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“Protecting Religious Freedom in Australia Through Legislative Balancing Clauses”

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The law of Australia protects religious freedom in a number of ways. There is no overarching Constitutional protection as provided in other Western democracies—for example, while our Commonwealth Constitution contains a provision modeled on the US First Amendment, our s 116 only operates in relation to Federal laws, and does not apply to State law. But there is a patchwork of protection that does at least serve to take into account the important human right of religious freedom in different ways.²

To be clear, religious freedom protection, to accord with international human rights standards, must provide protection to citizens, not merely in relation to attending worship services, but also in respect of living out their fundamental religious commitments in everyday life. Australia is a party to the *International Covenant on Civil and Political Rights* (ICCPR),³ article 18 of which provides:

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.

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² For a broad overview of religious freedom protection in Australia, see N Foster “Religious Freedom in Australia” 2015 Asia Pacific JRCLS Conference (2015), at: http://works.bepress.com/neil_foster/94/.

³ See *Australia Treaty Series* 1980 No 23; entry into force for Australia 13 November 1980 (except art 41, which entered into force for Australia on 28 January 1993). Art 41 allows reports to be provided as to whether a State Party is complying with the Convention or not.

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.

The right to “manifest” one’s beliefs in “observance, practice and teaching” is explicitly said by art 18(3) to be subject to formally enacted laws which protect, among a narrow list of other matters, “fundamental rights and freedoms of others”. This is not, of course, a license for States who are party to the Convention to simply interfere with religious freedom as the mood of the times takes them. It is a carefully crafted provision under which protection of the listed grounds must clearly justify any impairment of the right to free exercise.⁴

This is an important principle, as it is sometimes suggested that religious freedom must automatically “give way” when it may be brought into apparent opposition with laws forbidding discrimination on different grounds. The ICCPR has a specific provision spelling out a right not to be unjustly treated on the basis of various personal characteristics. Art 26 provides:

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.

Clearly “discrimination” (we shall have to unpack this in a moment) is to be prohibited where it is based on the list of protected grounds, including race and sex, but also including “religion”.⁵ But the simple fact that this provision forms part of the

⁴ See, eg, Noel Villaroman *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia* (Leiden: Brill, 2015) who points out that the word “fundamental” in art 18(3) means that the competing rights and interests of others need to be more than mere preferences. He concludes chapter 8 of his study of religious freedom and town planning issues by noting that “the right to freedom of religion or belief does not easily yield to opposing human rights, including those that underpin the objectives of local planning” (p. 289.) See my review of this book, N Foster “Review of *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia* by Noel Villaroman (2015)” (2016) 58 (2) *Jnl of Church and State* 387-389. A recent submission to a Federal Parliamentary inquiry, by an acknowledged expert in international human rights law, Dr Paul Taylor, makes a similar point: “The right to manifest religion may only be restricted within the scope defined by Article 18(3), namely by limitations that are ‘prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others’... Article 18 is violated by restrictions which are not fully justified by those terms of limitation. The additional disciplines which apply whenever a State relies on limitation provisions may be summarised as follows: a restriction may only be applied on the particular grounds stated in Article 18(3), in a way that is non-discriminatory, that avoids vitiating any Article 18 rights, that accords with a strict construction of the terms of Article 18(3), and that is “necessary” in the sense of being directly related to and proportionate to the specific need for which it is invoked”- see P Taylor, *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade: Status of freedom of religion or belief* (Sub No 140, April 2017) at pp 7-8; available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Submissions .

⁵ It may be noted in passing that it is not all clear that a natural reading of art 26 would include what has become known as “sexual orientation”, or indeed “gender identity”, as grounds on which discrimination is prohibited under the ICCPR. Nevertheless, subsequent commentators and adjudicatory bodies have concluded that these categories are included, and it may be accepted for the purposes of argument that this is so. See determinations of the Human Rights Committee in *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992) and *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003); also Manfred

same document which includes art 18 signals that, where both “rights” are at stake, some “balancing process” will be required, which attempts to the maximum extent possible to take account of each, and not to ignore one or the other.

Protection of religious freedom in Australia, consistently with these principles, involves a balancing process where laws which forbid unjustified discrimination on various prohibited grounds, will need to be qualified in some cases by recognition of equally important religious free exercise rights.

I have discussed some of these general issues in a previous academic publication.⁶ I will not repeat the matters canvassed there. However, the aim of my paper today is to drill down in somewhat more detail than was possible in the previous paper, to unpack exactly what type of provisions have so far been put in place to balance religious freedom in current Australian discrimination laws, and to suggest where changes seem to be necessary to better reflect the importance and centrality of religious beliefs to the lives of many Australian citizens.

Defining Discrimination

First, it seems to be wise to define some terms. The word “discrimination” in particular has become problematic in much popular discourse. In a broad sense it seems to have come to mean, “any situation where people are treated differently from each other”. But historically and legally, the term cannot be so broad. We treat persons differently all the time, for various good reasons. Some persons are locked up in jail, others are not. If the *reason* for this differing treatment is that those who are locked up have committed crimes and been adjudged guilty, then this is a perfectly sound policy. Some people will be paid a salary by company X, others will not. If the *reason* for the differential treatment is that those who are paid salaries are parties to contracts of employment with X, and perform work, and the others are not, then there is no problem.

