

THE POLITICS OF FREEDOM OF RELIGION IN AUSTRALIA: CAN INTERNATIONAL HUMAN RIGHTS STANDARDS POINT THE WAY FORWARD?

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I INTRODUCTION

A recent inquiry in Australia into the legal protection of religious freedom has reawakened the question whether Australia meets its strict obligations under the International Covenant on Civil and Political Rights (ICCPR) to protect freedom of religion, and the freedoms of expression and of association in the support they provide to freedom of religion. A key question is whether the sum total of constitutional protections, isolated statutory provisions, common law support for freedom of speech (in powerfully worded language such as “paramount importance”),¹ and general freedom to do everything not specifically prohibited is sufficient to protect freedom of religion in its individual and institutional forms. Some in Australia argue that domestic law provides enough, even too much, recognition for freedom of religion, while others contend that greater protection is needed. One prominent issue is whether the future of the freedom will be shaped by objective standards such as those demanded by international law, primarily under the ICCPR, and where they are informative, also those under the European Convention on Human Rights (ECHR). Assessing Australian law according to such objective standards offers a response to the risk that the future prospects of the freedom depend on how, in a highly politicised

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¹ *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 328 (“the paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest”).

environment, particular partisan views on any of the matters in play are allowed to prevail over others. However, the apparently neutral question of the adjustments required to comply with international standards has become highly contentious because of the asymmetrical benefits that may ensue.

Freedom of religion in Australia has enjoyed a chequered and turbulent history, which in recent times may be said to have begun with the debate associated with the postal survey plebiscite on same-sex marriage held in 2017. The passage of amendments to the *Marriage Act* implementing same-sex marriage in the following year was aided by the promise of the then Prime Minister Malcolm Turnbull that there would be an inquiry into the legal protection of religious freedom in Australia. This served to postpone an issue which was sharply divisive for both major parties, the governing Liberal-National coalition and the opposition Labor Party. The inquiry was led by a former Liberal Attorney-General Philip Ruddock, and the report which followed in May 2018 recommended, among other things, enactment of a Religious Discrimination Act.² Malcolm Turnbull did not survive in leadership however, and it was his successor Scott Morrison who led the Liberal party to success in the 2019 federal election and assumed responsibility of implementing the government's response to the Ruddock Panel recommendations.

It is against this background that recent debate on freedom of religion has occurred. This article, written within two months of Scott Morrison forming his new government, reflects on some of the legal and political dynamics of freedom of religion now facing Australian society. It is argued that although much of the debate has polarised along partisan lines, international human rights standards offer a way of addressing the issues that is more principled and attentive to the legitimate concerns of all involved.

An important question to pose at the outset is whether public debate surrounding the question of same-sex marriage, and which now attends the debate on freedom of religion, would not have been so hotly contested had Australia enjoyed a more established culture of human rights promotion. While there is room for disagreement about which ICCPR rights are engaged and what they imply for these debates, the idea is certainly monstrous that a fundamental human right might be put to the vote as if it may be conferred as a matter of popular will. For it is vital to recall that human rights are not "conferred". In the

² *Religious Freedom Review*, Report of the Expert Panel, May 2018 (*Religious Freedom Review*). One of the authors of this article was a member of the Panel.

ICCPR they are “recognised” as subsisting simply by virtue of the inherent dignity of the human person, and because “the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.³ The idea that they should only come into being because the people say so is alien to international conceptions of human rights protection. It is important to keep this in mind, as legislative proposals unfold in the near future. Come what may it is incontestable that freedom of religion is an internationally protected human right. Freedom of religion should therefore be given a standard of protection in Australia which achieves compliance with Article 18 of the ICCPR, regardless of which political or partisan cause this might aid. The central question facing the government is not: ‘To what extent should freedom of religion be protected in Australia?’ The more fitting question is: ‘What is an appropriate yardstick for measuring the protection for freedom of religion, and how might domestic law meet this standard where it falls short?’

II EXISTING PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA

There are many reasons why protection for religious freedom attracts opposition. Those advocating a strongly secular character for Australian society do not welcome anything which trends against that. Some associate religion with harmful traditional practices such as female genital mutilation, the entrenched immurement of women and regressive discriminatory treatment based on sexuality. Others associate religious extremism with terrorist security risks. And with the wounds still raw from the plebiscite, those who seek greater protection for freedom of religion are sometimes identified (rightly or wrongly) as opponents of same-sex marriage. Revelations of institutionalised sex abuse have recently discredited mainstream Christian traditions, and have particularly undermined those seeking greater support for the maintenance of the religious ethos of religious institutions. In this context, to advocate that freedom of religion is already adequately protected in Australia is not to adopt a neutral position on the matter. In some quarters it is apt to provoke hostility against those seeking further protection, for pursuing an unjustified entitlement.

