



Striking the right balance

Submission to the inquiry into the status of the human right to
freedom of religion or belief

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Human Rights Law Centre

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Contents

1.	INTRODUCTION	3
2.	LEGAL PROTECTION OF FREEDOM OF RELIGION	4
3.	BETTER BALANCING FREEDOM OF RELIGION WITH OTHER HUMAN RIGHTS UNDER AUSTRALIAN LAW	6

1. Introduction

(a) Background

The Human Rights Law Centre (**HRLC**) welcomes the opportunity to contribute to the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into the status of the human right to freedom of religion or belief.

In the immediate aftermath of the horrors of World War 2, including the Holocaust and the ethno-religious persecution experienced by religious minorities, the world came together and signed the Charter of the United Nations. To give substance to the term "human rights" used in the Charter, the nations of the world adopted the Universal Declaration of Human Rights (**UDHR**),¹ the International Covenant on Economic Social & Cultural Rights (**ICESCR**), the International Covenant on Civil and Political Rights (**ICCPR**), with its two Optional Protocols, and other specialised conventions, declarations and procedures. Together, these form the core human rights protections around the world.²

The right to freedom of thought, conscience, and religion or belief (hereafter referred to the right to freedom of religion or belief) is a fundamental, non-derogable right under international law.³ However, sadly, violations and abuses of the right to freedom of religion or belief continue around the world. Conversely, many human rights violations are perpetrated in the name of religion, including persecution of religious minorities, the subjugation of women, and attacks on gay, lesbian, bisexual, and transgender (LGBT) people.

The Terms of Reference include consideration of the status of the right to freedom of religion or belief internationally. This submission focuses on the status of the freedom of religion or belief in Australia and the gaps and issues relating to legal protection. The HRLC also refers to its previous submissions on the status of rights and freedom in Australia, and the balancing of the right to freedom of religion or belief with other human rights.⁴

¹ While the UDHR is not a treaty and is not legally binding on States, it is an expression of the fundamental values which are shared by all members of the international community and has had a profound influence on the development of international human rights law.

² Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary (2nd revised edition)*, XIX (Introduction).

³ Article 4(2) of the ICCPR.

⁴ Human Rights Law Centre, *Rights and Freedoms in Australia: Response to the Australia Law Reform Commission interim report of its inquiry into Traditional Rights and Freedoms* (https://www.alrc.gov.au/sites/default/files/subs/148._org_human_rights_law_centre_submission_.pdf).

(b) Summary of recommendations

Recommendation 1: Religious freedom should be protected through the addition of the protected attribute of 'religious belief or activity' (including not having a religious belief) to federal anti-discrimination law.

Recommendation 2: The Federal Government should enact a Human Rights Act that protects fundamental human rights, including the right to freedom of religion or belief.

Recommendation 3: Permanent religious exceptions/exemptions under Australian anti-discrimination laws should be amended to ensure that any limitations on other rights as a result of the exercise of religious freedom are reasonable, necessary and proportionate.

2. Legal protection of freedom of religion

(a) Existing legal protections are limited

Section 116 of the Australian Constitution provides that the Australian Government “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”. However, this limited right is directed to preventing the Australian Government from legislating in respect of religion rather than providing substantive protection of the right to religion and belief.

In the area of employment, the *Fair Work Act 2009* (Cth) (**FWA**) provides protections against discrimination on the basis of religion and political opinion. For example, the FWA provides that a modern award or enterprise agreement must not include terms that discriminate against an employee because of their religion or political opinion.⁵ Similarly, s 351 of the FWA provides that an employer must not take adverse action against a person because of their religion or political opinion.

As with any other protected attribute, this protection does not apply to action that is taken because of the inherent requirements of the particular position concerned.⁶ There are also broader exemptions made for conduct in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.⁷

⁵ *Fair Work Act 2009* (Cth) ss 153, 195.

⁶ *Fair Work Act 2009* (Cth) ss 153, 195, 351.