So differential treatment of persons alone is not unlawful discrimination. The term only makes sense if it refers to a prohibition on some persons who are *relevantly similarly situated*, being treated differently to others on the basis of an *irrelevant* criterion. We may add that the irrelevant criterion should be one as to which our society has decided to penalize those who make decisions on that basis, usually because of a serious prior history of people with that characteristic being treated unjustly. The reason why we add this criterion is that the imposition of a legal penalty into private decision-making is always something that must be justified for serious reasons, lest law reaches beyond its proper function.

So, to take only one example, we have come to see that, based on a terrible history of unjust treatment of persons on the basis of their race or skin colour, we should make it unlawful to treat people of one race badly in comparison to others of another race, where their race is irrelevant to the decision-making. We make it

Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p 623. See the discussion of these issues in s 4.1 the AHRC paper *Human rights and discrimination on the basis of sexual orientation or gender identity - Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report* (2011).

⁶ N Foster, “Freedom of Religion and Balancing Clauses in Discrimination Legislation” (2016) 5 *Oxford Journal of Law and Religion* 385-430. See <https://academic.oup.com/ojlr/article/5/3/385/2567807/Freedom-of-Religion-and-Balancing-Clauses-in?guestAccessKey=4cd22f70-0fb7-49bc-b904-4b573bb5b1df>.

unlawful to offer a job to a person because they are white, and exclude people from jobs because they are black or brown, or some other colour.

We do not, however, single out all possible categories of differential treatment, even if some are equally irrelevant. In NSW, at any rate, we do not make it unlawful for an employer to decide only to engage fans of the TV show “Doctor Who” to work for them. This is not because we have decided (though of course we could!) that Dr Who fans are more intelligent than others. But the problem of non-Whovian-based discrimination has not been a historical problem, it does not seem to affect a large number of people, and in the overall scheme of things it seems trivial. Nor is there any evidence that those who have sadly failed to appreciate the importance of the Time Lord are, in other areas, in need of particular help from society or otherwise disadvantaged.

To return to a more serious analysis- we as a society have enacted laws making it unlawful to treat people differentially on the basis of certain characteristics that they have, which have been identified as areas where legal redress is needed to prevent harmful societal trends. But we do so because those characteristics are *irrelevant* to the decision concerned; and where this is not true, then discrimination laws contain “exemptions” or “exceptions” or what I have elsewhere called “balancing provisions”,⁷ to accommodate the fact that in some cases decisions made on the basis of a particular characteristic are actually logical when viewed in light of the right to religious freedom.

So under the *Sex Discrimination Act 1984* (Cth) (the “SDA”), it is generally unlawful to discriminate in the area of employment by taking a person’s gender into account when making an employment decision- see SDA ss 5, 14. But under s 30 SDA such a decision is not unlawful where being of a particular sex is a “genuine occupational qualification”, and an example is provided under s 30(2)(b) where “the duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex”. Clearly where the role of Juliet is being cast in a traditional performance of *Romeo and Juliet*, the gender of the lead actress is relevant.

When we come to issues raised by religious freedom considerations, then, there are a couple of reasons why discrimination laws might provide that the usual rules do not apply. One set of underlying reasons may be a willingness to protect the human right of religious freedom, as discussed above. Another type of reason may be that society has concluded that the religious views of a person who has drawn a particular type of distinction, are actually relevant to that decision (at least from the point of view of that decision-maker.) These different reasons may overlap.

We turn then, to survey such balancing clauses based on religion. We will consider both those currently in operation, and then briefly discuss some provisions that have been put forward in draft form in relation to the possible introduction of same sex marriage. We will conclude by noting the complexities created by the possible clash of State and Commonwealth laws.

Current religious balancing clauses

Table 1 below identifies provisions in current Australian laws dealing with discrimination, which recognize religious freedom issues as a reason why would

⁷ See Foster (2016), above n 6, *passim*.

otherwise be discrimination in those areas may not be unlawful. This table does not deal with “vilification” provisions, provisions making it unlawful to stir up hatred or other emotions against persons on the basis of protected attributes, which are briefly noted below in Table 2.