The former President of the Human Rights Commission, Professor Gillian Triggs has reportedly suggested that much of the debate in recent times has occurred in the new “post-truth” climate and she has disputed claims there are insufficient protections for religious freedoms. “If you read the constitution you

³ ICCPR Preamble.

would know that there's a provision in the constitution — a rare provision in the constitution for human rights," she reportedly said. "And that protects the right to freedom of religious expression..." "It's one of the best protected rights under Australian law. Yet we now have a full on daily campaign to argue that we do not have the right of adequate protection of religious freedom in this country."⁴ With all due respect to Professor Triggs, these reported statements are misleading, for two reasons. The first is that the protection offered to freedom of religion by s 116 of the Constitution is very limited: it binds only the Commonwealth and has been interpreted and applied restrictively by the High Court.⁵ The second is that the position taken by mainstream proponents of better protection of religious freedom is not that there is not *any* protection for religious freedom, but that the *degree* of protection, particularly at a state level, is not adequate. To suggest that this is a "post-truth" assertion seems intended to discredit proponents of reform.

The ICCPR sets a clear, objective standard for protecting religious freedom. On ratification Australia made binding commitments to the international community, now comprising 172 Contracting States, to ensure to all individuals within Australian territory and subject to its jurisdiction the civil and political rights enshrined in the ICCPR. Australia also undertook to take all necessary steps to enact laws and other measures as may be necessary to give effect to those rights.⁶ The ICCPR standards, especially those in Article 18 on freedom of religion and Article 19 on freedom of expression, offer an objective method of addressing the question whether existing human rights protections in Australia are adequate. These standards are usefully supplemented by those established by the ECHR as interpreted by the European Court of Human Rights (ECtHR) on issues not specifically faced by the Human Rights Committee, the body charged with implementing the ICCPR.

One source of indirect protection for freedom of religion and freedom of religious expression in Australia is to be found in the constitutionally implied freedom of political communication. The implied freedom serves the purpose of enabling the Australian people "to exercise a free and informed choice as electors" and is capable of spanning a wide range of different forms of

⁴ Joe Kelly, "Gillian Triggs Warns of 'post-truth politics'", *The Australian*, 23 August 2017.

⁵ The first case in which the High Court was asked to apply s 116 was met with the disparaging observation of Barton J that the argument was as 'thin' as anything that had come before the court previously: *Krygger v Williams* (1912) 15 CLR 366, 373. See Nicholas Aroney, Peter Gerangelos, James Stellios and Sarah Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 344-8.

⁶ ICCPR Article 2.

expression.⁷ However, the application of the implied freedom to communications which have religious content is limited. It must be possible to characterise the speech as being sufficiently “political” in subject matter. At best, the implied freedom probably only has implications for the *interpretation* of statutes such as the various state religious vilification laws to the extent that they restrict political speech which contains religious content or is motivated by religious concerns.⁸ Further, the extent to which freedom of communication may be restricted turns on concepts of unjustifiable burden and proportionality. These concepts bear some superficial resemblance to the standards of limitation of freedom of religion and freedom of expression set out in Articles 18 and 19 of the ICCPR.⁹ However, the standards applied in relation to the implied freedom do not correspond with the much stricter substantive threshold of “necessity” and the strictly specified grounds of restriction established by the ICCPR. Moreover, the implied freedom of political communication is not a right inhering in individuals. The High Court has emphasised that it is *not* a personal right.¹⁰

A second potential source of protection is the common law. Here the basic starting point is that “everybody is free to do anything, subject only to the provisions of the law”.¹¹ The common law principle of legality proposes that statutes will not be interpreted as interfering with fundamental rights unless the legislature makes that intention unambiguously clear, and it seems that freedom of religion may be one of the rights protected in this way.¹² However, the protection provided is feeble, especially in an era of ever expanding State regulation of society. There is no guarantee, under the principle of legality, that

⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570. See Aroney et al, above n 5, 357-62.

⁸ Nicholas Aroney, 'The Constitutional (in)Validity of Religious Vilification Laws: Implications for Their Interpretation' (2006) 34 *Federal Law Review* 287. See also *Clubb v Edwards* [2019] HCA 11; 93 ALJR 448; 366 ALR 1, especially per Gageler J, Gordon J and Edelman J.

⁹ Article 18.3: '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 19:3: 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

¹⁰ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 150; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.

¹² *Coco v The Queen* (1994) 179 CLR 427 and *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525. See also *Evans v New South Wales* (2008) 168 FCR 576.

federal, state and territory laws will only interfere with freedom of religion where this is justified in terms of the strict requirements of the ICCPR.

Section 116 of the Constitution, as noted, merely precludes the Commonwealth making laws for establishing any religion, or imposing any religious observance. Even as a restraint on legislative power to enact laws prohibiting the free exercise of any religion, it is only directed at laws that have that as their purpose.¹³ Within its narrow scope of operation, the High Court's jurisprudence on section 116 does not correspond with the grounds of limitation permitted by Article 18.3. It allows, for example, restrictions on the free exercise of religion in the interests of national security.¹⁴ As the Human Rights Committee's General Comment on Article 18 puts it, "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."¹⁵

It is quite common for countries with federal systems to be put in breach of their international obligations by legislation enacted by their constituent states. It is therefore also relevant that none of the Australian states and territories have adequate protections of freedom of religion. Certainly, the human rights charters enacted in Victoria, the ACT and now Queensland include freedom of religion. But the charters only provide limited interpretative protection and, more importantly, do not adopt the "necessity" tests required by Articles 18 and 19 of the ICCPR.¹⁶ Rather, they adopt a single limitation provision which contemplates restriction of human rights in a generalised way—including some rights which are absolute and unimpugnable—and give licence to construe others on terms which are quite impermissible.

