important element of their religious and cultural identity. To force a choice between that identity (or cultural acceptability), and the woman’s involvement in the criminal, civil justice, or tribunal system (as a witness, party, member of court staff or legal office-holder) may well have a significant impact on that woman’s sense of dignity and would likely serve to exclude and marginalise further women with limited visibility in courts and tribunals. This is of particular concern for a system of justice that must be, and must be seen to be, inclusive and representative of the whole community.²⁸

7.4 OTHER ISSUES

There are a wide range of issues that may impact on how accessible and fair the court system is, and appears to be, to people from a variety of religious faiths. These may include judges and court officials understanding that people of some religious faiths

²⁴ Ibid [110] (Judge Moore).

²⁵ *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588, 617–18 [88].

²⁶ For a useful analysis of this issue, see Natasha Bakht, ‘Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms’ in Ralph Grillo et al, *Legal Practice and Cultural Diversity* (forthcoming).

²⁷ *Evidence Act 2006* (NZ) s 103(1), (3)(e).

²⁸ Judicial Studies Board, *Equal Treatment Bench Book* (2008) 3-18/2 [3.3].

may not make eye contact with or take an item directly from the hand of someone of the opposite sex, and trying to ensure that these practices do not disadvantage the person involved (for example, by assuming that a person who does not make eye contact is untrustworthy or being dishonest). It is also essential to ensure, to the greatest extent possible, that religious stereotypes are not permitted to influence the outcome of legal proceedings.

The Judicial Commission of New South Wales has given a series of useful examples of how courts can be made more welcoming and inclusive for people of all religious faiths, including consideration of issues such as the timing of court hearings:

If requested, wherever possible:

- Make the appropriate allowances for those who need to pray at certain times of the day (for example, Muslims) — that is, have a break in proceedings.
- Make the appropriate allowances for relevant holy days of the week and not insist that someone be called to give evidence on that day, or when they are meant to be at their place of religious worship.
- Make the appropriate allowances for (particularly important) religious festivals and not insist that someone be called to give evidence during such times.²⁹

Greater levels of understanding and cultural sensitivity cannot be legislated, but a variety of levels of engagement with these issues can be seen across different courts. The Family Court, for example, has a detailed action plan on cultural diversity and works with groups such as the Australian Multicultural Foundation to help to develop a good understanding of the diverse range of backgrounds of users of its courts.³⁰ By contrast, the High Court and Federal Court do not have systematic programmes in place to inform judges of religious differences. Nor, unlike several State jurisdictions, do they have formal guidance for judges on how to deal with religious differences.³¹ However, the Australian Human Rights Commission is currently working with the Australasian Institute of Judicial Administration on a National Roundtable Dialogue ‘Intersection Between the Law, Religion and Human Rights’, which may prove a useful forum for discussion of these issues into the future.³²

7.5 INTRA-RELIGIOUS DISPUTES AND RELIGIOUS LAW IN THE COURTS

As discussed in the section on international law, religious groups have a right to (limited) autonomy as part of the right to religious freedom. This includes, at least to some degree, the capacity for religious groups to: resolve intra-religious disputes internally through established religious mechanisms; determine their own rituals, doctrines and practices; and select their own religious leadership.

²⁹ Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2007) 4406 [4.4.6].

³⁰ See Family Court of Australia, *Cultural Diversity* <<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/CD/>>.

³¹ See, eg, Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2007), Section 4 ‘People with a Particular Religious Affiliation’.

³² Australian Human Rights Commission, *Intersection Between the Law, Religion and Human Rights: A National Roundtable Dialogue* <http://www.hreoc.gov.au/partnerships/projects/law_religion_hr.html>.

To the greatest extent possible, secular courts should avoid making determinations relating to religious doctrine or theological disputes.³³ Such matters are generally best left to debates internal to a religion, where different views may prevail at different points in time. However, there are circumstances in which courts may need to become involved in intra-religious disputes or apply religious laws.