Table 1: Religious balancing clauses in substantive discrimination laws

Jurisdiction	Legislation	Prohibited Ground(s)	Religious Balancing clause, area of operation
Cth	<i>SDA</i> 1984 ⁸	Sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities	Section 23(3)(b) – prohibition on discrimination re accommodation does not apply to “accommodation provided by a <i>religious body</i> ”. Section 37 exempts appointment and training of clergy, appointment of persons to perform religious duties, and “any other act or practice of a <i>body established for religious purposes</i> , 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”; however does not operate in Cth-funded age care, except in relation to appointment of employees- s 37(2).
Cth	<i>Age Discrimination Act</i> 2004	Age	Section 35 provides an exemption for an “act or practice of a <i>body established for religious purposes</i> that: (a) conforms to the doctrines, tenets or beliefs of that religion; or (b) is necessary to avoid injury to the religious sensitivities of adherents of that religion.” ⁹
ACT	<i>Discrimination Act</i> 1991	Wide range of “protected attributes” under s 7(1): accommodation status; age; breastfeeding; disability; employment status; gender identity; genetic information; immigration status; industrial activity; intersex status; irrelevant criminal record; parent, family, carer or kinship responsibilities; physical features; political conviction; pregnancy; profession, trade, occupation or calling; race; record of a person's sex having been altered; relationship status;	Section 32 is broadly similar to s 37 SDA above; exempts appointment and training of clergy, appointment of persons to perform religious duties, and “any other act or practice of a <i>body established for religious purposes</i> , if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion”, Section 33 applies to religious educational institutions, and allows discrimination in the areas of employment by, or enrolment in, such institutions “if the institution is <i>conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed</i> , and the... person so discriminates in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed”. Section 44 allows discrimination by some religious <i>schools and hospitals</i> in the area of employment “if the duties of the employment or work involve, or would involve, the <i>participation by the employee or worker in the teaching, observance or practice of the relevant religion</i> ”. Section 46 allows a <i>school</i> to discriminate in its policy “for admission as a student at an educational institution

⁸ Note that there are no specifically religious “balancing clauses” in the Commonwealth legislation forbidding racial discrimination or disability discrimination. In general, there seems so far to be no wide-spread custom of religious bodies in Australia making these matters an essential part of their faith. Perhaps the one major exception, discussed in Foster (2016), above n 6 at 391-392, 407-409 is the dilemma raised by the decision in *R (on the application of E) v Governing Body of JFS and the Admissions Panel of JFS* [2010] 2 AC 728 concerning a descent-based criterion applied by an orthodox Jewish school.

⁹ A provision not very widely used in litigation, but presumably inserted to allow specific rules about “rites of passage”, eg an Anglican bishop only confirming someone at the age of 13, or a Jewish congregation setting an age for a *bar mitzvah*. It may also perhaps be designed to allow religious groups to prescribe compulsory retirement ages for senior clergy.

		religious conviction; sex; sexuality; subjection to domestic or family violence	that is conducted <i>solely for students having a religious conviction</i> other than that of the applicant”. (See also note on s 11 below.)
NSW	<i>Anti-Discrimination Act 1977</i>	Protected attributes: race, sex, transgender status, marital or domestic status, disability, disability, carer’s status, age; does not include “religion” as a prohibited ground	Section 56: as above, exempts appointment and training of clergy, appointment of persons to perform religious duties and any “other act or practice of a <i>body established to propagate religion</i> that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion”. Section 59A allows a “faith based” adoption <i>agency</i> (in effect) to decline to place children with transgender or homosexual persons, if acting in accordance with a religious policy on the matter.
NT	<i>Anti-Discrimination Act</i>	Broadly the same range of matters as under the ACT law, but note s19 (m) “religious belief or activity” (not merely “conviction”)	Section 30(2): “An <i>educational authority</i> that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion.” Section 37A: “An <i>educational authority</i> that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination: (a) is on the grounds of: (i) religious belief or activity; or (ii) sexuality; and (b) is in good faith to avoid offending the religious sensitivities of people of the particular religion.” Section 40(2A): religious <i>school</i> may provide accommodation only for students of that religion, if they choose. Section 40(3): where accommodation “under the direction or control of a <i>body established for religious purposes</i> ” they may discriminate if “in accordance with the doctrine of the religion concerned; and ... necessary to avoid offending the religious sensitivities of people of the religion”. Section 43: access to sites of religious significance may be restricted to “people who are not of a particular sex, age, race or religion”. Section 51: more general exemption, as with other jurisdictions, exempts appointment and training of clergy, appointment of persons to perform religious duties and “(d) an act by a <i>body established for religious purposes</i> if the act is done as part of any religious observance or practice ”.
Queensland	<i>Anti-Discrimination Act 1991</i>	Broad list mostly like the ACT; note s 7(i) “religious belief or religious activity”	Section 25- an exemption covering “genuine occupational requirements” which includes specific provisions covering <i>educational bodies and bodies set up for religious purposes</i> “if the work genuinely and necessarily involves adhering to and communicating the body’s religious beliefs”. Discussed below. Section 41: allows a <i>school</i> set up for students of a particular religion to enroll students only of that religion. Section 48: allows restriction of “access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion”. (See also s 80 allowing similar restrictions re disposition of an interest in land.) Section 90: where accommodation “under the direction or control of a <i>body established for religious purposes</i> ” discrimination allowed if “in accordance with the doctrine of the religion concerned; and ... necessary to avoid offending the religious sensitivities of people of the religion”. Section 109 similar to above general provisions but with modifications. Exempts appointment and training