This is a matter of real concern. The protection available for each ICCPR right depends critically on respecting the dividing line between permissible and impermissible encroachment. It is the essence of human rights guarantees. Each right is defined in the ICCPR together with the appropriate scope for interference specifically crafted for that right. The charters list relevant human rights individually, but with a description which is shorn of the accompanying ICCPR

¹³ *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J).

¹⁴ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131-2 (Latham CJ), 149-50 (Rich J), 155 (Starke J), 157 (McTiernan J), 161 (Williams J).

¹⁵ *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4 (GC 22) [8],

¹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld) s 13(1); *Human Rights Act 2004* (ACT) s 28(1).

limitations clauses which guarantee them against undue restriction. This is understandable given that the charters do not purport to confer or guarantee rights as such. But it is important to grasp that reality, to avoid any misunderstanding that this is what they achieve. It is also relevant to public expectations that a charter at federal level may in some way cure some of the shortcomings in the current protection for freedom of religion, which it would not. Perversely, the charters fail to provide the guarantees required by the ICCPR, and at the same time invite an interpretation of them that fundamentally detracts from the protection they purport to afford. This is a source of special concern because it lacks the precision needed to safeguard each right according to the terms of limitation and qualification stipulated specifically for each right in ICCPR. These particular limitation clauses constitute the essence of each ICCPR guarantee.

It is not remotely suggested that Australia is obliged to conform its internal laws to the form or terminology of the ICCPR when implementing it. It is inevitable, as the Human Rights Committee has acknowledged, that States Parties 'give effect to Covenant rights in accordance with domestic constitutional processes'.¹⁷ Our criticism of the Australian state human rights charters is targeted at the fact that they superficially rather than authentically give effect to the ICCPR rights which they list. Article 2(2) obliges each State Party to take the necessary steps to adopt laws or other measures necessary to give effect to ICCPR rights, to the extent it has not already done so, and Article 2(3) obliges it to ensure an effective remedy for violation in combination with the right to have that remedy enforced. Even at this high level of generality the Human Rights Committee has stressed both the substantive standard of necessity and the importance of observing the requirements for limitation stated for each right.

The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.¹⁸

¹⁷ General Comment No. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (GC 31) [4], [13].

¹⁸ GC 31 [6].

Emphasis on these elements of implementation does not mean that the Committee is advocating that the form or terminology of any ICCPR provision must be adopted, just its substance. The point is driven home still further in the General Comments on Articles 18 and 19,¹⁹ among other similar Committee statements.

It is clear, therefore, that certain aspects of Australian law do not provide the degree of protection of religious freedom required by Article 18. Other aspects of Australian law, such as Commonwealth, state and territory antidiscrimination statutes, do include some protections for religious freedom in the exceptions or exemptions from discrimination prohibitions to enable religious organisations to preserve their religious ethos. It was these provisions that were a key focus of attention in the recent Ruddock inquiry into the protection of religious freedom in Australia.

III THE RUDDOCK PANEL AND THE GOVERNMENT'S RESPONSE

In its May 2018 Report, the Expert Panel on Freedom of Religion made a total of 20 recommendations. In December 2018 the federal government accepted all of these in principle but differentiated its response under three headings.

A *Legislation to protect against religious discrimination*

The centrepiece of the Government's response, though the least developed because it will involve opposition, crossbench and broad stakeholder participation, is the enactment (or amendment) of legislation to protect against discrimination on the basis of a person's "religious belief or activity", including that a person does not hold any religious belief, subject to suitable exceptions and exemptions. This proposal is for direct consultation and implementation. It is indicated that the legislation will be modelled on existing federal level

¹⁹ *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4 [8] (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 of 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. *General Comment No. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 [34] ('restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law').

antidiscrimination legislation which prohibits sex, age, race and disability discrimination and will identify areas of public life in which it will be unlawful to discriminate, such as education, employment, access to premises, the provision of goods and services, facilities and accommodation. Moreover, due to the risks of unduly burdening freedom of expression, and in light of the inherent risks of emulating a blasphemy law, the proposed law will not extend to offensive, humiliating or insulting behaviour even though that is protected against under federal racial discrimination legislation. The law may also, depending on the outcome of the consultations, include certain protections for those expressing a traditional view of marriage. (Since the time of writing, the government's an Exposure Bill and a revised Exposure Bill has been made public and is presently the subject of discussion.)²⁰

There is concern that in spite of such legislation there will be continued exposure to enactments at a state level that encroach on the freedom of religion. This will depend, in part, on the extent to which the Commonwealth law, as eventually enacted, is inconsistent with state and territory laws and therefore overrides them pursuant to section 109 of the Constitution. In any case, a federal religious discrimination law will not advance freedom of religion as such, only protect against unlawful discrimination. This will offer marginally better compliance with the ICCPR's non-discrimination requirements under Articles 2 and 26. However, this will do little more than correct Australia's status as one of the few countries in the world that does not currently adequately prohibit that form of discrimination across all of its jurisdictions.

B *Regard for principles of limitation*

The government undertook to implement 15 other recommendations as soon as practicable.