7.5.1 Circumstances in which Courts become Involved in Religious Disputes

For example, after a schism, a dispute over leadership or an amalgamation of religious groups, there may be disputes over who is entitled to the property or assets owned by the religious body.³⁴ Similarly, there may be questions over the employment or termination of employment of people by a religious group, including clergy or other religious leaders.³⁵ These types of disputes raise complicated issues for courts about the extent to which they should become involved in intra-religious disputes and what type of approach they should take to such cases. On the one hand, there may be disputes that cannot and have not been resolved by internal religious mechanisms (especially when the validity of such mechanisms may be in question) and which have significant, secular aspects to them (such as the ownership of real property or the commission of a tort) that cannot simply be left unresolved. On the other hand, courts are properly reluctant not to intrude too deeply into the internal practices and doctrines of a religious organisation for fear of interfering with its autonomy and taking the court outside its area of competence or jurisdiction.³⁶

While cases to do with property rights or employment may raise intra-religious disputes, the applicable law will often be common law, not religious law. On the other hand, cases in which religious law may be taken into account include cases where it has been incorporated into a contract or other legal document expressly or by implication. Thus, the Full Court of the Supreme Court of South Australia has recognised that the law that governs a contract can be religious law (just as it can be foreign law) but that there must be sufficient certainty as to what that law is and its relevance to the dispute at hand.³⁷ In these circumstances, the Australian courts have been prepared to make determinations about religious doctrine and practices, while expressing some concern at their competence to do so. However, the courts are cautious not to find legally binding obligations in relation to debates internal to a

³³ For a good analysis and critique of the current position, see Reid Mortensen, 'Church Legal Autonomy' (1994) 14 *The Queensland Lawyer* 217.

³⁴ See, eg, *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 249 ALR 250, and the underlying and long running proceedings in the Supreme Court of New South Wales *Petar v Mitreski*; *Petros v Biru* [2006] VSC 383 (Unreported, Morris J, 6 October 2006); aff'd [2007] VSCA 226 (Unreported, Maxwell ACJ, Chernov and Kellam JJA, 7 August 2007); *A-G (Vic) ex rel Harkianakis v St John the Prodromos Greek Orthodox Community Inc* [2000] VSC 12 (Unreported, Mandie J, 12 October 2000).

³⁵ See, eg, *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; *Engel v Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402.

³⁶ See, eg, *Solowij v Parish of St Michael* (2002) 224 LSJS 5.

³⁷ *Engel v Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402. The Court also recognised that it would be inappropriate for a court to grant an order for specific performance that would force a congregation to continue with a rabbi when that relationship had broken down. (That did not preclude other remedies.)

religious body unless it is necessary to do so (for example, because there is a dispute about property).³⁸

The courts may also, in some circumstances, enforce provisions requiring the use of religious dispute settlement mechanisms. The Supreme Court of Victoria, for example, has held that a clause in an arbitration agreement that required the parties to refer all claims and counterclaims to three rabbis was enforceable, as long as it complied with the relevant Act, in particular, by ensuring that there was no breach of procedural fairness.³⁹

In many of these cases, the secular courts have tried to keep as strictly within the bounds of secular law as possible (for example, with respect to the law of trusts in determining ownership of property). In other cases, however, a more distinctively religious case-law has developed. For example, ministers of religion are not always treated as employees, subject to the usual industrial law protection; the relationship between them and their religious bodies has sometimes been determined to be a spiritual or ecclesiastical one.⁴⁰ What has arguably been missing, however, is a more thorough-going appreciation of the religious freedom principles at stake when the courts interfere in intra-religious disputes and a recognition that a church is in a different position to most voluntary organisations in being the manifestation of the right to the collective aspects of religious freedom for a group of religious believers.⁴¹ Greater deference to internal religious procedures and greater hesitancy on the part of secular courts to enter into religious disputes might be one result of a human rights statute that gave more formal protection to religious freedom.