			of clergy, appointment of persons to perform religious duties and “an act by a <i>body established for religious purposes</i> if the act is— (i) in accordance with the doctrine of the religion concerned; and (ii) necessary to avoid offending the religious sensitivities of people of the religion” but not in the “work or work-related area or in the education area”- s 109(2), and not if it is covered by s 90. See discussion below.
South Australia	<i>Equal Opportunity Act 1984</i>	Covers sex, sexual orientation, gender identity, race, disability, age, and “other grounds” (see s 85T) which include domestic partnership status, pregnancy, breast-feeding, carer’s responsibilities, and “religious appearance or dress”; NB no overall “religion” ground beyond the “appearance or dress” one.	<p>Section 34(3)- allows <i>religious educational institutions</i> to discriminate re sexual orientation if they have a written policy which is publicized. Discussed below.</p> <p>Section 35(2b)- allows <i>associations</i> to discriminate “on the ground of sexual orientation or gender identity if the association is <i>administered in accordance with the precepts of a particular religion</i> and the discrimination is founded on the precepts of that religion”.</p> <p>Section 50 (concerning sex, sexual orientation or gender identity) allows appointment and training of clergy and also exempts “(ba) the administration of a <i>body established for religious purposes</i> in accordance with the precepts of that religion; or (c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.”</p> <p>Section 85ZM (re marital or domestic partnership) exempts decisions re appointment and training of clergy.</p> <p>Section 85Z(2) – discrimination against a domestic partnership of same sex partners re employment not unlawful where “for the purposes of an <i>educational institution</i> administered in accordance with the precepts of a particular religion” and s 34(3) would apply if it were a question of sexual orientation discrimination.</p> <p>Section 85ZB – allows <i>association</i> to discriminate “against same sex domestic partners on the ground of marital or domestic partnership status” if it satisfies criteria noted in s 35 above.</p> <p>Section 85ZE(5) – allows <i>religious school</i> to discriminate on grounds of religious dress if “the student or potential student appears or dresses, or wishes to appear or dress, in a manner required by, or symbolic of, a different religion”.</p>
Tasmania	<i>Anti-Discrimination Act 1998</i>	Very wide range of grounds similar to ACT; see s 16(o) “religious belief or affiliation”, 16(p) “religious activity” ¹⁰	<p>Section 27(1)(a) – discrimination on ground of gender permissible “in a <i>religious institution</i>, if it is required by the doctrines of the religion of the institution”.</p> <p>Section 42 – discrimination on grounds of race permissible “in relation to places of cultural or religious significance if the discrimination - (a) is in accordance with ... (ii) the doctrines of the religion; and (b) is necessary to avoid offending the ... religious sensitivities of any person of the ... religion”.</p> <p>Section 51(1)- discrimination permitted “on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.”</p> <p>Section 51(2) – discrimination in employment by <i>religious school</i> permitted on religious grounds “if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings,</p>

¹⁰ It is unclear to me at the moment why Tasmania puts “belief or affiliation” in one paragraph and “activity” in another; need to check further whether the two paragraphs are treated differently.

			<p>principles or practices”.</p> <p>Section 51A(1) – religious <i>school</i> may restrict new enrolments to pupils of that religion, or, s 51A(4), if a policy so says, to persons whose parents or grandparents were of that religion.</p> <p>Section 52: <i>discrimination on the grounds of religion</i> may be justified in case of appointment and training of clergy, appointment of people to carry out religious observance, or in relation to “any other act that - (i) is carried out in accordance with the doctrine of a particular religion; and (ii) is necessary to avoid offending the religious sensitivities of any person of that religion”. (NB see below for limited scope of this compared to other jurisdictions)</p>
Victoria	<i>Equal Opportunity Act 2010</i>	Wide range of protected attributes like ACT; see s 6(n) “religious belief or activity”	<p>Section 39: religious <i>school</i> “that operates an educational institution or program wholly or mainly for students of a particular ... religious belief ... may exclude from that institution or program— (a) people who are not of the particular ... religious belief”.</p> <p>Section 60: allowed to refuse “accommodation to another person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular ... religious belief if the other person is not of that ... religious belief”.</p> <p>Section 61: <i>school</i> operating “wholly or mainly for students of a particular... religious belief, ... may provide accommodation wholly or mainly for— (a) students of that ... religious belief.”</p> <p>Section 82(1): general exemption for <i>religious bodies</i> from all prohibited grounds re appointment and training of clergy and people to perform religious functions.</p> <p>Section 82(2): exemption from certain types of discrimination (including religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity) “by a <i>religious body</i> that— (a) conforms with the doctrines, beliefs or principles of the religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion”.</p> <p>Section 83(2): exemption for <i>body</i> running religious school similar to s 82(2) exemption noted above.</p> <p>Section 84: exemption for <i>individuals</i> along lines of s 82(2) “if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion”</p>
Western Australia	<i>Equal Opportunity Act 1984</i>	Prohibited grounds broadly similar to NSW with some extra: extras include “gender history” (similar to “transgender” status), religious or political conviction, and “publication of relevant details on Fines Enforcement Registrar’s website”	<p>Section 21(3)(b)- a <i>religious body</i> providing accommodation may discriminate on basis of “sex, marital status, pregnancy or breast feeding”.</p> <p>Section 35AM(3)(b)- as above re gender reassigned persons on basis of gender history.</p> <p>Section 35Z(3)(b)- as above re sexual orientation discrimination.</p> <p>Section 63(3)(b)- as above re religious or political conviction.</p> <p>Section 66- employment discrimination on grounds of religious conviction permitted where a <i>private school or religious hospital</i> “if the duties of the employment or work are for the purposes of, or in connection with, or otherwise involve or relate to the participation of the employee in any religious observance or practice”</p> <p>Section 66ZG(3)(b)- exception as above re discrimination on basis of age in accommodation area, where accommodation provided by a religious body.</p> <p>Section 67I(3)(b)- as above re “publication of website details” discrimination.</p> <p>Section 72 general exemption re appointment and training of clergy, people performing religious function,</p>