One of these recommendations is that constituent Australian governments should have regard to the *Siracusa Principles* on the limitation and derogation provisions in the ICCPR when drafting laws that would limit the right to freedom of religion.²¹ The *Siracusa Principles* emphasise the strict standards established

²⁰ For commentary, see Nicholas Aroney, 'Religious Discrimination and Religious Freedom: An Evaluation of the Exposure Draft of the Australian Religious Discrimination Bill 2019', a paper presented to the Freedom for Faith Conference, NSW Parliament House, 4 September 2019, available at <<https://papers.ssrn.com/abstract=3455089>>.

²¹ *Religious Freedom Review*, Recommendation 2.

by the ICCPR for the limitation of human rights. They state that limitations clauses must be “interpreted strictly and in favour of the rights at issue”, they must only be based on one of the specified grounds, they must respond to a “pressing public or social need”, they must pursue a “legitimate aim”, and they must be “proportionate to that aim”.²² Moreover, when applying a limitation, a State must use “no more restrictive means than are required for the achievement of the purpose of the limitation”.²³ It is not intended that the *Siracusa Principles* will operate in a direct sense to prevent undue restriction of the freedom of religion. The impact of the recommendation will primarily be felt in the area of the drafting and scrutiny of bills and legislative instruments for compatibility with international human rights standards.

There is an important caveat to record concerning the *Siracusa Principles* however, concerning their reference to a “certain margin of discretion” allowed to States Parties in their regulation of human rights. This expression evokes the “margin of appreciation” doctrine, a judge-made construct which originated in ECHR jurisprudence and is now more formally enshrined in an amending protocol to the ECHR.²⁴ This doctrine has no substance under the ICCPR in spite of short lived support given to it in 1982 in *Hertzberg et al. v. Finland*. In that case the Human Rights Committee noted that “public morals” may differ widely from one country to another and that “in this respect, a certain margin of discretion must be accorded to the responsible national authorities”.²⁵ The experts drafting the *Siracusa Principles* similarly referred to a “certain margin of discretion”. However, they did so particularly with reference to the public morality ground for restriction of human rights as decided in *Hertzberg*.²⁶ The *Siracusa Principles* were drafted shortly after *Hertzberg* and at a time when the doctrine had gained some traction under the ECHR. However, they need to be

²² United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) A.1, A.3, A.10.

²³ Ibid A.11. In its General Comment on Freedom of Religion under article 18 of the ICCPR, the UN Human Rights Committee has similarly observed that limitations clauses are to be ‘strictly interpreted’, limitations may be applied ‘only for those purposes for which they were prescribed’ and they must be ‘directly related and proportionate to the specific need on which they are predicated’. General Comment 22, [8].

²⁴ ECHR, Protocol No 15 (CETS 213 (2013)).

²⁵ *Hertzberg et al. v. Finland*, Communication No. 61/1979, CCPR/C/OP/1 at 124 (1985), 2 April 1982 [10.3].

²⁶ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4 [27].

read in light of the Committee's position firmly established since then that there is *no* margin of appreciation under the ICCPR equivalent to that developed under the ECHR, which is decisive to the outcomes of the many European cases in which it is invoked. The Human Rights Committee has rejected it in numerous decisions as well as in its recent General Comment on freedom of expression.²⁷

Another important recommendation of the Ruddock Panel was directed to adjusting the interpretive provisions in antidiscrimination legislation to accord equal status to all human rights. It was proposed that such laws should acknowledge that freedom of religion is the rationale behind particular exceptions and exemptions accorded to religious individuals and organisations, and that the freedom does not possess a lower ordinal ranking, or concessionary status, merely for being treated as an exception or exemption.²⁸ This would in part address a disparity in approach to discrimination between domestic and international law. The position under state and territory discrimination legislation is typically expressed in terms of prohibition against all forms of unfavourable treatment on the basis of specified attributes, with exceptions which disapply the prohibition in particular circumstances. The concern is that the use of exceptions and exemptions carries the stigma of prohibited discrimination, even though they exist in support of particular rights such as freedom of religion. This contrasts with the non-discrimination scheme stipulated by the ICCPR (Articles 2 and 26) and the ECHR (Article 14).

It is long established in decisions of the Human Rights Committee that differentiation based on reasonable and objective criteria does not amount to discrimination prohibited by Articles 2 or 26.²⁹ The principle applies equally to direct and indirect discrimination. Indirect discrimination occurs when a measure that is neutral on its face disproportionately affects those in a particular group, without reasonable and objective justification.³⁰ For example, in *F.A. v France* an employee at a private day care centre was dismissed for wearing a

²⁷ See e.g. General Comment No. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 [36].

²⁸ *Religious Freedom Review*, Recommendation 3.

²⁹ For Article 26 findings to that effect see e.g. *Broeks v. Netherlands*, Communication No. 172/1984, CCPR/C/OP/2 at 196, 9 April 1987 [12.4]-[13], *Zwaan-de-Vries v. Netherlands*, Communication No. 182/1984, CCPR/C/OP/2 at 209, 9 April 1987 [12.4]-[13], *L.G. Danning v. Netherlands*, Communication No. 180/1984, CCPR/C/OP/2 at 205, 9 April 1987 [12.4]-[13].