7.5.2 Recognition of Religious Law in the Secular Courts

Another issue raised in the context of secular courts intervening in religious issues is that of the recognition of religious law, either formally or informally, by the Australian legal system. One place where this arises in a particularly acute form is the recognition of indigenous religious practices and law. The Western legal system has not dealt well with the recognition of religious aspects of sacred land, for example, and struggled with issues such as knowledge that can only be shared with men or women, or which must be kept secret from outsiders. One scholar has argued that the Australian system for the protection of sites of religious significance to Aboriginal people has failed because

it does not give adequate protection to Aboriginal restrictions on disclosure of secret knowledge or provide adequate protection for secret knowledge, leading to secret Aboriginal religious beliefs being exposed to intensive public scrutiny. Aboriginal people should not be forced to break their law, their religion or their culture to prove

³⁸ *Scandrett v Dowling* (1992) 27 NSWLR 483. This case remains one of the leading cases with respect to the circumstances in which an enforceable legal obligation is created by church rules.

³⁹ *Mond v Berger* (2004) 10 VR 534.

⁴⁰ See *Greek Orthodox Community of SA Inc v Ermogenous* (2000) 77 SASR 523, 563–76 [173]–[207] (Bleby J) for a detailed discussion of the comparative law of religious employment and conclusions as to how it applies in Australia. See also *Knowles v Anglican Church Property Trust, Diocese of Bathurst* (1999) 89 IR 47. But this is not always so: see, eg, *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, where the High Court upheld an industrial magistrate's decision to award unpaid annual and long service leave to the Archbishop of the autocephalous Greek Orthodox Church in Australia.

⁴¹ For a more detailed discussion of these issues, see Mortensen, above n 33.

to non-Aborigines that their law, religion or culture exists.⁴²

He has also pointed to the far higher requirements for rationality placed on Aboriginal religious beliefs than on other forms of religious beliefs.⁴³ Another scholar discusses the 'culture of disrespect' that has disappointed Aboriginal people 'with the paucity of recognition and legal protection given to tangible and intangible aspects of Indigenous culture and religion.'⁴⁴

There has, to date, been no comprehensive engagement by the Western legal system with the indigenous legal system and indigenous religious beliefs. Issues have been dealt with in a piecemeal fashion. There is a need for better consideration of the manner in which the two systems could interact in a way that is more respectful of the religion of Aboriginal people. Given that such a consideration could only be undertaken properly with full inclusion of indigenous groups, it would not be proper to speculate further here about what the practical outcomes of such an engagement would be. However, legal protection for the religious freedom of indigenous people and recognition of indigenous religion in the courts are areas where there is currently insufficient development in Australian law.

The recognition of religious legal systems by the dominant legal system is also likely to become an issue with other religious groups. In particular, there is a question over the extent to which the formal legal system should acknowledge the existence at present of informal Islamic law processes for settlements of legal disputes, marriage and divorce, etc. and whether any of those methods should be formalised.⁴⁵ This question of the formal recognition of Islamic law has led to heated debate, both inside and outside the Muslim communities, in places where it has been proposed.⁴⁶ It is not discussed in detail here, but rather flagged as an issue that will likely require more comprehensive consideration in the future.

7.6 CONCLUSION

Courts deal with people from a wide variety of religions every day. In a multi-religious society, it strengthens the legal system for people from a wide variety of religious backgrounds to take part in legal proceedings as judges, lawyers, jurors and court officials. It is also important that the legal system treats all participants in legal disputes fairly, and ensures that they are able to participate fully and equally in those disputes. Rules around issues such as oaths/affirmations or the wearing of particular garments need to be flexible enough to ensure that everyone can participate in legal proceedings with as little intrusion on their freedom of religion or belief as possible, without imperilling the right to a fair trial and open justice.

⁴² Ernst Willheim, 'Australian Legal Procedures and the Protection of Secret Aboriginal Spiritual Beliefs: A fundamental conflict' in Peter Cane, Carolyn Evans and Zoe Robinson, *Law and Religion in Theoretical and Historical Context* (2008) 214, 236–7.

⁴³ Ibid 214.