⁷ *Ibid.*

If an employee is dismissed or treated unfairly on the basis of their political opinion or religion they are entitled to make a complaint that can lead to a legally enforceable finding against their employer.

(b) Need for anti-discrimination protections

A number of state laws protect against discrimination and vilification on religious grounds (including not holding a religious belief). However, there is no federal legislation that prohibits discrimination or vilification on the ground of religion. An appropriate pathway to protect against discrimination on the basis of religious belief would be to include religious belief (including not holding a religious belief) as a protected attribute in federal discrimination law.

In 2013, following a number of inquiries and consultation processes, the former Commonwealth Government proposed a *Human Rights and Anti-Discrimination Bill 2013* (Cth). The HRAD Bill would have consolidated and modernised the five separate Commonwealth anti-discrimination laws to ensure justice is not denied because of the complex technicalities of our current laws which represent a significant barrier for both victims of discrimination and innocent parties who are subject to a discrimination complaint. Unfortunately, the progression of the HRAD Bill was deferred indefinitely in 2013 prior to the federal election hat year.

In the future, legal protection from discrimination for religious belief (including not holding a religious belief) could be incorporated into a similar consolidated bill, a stand-alone statute or as an amendment to the *Racial Discrimination Act 1975* (Cth).

The attribute of religion should be broadly defined to include not having a religion or religious belief, consistent with international human rights law. Such legal protection would apply in various settings including education, goods and services, employment and clubs. The development of any such legislation would have to carefully consider any exemptions or exceptions that would be appropriate.

Including religious belief and/or activity as an additional protected attribute in federal discrimination law would reduce inconsistencies between federal and state and territory laws and strengthen protections for vulnerable communities within Australia in line with Australia's human rights obligations.

Recommendation 1: Religious freedom should be protected through the addition of 'religious belief or activity' as a protected attribute (including not having a religious belief) in federal anti-discrimination law.

(c) Need for a Human Rights Act

While Australia has agreed to be bound by the major international human rights treaties, individuals cannot enforce these international protections directly under Australian law.

Australian parliaments have passed a small number of important laws that protect human rights (e.g. anti-discrimination laws) and the Australian common law provides some protection for a number of human rights, particularly those relating to criminal justice. However, Victoria and the Australian Capital Territory are the only jurisdictions within Australia to have introduced statutory protection of human rights through a human rights act or charter. Australia is the only Western liberal democratic nation without comprehensive statutory or constitutional protection of human rights.

This gap in legal protection leaves Australians - and in particular vulnerable groups, including religious minorities - vulnerable to having their human rights violated. There is no recourse for Australians whose right to freedom of religion is curtailed by government law or policy or through the conduct of a state agency, department or public official.

Recommendation 2: Australia should enact a Human Rights Act that protects fundamental human rights and freedoms, including the right to freedom of religion or belief.

3. Better balancing freedom of religion with other human rights under Australian law

(a) Right to freedom of religion or belief

Article 18(1) of the ICCPR states that everyone shall have the right to freedom of thought, conscience and religion.⁸ 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.⁹

⁸ The General Assembly *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief* (GA Res. 36/55 of 25 November 1981) has normative value in the interpretation of this provision. Further, a number of special studies from UN organs are taken into consideration in interpreting Article 18 of the ICCPR (See Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Sales No.60.XIV.2. See also Odio Benito, *Study of the current dimensions of the problems of intolerance and of discrimination on grounds of religion or belief*, UN Sales No E.89.XIV.3 (1989); Eide/Mubanga-Chipaya, *Conscientious Objection to Military Service*, UN Sales No. E.85.XIV.1 (1985). See also the reports of the Special Rapporteurs on freedom of religion or belief (for example, the report E/CN.4.2004/63)).

⁹ These individual and collective manifestations of a religion or belief are also found in Article 18 of the UDHR (teaching is mentioned first), Article 9(1) of the ECHR and Article 1(1) of the 1981 UN Declaration on Religious Intolerance. Equivalent provisions can be found in section 14 of the ACT HRA and section 14 of the Victorian Charter, which are based on Article 18 of the ICCPR.