		<p>and “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 religion”.</p> <p>Section 73(1), (2) general exemption for religious <i>schools</i> re employment and contracted work “in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”.</p> <p>Section 73(3) – exemption for <i>religious schools</i> (“other than the grounds of race, impairment or age”) to allow discriminating “in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed”.</p> <p>(?)</p> <p>Section 74- general exemption re provision of aged care accommodation for “any rule or practice of an institution which restricts admission thereto to applicants of any class, type, sex, race, age or <i>religious</i> or political conviction” (but restrictions may not be imposed on ground of impairment or gender reassignment- s 74(3),(3a)) (?)</p>
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There are some significant features to these laws, and differences between them, which are worth noting. (The following discussion is the beginning of an analysis which I hope to complete in a more formal way in the future.)

Generic Religious Body Provision

One general observation is that almost all the legislation contains what we may call a “**generic religious body provision**”.¹¹ This generic provision usually provides that the other provisions of the Act forbidding discrimination do not apply to certain types of decisions by religious bodies. We may take s 56 of the NSW legislation as a “paradigm” example:

56 Religious bodies

Nothing in this Act affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Para (a) preserves the right of a religious body to appoint its leaders, whether called “priests” or “ministers,” or members of a “religious order”. The most obvious area where this will apply is in the historic practice of the Roman Catholic church (and other churches) of only ordaining male priests, and of course in “orders” of nuns or monks or brothers where usually there will be a single-sex membership.

This principle, that it is vital for a religious body to appoint leaders in accordance with its own doctrine, is reflected in overseas religious freedom jurisprudence such as *Hosanna-Tabor Evangelical Lutheran Church and School v*

¹¹ See Cth SDA s 37, Cth ADA s 35, ACT DA s 32 (but note “and”), NT ADA s 51 (narrower), Qld ADA s 109 (“and”), SA EOA s 50, Tas ADA s 52 (only re “religion”), Vic EOA s 82, WA EOA s 72.

EEOC 565 US 171 (2012), where the US Supreme Court held that the First Amendment to the US Constitution requires that ordinary discrimination laws will not apply to the appointment of a religious leader in a church school.

Para (b) provides a similar exemption for “training and education”- presumably meaning that a single sex religious seminary would not be obliged to admit persons of the opposite sex.

Para (c) then broadens the coverage a bit to exempt “appointment of any other person in any capacity by a body established to propagate religion.” Here it will be necessary to determine the meaning of the phrase “body established to propagate religion”, but this will no doubt include “para-church” and missionary societies whose role is to preach the gospel to outsiders.

Noting that this type of model exempts the activity from the whole field covered by the Act, it will not only allow the appointment, say, of only a woman to a ministry designed to reach women, but also for that body to set Biblical standards of sexual morality and not appoint persons in active sexual relationships outside marriage.

The words here, “any capacity”, are quite broad. If an organization of the relevant sort engaged a gardener on its premises and wanted to apply religious standards to the gardener, it would apparently be allowed to. But here the decision of the NSW Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 needs to be read carefully. That decision was that appointment by Wesley Mission of someone to be a “foster carer” under State legislation did not amount to a “capacity”, because this was not an appointment to perform work for the Mission. (See the discussion at paras [69]-[72].) Still, it is clear that “capacity” need not be a specifically religious job.

It is worth noting that the former similar Victorian provision, s 75 of the *Equal Opportunity Act* 1995 (Vic), contained an exemption in relation to “selection or appointment of people to perform functions in relation to, or otherwise to participate in, any religious observance or practice”. This exemption was held to be applicable to a decision by a local Roman Catholic priest to not allow the church hall to be used for a specific religious celebration by parishioners, in *Tassone v Hickey* [2001] VCAT 47 (4 July 2001) at [42].

Para (d) is widest of all, and allows an exemption for a relevant body that either “conforms to the doctrines of that religion” or, alternatively, “is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.”

There are two separate criteria or “limbs”. One of the findings of the *Wesley Mission* case noted above is that, in the first limb, “doctrine” is not to be simply confined to formal creeds, and extends to what the body currently teaches and believes, not just historical matters- see eg para [50].