³⁰ *Derksen v. Netherlands*, CCPR/C/80/D/976/2001, 1 April 2004 [9.3]; *Simunek et al. v. Czech Republic*, CCPR/C/54/D/516/1992, 19 July 1995, [11.7]; *Althammer et al. v. Austria*, CCPR/C/78/D/998/2001, 8 August 2003 [10.2]; *Prince v South Africa*, CCPR/C/91/D/1474/2006, 31 October 2007 [7.5].

headscarf, contrary to the centre's internal regulations upholding principles of secularism and neutrality. This was defended on the basis that no particular religion or philosophical belief was targeted. The employee succeeded in her claim that she was subjected to "indirect" discrimination because the internal regulations affected Muslim women in a disadvantageous and disproportionate way, and her dismissal was not based on reasonable and objective criteria.³¹ Indirect discrimination was also found in *Sonia Yaker v France* and *Miriana Hebbadj v France* in relation to a criminal prohibition of concealing the face in public areas. This disproportionately affected Muslim women who chose to wear a full face veil. Although it was argued that a full veil is emblematic of discrimination (on the assumption that women who wear it are forced to do so) the Committee placed more emphasis on the religious practice of wearing it as a matter of choice even if there may be some instances of pressure.³²

The ECtHR has similarly recognised that direct and indirect discrimination can occur under Article 14 of the ECHR when a law imposes different standards on persons in analogous situations, as well as when a law applies the same standard to people in situations that are significantly different, without objective and reasonable justification. The Court put it this way in *Thlimmenos v Greece*:

The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.³³

In *Thlimmenos*, the ECtHR found a violation of Article 14, in conjunction with the freedom of religion protected by Article 9, when a Jehovah's Witness was automatically excluded from becoming a chartered accountant due to his criminal conviction and sentencing for insubordination, imposed because he had refused to wear a military uniform. The case is instructive because the violation of the ECHR arose out of the failure of the legislation to make appropriate

³¹ *F.A. v France*, CCPR/C/123/D/2662/2015, 16 July 2018 [8.8], [8.10]-[8.13].

³² *Yaker v France*, CCPR/C/123/D/2747/2016, 17 July 2018 [8.15]-[8.17]; *Hebbadj v France*, CCPR/C/123/D/2807/2016, 17 July 2018 [7.15]-[7.17].

³³ *Thlimmenos v. Greece* [GC], Application No. 34369/97, Judgment of 6 April 2000 [44].

allowance for the individual's freedom of religion. As the ECtHR observed, the State violated the applicant's right not to be discriminated against in the enjoyment of his right to freedom of religion by failing to include appropriate exceptions to the general rule which barred those convicted of serious crimes from admission to the profession.

Among several other recommendations that the government committed to implement as a soon as possible is the recommendation that parents and guardians be given sufficient advanced information to allow their child to opt out of attendance at classes in public sector schools when religious and moral instruction is given, if the content may be inconsistent with the parents' or guardians' religious beliefs.³⁴ The government has undertaken to develop model guidelines which could form the basis of a national framework for this purpose. Such action is required in order to bring Australian practices into line with Article 18.4 of the ICCPR, which requires States Parties to have respect for the liberty of parents to ensure the religious and moral education of their children in accordance with their own convictions. At present there is significant concern that some teaching materials used in state public schools are inconsistent with the religious beliefs and moral convictions of parents.

C *Exemptions for religious schools*

In relation to five other recommendations made by the Ruddock Panel, the government has commissioned the Australian Law Reform Commission (ALRC) to consider drafting options for limiting or removing exceptions to discrimination based on a person's identity, while also protecting the rights of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos.

Where discrimination is currently permitted in Commonwealth, state and territory laws on grounds of race, disability, pregnancy or intersex status the Expert Panel recommended review of the relevant provisions in the case of religious bodies, having regard to community expectations;³⁵ and abolition of such provisions in relation to employment and enrolment in religious schools.³⁶ The Panel did not hear of a single instance of a faith-based school discriminating, or wanting to discriminate, against a person on the basis of race, disability,

³⁴ *Religious Freedom Review*, Recommendation 9.

³⁵ *Religious Freedom Review*, Recommendation 1.

³⁶ *Religious Freedom Review*, Recommendations 6 and 8.

pregnancy or intersex attributes.³⁷ In the case of pregnancy the historic issue was not the status of pregnancy itself but compliance with a religious moral code prohibiting sex outside marriage.³⁸

By far the most contentious protected attributes are sexual orientation, gender identity and relationship status. The Panel recommended that a religious school should continue to be permitted to discriminate on these grounds in relation to the employment of staff and in relation to the enrolment of students, provided (when relying on each of those separate bases) the discrimination is founded in the precepts of the religion, the school's position is set out in a publicly available policy document, and in the case of students the school has regard to the best interests of the child as the primary consideration.³⁹ When recommendations of the Ruddock Panel were leaked, media reporting misleadingly characterised these recommendations as supporting the introduction of a right to discriminate, when they actually proposed further restrictions and limitations. Nonetheless, the political response was that such a right was to be abolished, at least in relation to students, if not also in relation to teachers and staff of private schools.