It further includes “the right to declare religious beliefs openly and without fear of hindrance or reprisal”¹⁰ and to attempt to convert others to one’s beliefs (or in other words, to proselytise).¹¹

The right to freedom of religion or belief is also guaranteed in Article 9(1) of the European Convention of Human Rights (**ECHR**), Article 14 of the Convention on the Rights of the Child (**CRC**), Article 12 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families and Article 18 of the UDHR.

(b) The human right to equality and non-discrimination

Freedom of religion or belief sometimes conflicts with other human rights, such as the right to equality and non-discrimination.

Equality and non-discrimination constitute basic and general principles relating to the protection of all human rights.¹² These obligations arise under the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), Convention on the Rights of Persons with Disabilities (**CRPD**), and the CRC.

Article 2(1) of the ICCPR and article 2(2) of ICESCR require States to respect and ensure the rights 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’.¹³

Article 26 of the ICCPR is a free-standing non-discrimination clause that prohibits discrimination and provides that all people are equal before the law – in fact or in law – in all aspects of public life.

The rights to non-discrimination and substantive equality have also been confirmed time and time again by a wide range of United Nations Treaty Bodies,¹⁴ and international

¹⁰ *R v Big M Drug Mart* [1985] 1 SCR 295 at 353-354.

¹¹ *Kokkinakis v Greece* (1993) 17 EHRR 397 at [31], where the European Court of Human Rights held that the criminal conviction of a Jehovah’s Witness for proselytising violated his freedom to manifest his religion. See also *Larissis v Greece* (1998) 27 EHRR 329.

¹² Human Rights Committee, *General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

¹³ See, e.g. UN Economic and Social Council, Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 (2009) [19].

¹⁴ See, eg, Human Rights Committee (**HRC**), *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); Committee on Economic, Social and Cultural Rights (**CESCR**), *General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005); CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Elimination of Discrimination against Women

jurisprudence.¹⁵ Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality,¹⁶ and have done so through a wide range of national laws.¹⁷

(c) Balancing the right to religion or belief and other human rights

While “[all] human rights are universal, indivisible and interdependent and interrelated”,¹⁸ human rights are rarely absolute.¹⁹ There are express limitations on many human rights as well as mechanisms available to States which allow them to limit their treaty obligations and restrict individual rights.²⁰

The freedom to have or adopt a religion or belief can be contrasted with the freedom “to manifest” this or to live one’s life in accordance with it, since the active exercise of this right is usually performed externally, to the outside world.²¹ Whilst the freedom to hold religious beliefs is **absolute**,²² the manifestation element of this right can be **limited** if those limitations are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”²³

(CEDAW Committee), *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004).

¹⁵ See, eg, *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zgraggen v Switzerland*, Ser. A No. 263 (1993).

¹⁶ See, eg, ICCPR arts 2, 3, 26; ICESCR; CEDAW; CERD; CRPD, art. 5.

¹⁷ See, eg, *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

¹⁸ Vienna Declaration and Programme of Action, A/CONF.157/24 (Part I), chap. III; Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary* (2nd revised edition).

¹⁹ The rights to freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition against the retrospective operation of criminal laws and the right to recognition before the law, are the only human rights which cannot be restricted under any circumstance (Articles 1, 8 (1) 11 15 and 16 of ICCPR).

²⁰ States can under certain circumstances derogate from their human rights obligations. They can also make reservations to certain articles of human rights treaties.

²¹ Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary* (2nd revised edition), 417.

²² Paragraph 3 of the UN HRC General Comment No.22 on Article 18 states: “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...” (available at: <http://www.unhchr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>)

²³ *International Covenant of Civil and Political Rights*, art 18(3).