In its final decision on the case, in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010), the Tribunal held that the evidence established that the Wesley Mission had a relevant belief based on the Bible that they should not place a child with a same sex couple, and that in refusing the application of the couple in question they were acting in conformity with that belief- see para [34]. It was also accepted that placing a child with a same sex couple would have caused their “provision of foster care services [to be] unacceptable to those who support the ethos of Wesley Mission”, and this would have satisfied the second limb of s 56(d), causing “injury to the religious susceptibilities of the adherents of that religion”.

It should be noted that there is a fairly strong difference of approach from the *OV & OW* model, in relation to the interpretation of the then-relevant Victorian defence, in the decision in *Christian Youth Camps v Cobaw* [2014] VSCA 75. In that case the Victorian Court of Appeal by majority upheld the view that the “doctrines” of Christianity did not include views on sexual morality- see eg paras [276]-[277]. I have written elsewhere on that decision,¹² which I think is wrong for a number of reasons, and in any case, seems to me to be clearly inconsistent with the sort of approach taken in *OV & OW*. The High Court sadly declined special leave to appeal; in my view there is a clash between these two superior appellate courts on the interpretation of very similar pieces of legislation, which will eventually need to be resolved by that court.¹³

While the above model is broadly reflected in most other jurisdictions, it should be noted that there are **some important differences**, and one lesson of this whole paper is that each different Act needs to be read very carefully to see if it applies in the specific circumstances.

So, for example, some versions of the “generic religious body” clause in the final paragraph require that the relevant practice *both* conform to doctrine *and also* be necessary to avoid injury to “religious susceptibilities” (see eg Tas and ACT).

In Tasmania the narrowest version of the defence, in its ADA s 52, only allows discrimination “on the basis of religion” to be justified by these considerations. (All of the other “generic” provisions apply across the full range of prohibited grounds.) If it were not for the separate s 27(1)(a), which seems to narrowly cover the point so long as “religious institution” (otherwise undefined) includes churches, Tasmania would be the only jurisdiction not allowing the Roman Catholic church to not appoint women priests. As it is, that policy is allowable.

But it has to be said that there seems no provision allowing a church in Tasmania, when deciding whether or not to ordain a person as a priest or appoint them as a congregational minister, to decline to appoint someone who is a practicing homosexual, or who is in a heterosexual unmarried (de facto) relationship. This would arguably be contrary to paras 16(c) and (d) of the ADA. Appointment of a clergy member *might* not be caught by the Act, given that s 22(1)(a) only refers to “employment” as a prohibited area of discrimination, and given that ministers of religion are not usually “employees”.¹⁴ But it would seem that the provision would prevent a church, for example, from refusing to employ a youth worker in one of these categories. (The clash between the Tasmanian and the Commonwealth provisions is discussed in the final section of this paper, below.)

Variations in balancing clauses covering similar areas

Having identified one broadly similar “generic” defence, perhaps it will be surprising to others (it was to me) to note the **variations** that there are between

¹² See Neil J Foster, "Christian Youth Camp liable for declining booking from homosexual support group" (2014) at: http://works.bepress.com/neil_foster/78/.

¹³ See my comment on the special leave application, Neil J Foster, "High Court of Australia declines leave to appeal *CYC v Cobaw*" (2014) at: http://works.bepress.com/neil_foster/89/.

¹⁴ See my blog post on this area, “Employment status of clergy” <https://lawandreligionaustralia.blog/2015/05/03/employment-status-of-clergy/> (May 3, 2015) for more details.

different jurisdictions in matters of detail, and the range of other defences that are provided. Some will be mentioned; there are others that could have been discussed.

Take the **ACT DA 1991**, for example. It makes “religious conviction” a protected attribute, under s 7(1)(u). But then we have **s 11**, a provision apparently not replicated elsewhere:

11. It is unlawful for an employer to discriminate against an employee on the ground of religious conviction by refusing the employee permission to carry out a religious practice during working hours, being 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.

Why is this provision needed here, yet apparently not elsewhere in Australia? It may simply be that it is included for “avoidance of doubt”. But it is also possible that when the protected attribute is said to be “religious *conviction*”, that the ACT Parliament intends this literally only to cover one’s *internal* beliefs, and that an *expression* of one’s beliefs in terms of practice (such as a desire to attend church, or a mosque, or a synagogue) is not covered. This would then explain why it was necessary to include s 11, which is of course fine as far as it goes, but which then means that there are large areas of life outside attending a religious service that are not protected by the law. The question doesn’t so far seem to be resolved by case law.

To take another example, the specific “religious” aspects of **Qld ADA s 25** are more detailed than one would expect. Section 25 provides:

25 Genuine occupational requirements

- (1) A person may impose genuine occupational requirements for a position.
 - Examples of genuine requirements for a position— ...
 - * Example 4—
 - * employing persons of a particular religion to teach in a school established for students of the particular religion
- (2) Subsection (3) applies in relation to—
 - (a) work for an educational institution (an employer) under the direction or control of a body established for religious purposes; or
 - (b) any other work for a body established for religious purposes (also an employer) if the work genuinely and necessarily involves adhering to and communicating the body’s religious beliefs.
- (3) It is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under section 14 or 15 *{in pre-work decision or work decisions}*, in a way that is not unreasonable, against a person if—
 - (a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer’s religious beliefs—
 - (i) during a selection process; or
 - (ii) in the course of the person’s work; or
 - (iii) in doing something connected with the person’s work; and
 - * Example for paragraph (a)—
 - * A staff member openly acts in a way contrary to a requirement imposed by the staff member’s employer in his or her contract of employment, that the staff member abstain from acting in a way openly contrary to the employer’s religious beliefs in the course of, or in connection with the staff member’s employment.
 - (b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person’s work, act in a way consistent with the employer’s religious beliefs.
- (4) Subsection (3) does not authorise the seeking of information contrary to section 124.