The key federal law on the topic is the *Sex Discrimination Act*, which contains an exception allowing religious schools to discriminate in the appointment of staff, contractors and students.⁴⁰ The way the exception is currently framed is that schools conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed may discriminate in the appointment of staff, contractors and students in good faith on the ground of a person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy "in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".⁴¹ The provision has been hotly disputed since Scott Morrison announced last year that his government would remove it. However, if Australia had enacted some form of protection equivalent to that which exists under the ECHR and the ICCPR, to allow organisations generally to require an appropriate degree of loyalty in support of their "ethos", it is

³⁷ *Religious Freedom Review* [1.248].

³⁸ *Religious Freedom Review* [1.213].

³⁹ *Religious Freedom Review*, Recommendations 5 and 7.

⁴⁰ Sex Discrimination Act 1984 (Cth), s.38.

⁴¹ Sex Discrimination Act 1984 (Cth), s.38. There is also an exemption in s.37 for "bodies established for a religious purpose" (not just schools) to discriminate in relation to any act or practice "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 religion."

doubtful that the schools exemption would have been anything like as contentious as it is currently.

IV PROTECTING THE ETHOS OF RELIGIOUS SCHOOLS AND SIMILAR BODIES

The decisions of the Human Rights Committee and ECtHR already mentioned have a bearing on how to re-craft existing exceptions or exemptions in antidiscrimination legislation for religious bodies or schools, and whether it is appropriate to remove them. Their importance is that, contrary to what is sometimes asserted, the existence and operation of such exceptions or exemptions do not involve prohibited discrimination under the ICCPR where there is objective and reasonable justification for differential treatment. In such circumstances it is wrong in principle to describe their operation in terms of a “right to discriminate”. The key question is whether freedom of religion (including its associative aspects), or freedom of association taken separately, provide appropriate objective and reasonable justification for this purpose.

The significance of freedom of association to freedom of religion was explained in the ECtHR’s famous statement that

... religious communities traditionally and universally exist in the form of organised structures. Where the organisation of the religious community is at issue, Article 9 [freedom of religion] must be interpreted in the light of Article 11 [freedom of association], which safeguards associations against unjustified State interference. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected by Article 9, all other aspects of the individual’s freedom of religion would become vulnerable.⁴²

It is sometimes argued that reform of Australia’s religious freedom protections in anti-discrimination law should follow the model of European Directive 2000/78. This Directive is a component of European Union labour law under the jurisdiction of the European Court of Justice, whose task it is to interpret EU law and ensure its equal application across all EU Member States. It provides that a difference of treatment based on a characteristic related to

⁴² *Sindicatul “Pastorul Cel Bun” v Romania*, App.No. 2330/09, Judgment of 9 July 2013 [136].

religion or belief, disability, age or sexual orientation shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.⁴³ Some Australian jurisdictions have similar provisions,⁴⁴ which have been enacted in substitution for provisions which enable religious organisations to act in conformity with their religious doctrines, beliefs or principles or as reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.⁴⁵

However, two important points need to be borne in mind when considering the use of the EU Directive as a model law in this area. The first is that the Directive expressly acknowledges “the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos”. The second is that it is important to distinguish the purpose and coverage of the Directive (as an aspect of EU labour law) from the human rights protection provided by the ECHR across a broader spectrum. The Directive draws its inspiration at a general level from the protection against discrimination as a universal right expressed in various UN instruments. The ECHR is mentioned in that context (with obvious relevance given its signatories). However, much closer to the Directive's own purpose, and mentioned separately, is the 1958 *ILO Convention concerning Discrimination in Respect of Employment and Occupation*.⁴⁶ The titles of the Directive and the ILO convention signify their commonality. Article 1.2 of the ILO convention takes a “requirements-based” approach (as does the Directive) in providing that “[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.” The inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR. The Directive

⁴³ *European Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.*

⁴⁴ Eg, *Anti-Discrimination Act 1991* (Qld) s 25.

⁴⁵ Eg, *Equal Opportunity Act 2010* (Vic) ss 82-84.

⁴⁶ C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

acknowledges this through the express acknowledgement that organisations which have a religious ethos have a positive right to require employees to act in good faith and with loyalty to that ethos.

Considered on their own terms, therefore, the Directive and ILO convention reinforce the point already made about the inappropriateness of Australian anti-discrimination legislation treating, as *exceptions*, those provisions which give effect to religious freedom and related rights. It is for this reason that the Directive expressly articulates the legitimate need for loyalty to an organisation's religious ethos to be protected. But, further, it is important to mark the difference in approach between the Directive and the ECtHR (with its specialist human rights competence). The ECtHR's decisions in support of religious institutional ethos are appropriately more generous than the Directive's genuine and determining occupational requirements. In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.