According to Nowak, the limitations contained in Article 18 of the ICCPR exercise an important corrective function due to the potential for far-reaching freedom of religion to lead to suppression not merely of freedom of religion of others but to other rights as well.²⁴ This is because of the inherently controversial character of freedom of religion - the fact that most religious faiths believe their faith to represent the “absolute truth” and thus reject the faiths of others. It is the interplay between the principle of freedom of religion and its restrictions that truly determines the actual scope of the individual’s right.²⁵

Limitations on freedom of religion are also similarly expressed in the CRC,²⁶ the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families,²⁷ as well as the ECHR.²⁸

The notion of balancing competing rights and interests is not radical. In fact, it is a fundamental concept embedded within the international and domestic legislative instruments protecting human rights. Schemes for limiting human rights to allow for the realisation of other rights or public good are an integral part of the human rights framework and have been successfully applied for decades.²⁹

An example of the application of these limitations is the European case of *Pichon and Sajous v. France*, where the European Court rejected a “manifestly ill-founded” application from pharmacists who refused to sell contraceptives because of their religious beliefs, stating that “the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.”³⁰

Legislative mechanisms for balancing rights commonly provide that a right may only be limited in circumstances where the limitation:

²⁴ Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary (2nd revised edition)*, 408.

²⁵ *Ibid.* 409.

²⁶ Article 14 (3).

²⁷ Article 12 (3).

²⁸ Article 9 of ECHR.

²⁹ See for example, the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*; section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.

³⁰ European Court of Human Rights, *Pichon and Sajous v. France Application*, Application no 49853/99 2nd October 2001.

- (a) has a **legitimate aim** (the limitation must reflect a concern that is pressing and substantial in a free and democratic society and must have a specific purpose, rather than being based on a general concern);
- (b) is **reasonable** (the limitation must not be arbitrary, irrational or ineffective); and
- (c) is **proportionate** (there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised).

Action in accordance with a genuinely held religious belief will generally constitute a legitimate aim, so the question becomes whether the discrimination at issue is reasonable and proportionate to that aim.³¹

Drawing this line is not a simple or uncontroversial exercise, but it is a legitimate and important subject for discussion and debate given that international and domestic human rights law allows for such limitations on the right to manifest religion and belief.³²

When considering the balancing exercise, the line dividing public and private is relevant because it marks the point at which the religious beliefs of one person or group impact upon other people and society generally. When religious practice affects those who do not subscribe to the religion, the Government's regulatory capacity and responsibilities are increased.³³

For example, in Australia legal prohibitions on child marriage, polygamy or female genital mutilation apply regardless of how deeply entrenched these practices are to a person's religion.³⁴ On the other hand, there are situations where concessions are made to religious groups and laws specifically protect religious freedoms. For example, exemptions from animal cruelty laws which allow religious groups to slaughter animals in a manner that is kosher or halal.³⁵

³¹ See, for example, *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (Canada) and *R (on the application of Begum (by her litigation friend Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School* (Appellants) [2006] UKHL 15 (United Kingdom)

³² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *International Covenant of Civil and Political Rights*, art 18(3).

³³ See for example, John Stuart Mill's statement "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it ...". 'On Liberty' in Mary Warnock (ed), *Utilitarianism*, Collins/Fontana, London, 1962, at p.205.

³⁴ Carolyn Evans and Beth Gaze, "Between Religious Freedom and Equality: Complexity and Context" *Harvard International Law Journal* Volume 49, April 21, 2008; Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom*, Public Law and Legal Theory Working Paper No. 167 (2007).

³⁵ Evans and Gaze, *ibid*, p. 43.

The recognition of a distinction between public and private activities does not mean acceptance of a system in which all public activities are denied the protection of freedom of religion. It simply means that the impact of these activities on others will be a relevant factor in a balancing exercise.

For example, a religious school receiving public funds would not be prevented from teaching religious classes, provided these classes must not cause harm to LGBTI and other children, since the rights of the child are paramount. On the other hand, a rural church-run emergency accommodation facility which received public funding would not be entitled to evict a lesbian into homelessness on the basis of her sexuality. Similarly, hospital that received public funding would not be entitled to refuse to perform a lawful abortion based on a religious principle. In each case the impact of protection of religious freedom is vastly different in terms of harm done, the effect on those who don't subscribe to the religion, and the entrenchment of harmful stereotypes.