- (5) For subsection (3), whether the discrimination is not unreasonable depends on all the circumstances of the case, including, for example, the following—
- (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions;
 - (b) the consequences for both the person and the employer should the discrimination happen or not happen.
- (6) Subsection (3) does not apply to discrimination on the basis of age, race or impairment.
- (7) To remove any doubt, it is declared that subsection (3) does not affect a provision of an agreement with respect to work to which subsection (3) applies, under which the employer agrees not to discriminate in a particular way.
- (8) In this section—
- religion includes religious affiliation, beliefs and activities.
 - selection process means a process the purpose of which is to consider whether to offer a person work.

The detailed provisions here lead one to suspect a very specific type of case was in mind. The section, for example, would seem to allow an employer whose business was of a “religious” nature (eg a Christian school, or a church) to decline to employ someone who was in a same sex relationship or an unmarried de facto heterosexual relationship, if it could be viewed as a “genuine occupational requirement” that employees “act in a way consistent with the employer's religious beliefs”.

However, s 25(4) would seem to imply that an employer could not *ask* a prospective employee about such relationships! And s 25(5) has an interesting balancing process set out to decide whether such a requirement is “unreasonable”.

In *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 (12 December 2008) the Queensland Tribunal had to consider s 25 when the issue arose as to whether a leader of the St Vincent de Paul organization had to be a practicing Roman Catholic or not. Controversially, the Tribunal considered that the issue of whether something was a “genuine occupational requirement” of the job was an “objective” issue to be determined by the Tribunal, and found that in the circumstances it was not an essential requirement for the CEO to be a Roman Catholic. The Tribunal held:

[123]...I conclude that being a Catholic is 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, especially given the status and the role of the Spiritual Advisor, who may well be a priest, in a conference.

[124] To this may be added the facts – undisputed by the Respondent – that the Respondent knew that the Claimant was not a Catholic; with this knowledge welcomed her as a member and saw her elected as president of three of its conferences, one of these elections being in the presence of a regional president and a priest of the Catholic Church; saw her inducted as a president of a conference by a priest of the church in a service of the church; and allowed her to work without challenge for years as a conference president. These facts point strongly to a conclusion, which I make, that it was not a genuine occupational requirement that a president of a conference of the Respondent be a Catholic.

Obviously, it did not help the case that the complainant had been appointed to the position in the knowledge that she was not a Catholic. But it does seem a matter of some concern that weighty evidence from within the Society and the broader Church was not accepted as this question.

Next, consider the unusual provisions of **Qld s 109**. This is an odd variation on the “generic” model noted above.

109 Religious bodies

- (1) The Act does not apply in relation to—
- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
 - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
 - (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or
 - (d) unless section 90 (Accommodation with religious purposes) applies—an act by a body established for religious purposes if the act is—
 - (i) in accordance with the doctrine of the religion concerned; and
 - (ii) necessary to avoid offending the religious sensitivities of people of the religion.
- (2) An exemption under subsection (1)(d) does not apply in the work or work-related area or in the education area.

Paragraph (1)(d) here is the odd part. Section 90 of the legislation is as follows:

90 Accommodation with religious purposes

- It is not unlawful to discriminate with respect to a matter that is otherwise prohibited under subdivision 1 if—
- (a) the accommodation concerned is under the direction or control of a body established for religious purposes; and
 - (b) the discrimination—
 - (i) is in accordance with the doctrine of the religion concerned; and
 - (ii) is necessary to avoid offending the religious sensitivities of people of the religion.

Section 90 operates as an exemption to the prohibitions on discrimination in the area of provision of accommodation in ss 82-85. It envisages that a “body established for religious purposes” may need to discriminate in accommodation it directs or controls, either in accordance with its doctrines or to avoid causing harm to religious “sensitivities”. Perhaps we can postulate a religiously based college or hostel, which may wish to only house persons who are willing to commit to live in accordance with Christian sexual values.

So, when we come to s 109(1)(d) it does not apply to accommodation decisions, but it applies to other decisions. But the two conditions for the exemption to operate are precisely the same; so why is s 90 needed? And then we have the odd s 109(2), which seems to say that the final paragraph of the generic exemption cannot operate in a “work” area or in “education”.

There are a number of ambiguities here. Suppose a residential college at a University which wished to only offer its services to people of the Jewish faith. Section 90 would appear to allow them to do that. But then s 109(2) says that the identical “exemption” under s 109(1)(d) cannot operate in the “education” area. Perhaps the intent is that a s 90 exemption will apply even if the s 109 exemption does not?