⁴⁴ Megan Davis, 'A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions' (2006) 8 *UTS Law Review* 135, 135.

⁴⁵ Ann Black, 'Accommodating Shariah Law in Australia's Legal System: Can we? Should we?' (2008) 33 *Alternative Law Journal* 214.

⁴⁶ When the Archbishop of Canterbury proposed this idea for the United Kingdom, it sparked off a worldwide debate: see Dr Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (Foundation lecture at the Royal Courts of Justice, London, 7 February 2008) <<http://archbishopofcanterbury.org/1575>>.

More complicated issues arise over the way in which the legal system deals with intra-religious disputes or in acknowledging other, religious legal systems that exist in Australia. While a detailed discussion of how the law does and should respond to these issues is beyond the scope of this report, the current approach of the courts leaves space for a fairly significant intrusion of secular courts into religious disputes and arguably too little understanding of the importance of religion in areas such as claims over sites sacred to indigenous people.

8 APPENDIX: EXTRACTS FROM SELECTED INTERNATIONAL INSTRUMENTS ON RELIGIOUS FREEDOM

8.1 HUMAN RIGHTS TREATIES

8.1.1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2, 4, 18, 20, 24, 26, 27 (entered into force 23 March 1976) ('ICCPR')

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...

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 20

...

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

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

...

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.

8.1.2 *Convention Against Discrimination in Education, adopted on 14 December 1960, 429 UNTS 93, arts 1, 2, 5 (entered into force 22 May 1962)*

Article 1

1. For the purpose of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

- (a) Of depriving any person or group of persons of access to education of any type or at any level;

- (b) Of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

...

Article 2

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention:

...

- (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

...

Article 5

1. The States Parties to this Convention agree that:

- (a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;
- (b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction;

...

8.1.3 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13, art 2 (entered into force 3 September 1981) ('CEDAW')

[Note: This Convention contains no specific articles relating to freedom of religion and belief, but contains general principles prohibiting all forms of discrimination against women and requires states to work towards modifying or abolishing customs and practices (most likely including religious ones) that undermine the equality of men and women.]

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

8.1.4 *Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, arts 2, 14, 20, 29 (entered into force 2 September 1990) ('CROC')*

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

...

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

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

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 29

1. States Parties agree that the education of the child shall be directed to:

...

- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin

...

8.1.5 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195, art 5 (entered into force 4 January 1969) ('ICERD')

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

- (vii) The right to freedom of thought, conscience and religion;

...

8.2 HUMAN RIGHTS DECLARATIONS

8.2.1 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, arts 2, 16, 18, 26, UN Doc A/RES/217A (III) (1948)

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

...

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 26

...

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

...

8.2.2 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 36/55, 36 UN GAOR Supp (No 51), 36th sess, 73rd plen mtg, arts 1–8, UN Doc A/36/684 (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.

Article 7

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

Article 8

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

8.2.3 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135, annex, 47 UN GAOR Supp (No 49), arts 1, 2, 4, UN Doc A/47/49 (1992)

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 4

...

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

...

8.3 HUMAN RIGHTS COMMITTEE GENERAL COMMENTS

The full text versions of the following Human Rights Committee Comments can be found at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

8.3.1 United Nations Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993)

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders,

priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

5. The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.

6. The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

7. In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its General Comment 11 [19], States parties are under the obligation to enact laws to prohibit such acts.

8. Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to

manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.

9. The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2 of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination. Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the right to freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the

basis of their rights under article 18 and on the nature and length of alternative national service.

8.3.2 United Nations Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art 20)*, (Nineteenth session, 1983)

...

2. Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations. For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy.

8.3.3 United Nations Human Rights Committee, *General Comment No 23: The Rights of Minorities (Art 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994)

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these 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. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

...

4. The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the

territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not. Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

...

5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2. Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

...

6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate

differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

...

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

8.3.4 United Nations Human Rights Committee, *General Comment No 18: Non-Discrimination, as contained in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006)

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees 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.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

...

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4,

stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

...

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

...

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.