(d) *Current religious exemptions unreasonably limit the right to non-discrimination*

Currently, a number of federal and state anti-discrimination laws contain permanent exceptions (or exemptions – the terminology varies across statutes) that provide a defence to discrimination claims for religious organisations where conduct a) conforms with religious doctrine tenets or beliefs or b) is necessary to avoid injury to the susceptibilities of adherents to a religion.

These permanent religious exceptions in Australian laws are unacceptably broad. While they may allow for justifiable discrimination in some circumstances, they may also allow for discrimination that is not reasonable and proportionate. Importantly, these broad permanent exceptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question.

The HRLC supports an exemption for religious bodies to organise and conduct affairs closely connected to religious practice and observance (e.g. events held in places of worship) in a manner that accords with their religious beliefs and customs. However, as discussed above, manifestation of religious belief is subject to limits when this public expression would conflict with other human rights such as the right to be free from discrimination.

(i) Intimate nexus between belief and conduct required

International human rights law requires a sufficient connection between the public expression of religion and the act or practice requiring legal protection. A manifestation of religious belief must be 'intimately linked to the religion or belief' and there must be a 'sufficiently close and direct nexus between the act and the underlying belief'.³⁶ Places of worship (e.g. temples, mosques and churches), goods connected to the observance of a particular religion (e.g. candles, incense, ritual ornaments, a chuppah) and services closely connected with a religious ceremony which are only

³⁶ *Eweida v United Kingdom* (European Court of Human Rights, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10 2013, 15 January 2013) 82.

provided to a particular religious community (not sold to the public) because of their religious significance are examples of a public expression of religious belief protected under the right to freedom of religion.

In *Roman Catholic Archbishop of Melbourne v Lawlor*, Dixon J relevantly stated in considering whether a purpose was religious that:

[I]t is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it ... But, whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion.³⁷

(ii) Discrimination in commercial services not justified

Where a religious body or organisation provides facilities, goods and services in the public sphere as part of a commercial enterprise, the justification for a broad religious exemption materially lessens. Whether discrimination should be permitted requires careful assessment on a case by case basis.

For example, it would be reasonable for a church hall used by a congregation for activities related to the practice and observance of their religion to not be made available to a same-sex couple for a wedding or commitment ceremony (assuming the doctrines of that particular faith did not support same-sex marriage). It would be an entirely different proposition if a religious owned (but not branded) commercial convention centre or similar venue was to advertise its services generally to the market place for the booking of events sought to reject a booking upon finding out the customer was gay.

(iii) Exemptions should be replaced with a general limitations defence

As discussed in submissions to a number of previous inquiries into reform to federal discrimination law, the HRLC supports the use of a general defence of justification in discrimination law in replace of permanent statutory exceptions and exemptions, including religious exemptions. Such a defence would enshrine the principles of necessity, reasonableness, proportionality and legitimacy.³⁸ This would allow a nuanced balancing of rights in cases where the individual's right to non-discrimination may conflict with another right such as the right to freedom of religion.

(iv) Lack of transparency in operation of religious exemptions

A further problem with the existing exceptions and exemptions for religious organisations is the lack of transparency surrounding their operation, meaning that people interacting with religious organisations and schools which are able to rely on

³⁷ *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

³⁸ See, for example, HRLC "A Simpler, Fairer Law for All: submission on the *Human Rights and Anti-Discrimination Bill 2012*, December 2012, p 45.

the exceptions can be unaware of the risk of discrimination when seeking out services or applying for a job.

Recommendation 3: Permanent religious exceptions/exemptions under Australian anti-discrimination laws should be amended to ensure that any limitations on other rights as a result of the exercise of religious freedom are reasonable, necessary and proportionate.