In *Fernández Martínez v Spain*, for example, the ECtHR found that the failure to reappoint a teacher of Catholic religion and ethics in a State-run secondary school did not violate his right to respect for private and family life (ECHR Article 8). The teacher was a former Roman Catholic priest who had married, fathered a family, and was a member of the *Movement for Optional Celibacy* of priests. Under an agreement between the Spanish State and the Holy See, renewal of such appointments was subject to the approval of the relevant diocese. The Church's interest was to uphold the coherence of its precepts and from that point of view, teaching Catholic religion to adolescents was a crucial function requiring special allegiance. The content of his teaching was not incompatible with the Church's doctrine but, as the Court put it,

a teacher of religious education who belongs to and publicly promotes an organisation advocating ideas that run counter to the teaching of that religion has to be distinguished from, for example, a language teacher who is at the same time a member of the Communist Party... In the former case, the heightened duty of loyalty is justified by the fact that, in order to remain credible, the religion must be taught by a person whose way of life and public statements are not flagrantly at

odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers.⁴⁷

Similarly, in *Travaš v. Croatia*, a teacher of Catholic religious education knowingly placed himself in a situation that was incompatible with the Church's precepts, by divorcing and remarrying. This breached the requirements of special allegiance towards the teachings and doctrine of the Church, and he thereby lost the canonical mandate which was a precondition for his job. In view of the nature of his position as a teacher of religious education and its proximity to the mission of disseminating the Church's teachings, the Court held that this was not an excessive condition or ground of dismissal.⁴⁸ In *Obst v Germany* it was held that there was no violation of Article 8 in the dismissal of a public relations director of the Mormon Church after an adulterous affair emerged, an important factor being that his contract emphasised the Church's 'high moral principles.'⁴⁹ Nor did the ECtHR find a violation of Article 9 (freedom of religion) in *Siebenhaar v. Germany* in the dismissal of a teacher from a Protestant day care centre because her membership in the Universal Church and her activities in support of it were incompatible with her involvement in the Protestant Church. The bonds of loyalty were acceptable in that they were intended to preserve the credibility of the Protestant Church vis-à-vis the public and the parents of the children.⁵⁰

All these cases concerned off duty conduct. Cases in which unlawful discrimination or other violations were found to have occurred have involved serious procedural failings and significant injustices to the wronged party. In *Vallauri v Italy* the failure to appoint on a permanent basis a lecturer who had been employed for over 20 years under a succession of contracts followed a series of irregularities in procedural fairness when his application was declined because his views were "in clear opposition to Catholic doctrine".⁵¹ *Schüth v Germany* concerned the dismissal of an organist and choir master by a Catholic Church employer for an adulterous relationship. It was found that the domestic court failed to consider adequately the proximity of his work to the mission of the Church (which was not the same as that of a priest, who may be expected to

⁴⁷ *Fernández Martínez v Spain*, App. No. 56030/07, [2014] ECHR 615, [137].

⁴⁸ *Travaš v. Croatia*, App.No. 75581/13, Judgment of 4 October 2016 [106], [112].

⁴⁹ *Obst v Germany*, App.No. 425/03, Judgment of 23 September 2010 [50], citing *Ahtinen v. Finland*, App. No. 48907/99, Judgment of 23 December 2008 [41], [51].

⁵⁰ *Siebenhaar v. Germany*, App.No. 18136/02, Judgment of 3 February 2011 [44-48].

⁵¹ *Vallauri v Italy*, App.No 39128/05, Judgment of 20 October 2009 [53].

observe in his private life the full canonical code of the Church) and that inadequate attention was paid to the fact that it would be difficult for him to find work outside the Church as an organist and choirmaster.⁵²

The ECtHR has maintained that, in principle, the State owes a duty of neutrality and impartiality, which is incompatible with any power on its part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.⁵³ Do the European decisions therefore support the freedom of a religious school to determine that its ethos must be expressed by *all* its staff (as some Australian schools do), rather than only through the chaplain or those employed to teach religious doctrine? *Fernández* and *Travaš* concerned individuals employed to teach religion so the ECtHR focused on the evident divergence between what they were engaged to teach and how they actually lived. However, this does not answer the question whether loyalty to an organisational ethos may *only* be expected from teachers of religion, or even teachers generally. The emphasis more generally in the *Schüth* case was the proximity of the employee's work to the mission of the organisation (and this was followed in *Fernández Martínez v Spain*). In some, perhaps most, religious schools loyalty might not be expected from those employees who are not engaged in representing the ethos of the organisation by functions such as chaplaincy or religious education. In some other schools, however a wider range of employees (perhaps even all of them) may be commissioned to promote the religious calling of the school. Their terms and conditions of employment would presumably reflect this in some way. The faith-based calling of a school, and the degree to which there is an expectation that the staff in question share that faith and will be actively engaged in promoting its mission, become the distinguishing features justifying them being contractually bound to remain loyal to the ethos of the organisation. This is not that far removed from the political allegiance expected of those employed by political parties and lobbyists.

It is instructive to consider how the ECtHR approached this issue in *Siebenhaar* when assessing the situation of a kindergarten teacher employed in a day care centre. What was more important to the ECtHR than the employee's status as a teacher was that the contractual requirement stemmed from the

⁵² *Schüth v Germany* App. No. 1620/03, Judgment of 23 September 2010 [69-75]. In *Travaš v. Croatia* it was also important that efforts were made to deploy the dismissed employee in other more generalised positions, but none could be found.

⁵³ *Hasan and Chaush v. Bulgaria* [GC], App.No. 30985/96, ECHR 2000-XI [78]; *Izzettin Doğan and Others v. Turkey* (GC), App.No. 62649/10, Judgment of 26 April 2016 [68].

religiously-based ethics of the employer and was intended to preserve the credibility of the Protestant Church vis-à-vis the public and the parents of the enrolled children. It was also noteworthy that the employee's obligation of loyalty was premised on the acknowledgment in her contract that her professional services were provided in support of the church's "mission of proclaiming the gospel in word and deed" (unofficial translation from the German text). The mission of the employer was clear and the employee in question was tasked with supporting that mission.⁵⁴

Although there are no Human Rights Committee decisions which address the matter as clearly as those of the ECtHR, the position under the ICCPR may be taken to be the same as under the ECHR. The UN Special Rapporteur on Religion or Belief has paid close attention to this issue both in support of religious organisations and out of concern that the religious convictions of employees be suitably accommodated.⁵⁵ Article 18.4 is more detailed than its counterpart in the ECHR (Optional Protocol 1, Article 2). In particular, it makes specific provision for "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". The Special Rapporteur has given this provision weight when determining the appropriate approach to be taken towards denominational schools.⁵⁶

If support for the institutional ethos of an employer has long been part of the normal landscape of European and international human rights law why, it may be asked, do we find exemptions to equivalent effect so difficult to fit conceptually within the framework of Australian discrimination legislation? The explanation lies partly in the way the legislation is drafted. The law prohibits numerous forms of unfavourable treatment on the basis of specified attributes, while religious freedom is protected indirectly through limited exemptions and exceptions to such prohibitions.

The difficulty facing religious schools is that the citadel which represents their last point of refuge for supporting their institutional ethos is not strongly

⁵⁴ The employee in *Obst* was a public relations director of the Mormon Church. His contract required him to abstain from communications or behavior that could damage the reputation of the Church or call into question its essential principles, and he was required to observe high moral standards. "Increased performance requirements" applied to three categories of employees: senior executives, employees who came into contact with those outside the Church, and employees who gave religious classes in the Department of Education.

⁵⁵ A/69/261 (2014) [38]-[41].

⁵⁶ A/HRC/19/60 (2011) [47].

defensible because it is directed pointedly, but irrelevantly, at gender and sexuality-based discrimination. Even those institutions which would rally keenly to an ethos-based exemption to support their mission are inclined to retreat from an exemption framed in this way, partly because it appears to be offensively targeted at sexual minorities, and partly because it does not focus on what is really needed, which is the ability of such organisations to maintain their religious ethos generally, in terms of both the committed beliefs and conscientious practices of their employees. At the risk of over-generalisation, what they are calling for is the freedom to conduct their educational functions through a curriculum and in a manner which is consistent with their religious ethos, delivered by and within a community of like-minded others. Their wish is to make suitable appointments based on the alignment of fundamental beliefs and practices, for which the protection under the ECHR and ICCPR would suffice. Substitution of legislation to similar effect, in place of the existing schools exemptions, could remove some of the impassioned hostility from current debate, in particular by enabling them to require employees to act in a manner that demonstrates loyalty to their religious ethos, rather than misplaced sexuality-focused exceptions and exemptions.

The European Directive demonstrates that the essential principles supporting institutional ethos can be reduced to a workable form for implementation in domestic law, and suitable text may be derived from the case law of the ECtHR for Australian legislation. In an Australian context, this does not mean that the legislative language should mimic the Directive. As pointed out, the Directive does not provide the most appropriate model, as it was conceived within a specific EU labour law context, and does not fully reflect the principles subsequently developed by the ECtHR. These latter principles are much more apt, since they derive from the Court's careful assessment of the human rights claims which attend expectations of loyalty to an organisation's religious mission. The law should, in practice, allow religious schools to maintain their particular religious ethos through their employment policies, and the above principles established by the ECtHR represent the appropriate yardstick for implementing this.

V CONCLUSION

Popular opinion is as strong and conflicting as ever in current discussion of the protection of religious freedom in Australia. It is difficult to make sense of the debate without certain objective standards for assessing whether existing

protection for the freedom in Australia is adequate. The ICCPR is an obvious reference point since it binds Australia and 171 other countries. If it is true to say that existing protection in Australian domestic law is well below the standards required by the ICCPR then remedial improvements will serve the purpose of guaranteeing the freedom where it is not currently secured. Approaching the issue in a principled way has the potential to reduce the degree of polarisation and partisanship that has been evident to this point in time.

The government's response to the Ruddock Panel recommendations provides an important opportunity to redirect focus away from interest-based disagreement to principle-based consensus building, drawing on ethos-based approaches developed within international human rights law. It is a chance to correct some of the misdirected aspects of the current exemptions and exceptions regime in anti-discrimination legislation, and to align those measures intended to support religious freedom, in its individual and collective dimensions, positively with international human rights standards. According to international law standards, religious bodies, including religious schools, should be free to determine their own mission and to decide how best to fulfil it in accordance with their own beliefs and principles. There is no reason why ethos-based standards such as those supported by the ECtHR may not be incorporated in the government's proposed anti-discrimination package. To achieve this, the position to be taken on religious exemptions and exceptions may need to depart decisively from existing domestic principles of interpretation where they would result in over-restrictive interpretation measured against international standards. Some interpretive clarification is already contemplated in the government's proposals but a number of issues raised in this article indicate that a more resolute corrective approach is needed.