In relation to s 109(1)(d), does this mean that a church cannot decide to make it a condition of employment of a youth worker that he or she not be in a “de facto” relationship? One could perhaps try to argue that s 109(1)(c) might operate here, but is a youth worker someone who “perform(s) functions in relation to, or otherwise participate in, any religious observance or practice”? Perhaps not.

As a final note in this brief review of some variations, it is interesting to see the SA EOA s 34 and its “written policy” provision. Section 34(3) is as follows:

(3) This Division {*dealing with discrimination against workers on the grounds of sex, sexual orientation or gender identity*} does not apply to discrimination on the ground of sexual orientation or gender identity in relation to employment or engagement for the purposes of an educational institution if—

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and
- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - (i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and
 - (ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and
 - (iii) to other members of the public.

In other words, a religious school may decline to employ (or presumably choose to dismiss) someone who is a homosexual or a transgender person (where justified by their religious beliefs) but only if they have a written policy on the issue which is handed to prospective employees or contractors, and also made available (on request) to the school community or members of the public. Presumably a stated aim of the policy would be that prospective employees become aware of the policy before choosing to work at the school. But the requirement to make the policy available to all and sundry raises a question, in my mind at least, whether the requirement for the written policy is perhaps a “shaming” mechanism and would allow protestors to target the school.¹⁵

Balancing clauses in vilification provisions

As well as provisions making it unlawful to treat people detrimentally in various areas on the basis of a protected characteristic, some laws in Australia (not all) forbid the stirring up of hatred, etc, against someone on the basis of the characteristic. Some of these laws allow speech of a religious nature to be protected. The following Table is a sample of relevant provisions.

Table 2: Religious Balancing Clauses in Anti-vilification provisions (sample)¹⁶

Jurisdiction	Legislation	“Vilification” not prohibited where speech has religious character?
NSW	<i>Anti-Discrimination Act 1977</i> ; prohibits vilification on transgender status grounds (s 38S), homosexuality (s 49ZT), HIV/AIDS status (s 49ZXB)	Section 38S(2)(c) – transgender vilification deemed not to occur in “a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction

¹⁵ For further discussion of this sort of “opt in” model, see, Greg Walsh “An Opt-In Approach to Regulating the Employment Decisions of Religious Schools” [2014] *MqLawJl* 20; (2014) 14 *Macquarie Law Journal* 163.

¹⁶ I have included here all jurisdictions where “religious vilification” is prohibited, and NSW. But further research would be needed to check whether vilification on *other* grounds in other jurisdictions is excused by a religiously-related defence. I suspect not but have not yet done the checking.

		<p>purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter”.</p> <p>Section 49ZT(2)(c) – <i>homosexual vilification</i> exempted in same circumstances as above.</p> <p>Section 49ZXB(2)(c) – as above re HIV/AIDS vilification</p>
Qld	<p><i>Anti-Discrimination Act</i> 1991; Section 124A- vilification on grounds of “race, religion, sexuality or gender identity” prohibited</p>	<p>No specific “religious” defence but s 124A(c) exempts “other purposes in the public interest”- but unclear if this would cover religious speech or not.</p>
Tasmania	<p><i>Anti-Discrimination Act</i> 1998, s 17 very wide provision (eg “offends, humiliates, intimidates, insults or ridicules another person” on certain grounds); s 19 more common “vilification” provision</p>	<p>Note that there is no provision for “religious purposes” to be an exemption to ss 17, 19 under the general s 55 defence provision; it does include in s 55(c) “a public act done in good faith for -... (ii) any purpose in the public interest” but the meaning of this “public interest” test is unclear and not sure whether it covers “religious” purposes</p>
Victoria	<p><i>Racial and Religious Tolerance Act</i> 2001, s 8 prohibits vilification “on the ground of the religious belief or activity of another person or class of persons”</p>	<p>Section 11 defence covers “conduct ... engaged in reasonably and in good faith- ... (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for- (i) any genuine ... religious ... purpose ... (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.”</p>

General comments on balancing clauses

A couple of final general comments about the balancing clauses noted above may be made.

One is the reliance, in the second “limb” of what I have called above the “generic religious body” clauses, of the notion of doing harm to the “religious **susceptibilities** of adherents of that religion”¹⁷, or sometimes “religious **sensitivities**”¹⁸. I don’t know about others, but as someone who has a religious belief I find these clauses insultingly patronising! Both words make it sound like I have either an allergy or a psychological problem, where I will collapse in a heap if someone tells me I am wrong. It would be a step forward to find a better phrase here. Perhaps it would be more suitable to say something along the lines of “necessary to avoid requiring adherents of the religion to act in a way which is contrary to their conscientious beliefs”?

A significant feature of these balancing clauses is that with one major exception, they all mostly operate for the benefit of religious *groups* or organisations,

¹⁷ Eg Cth SDA s 37, ACT ADA s 32, NSW ADA s 56.

¹⁸ Eg Cth ADA s 35, NT ADA s 37A.

and not directly for the benefit of individual *believers*. There are one or two minor exceptions- so ACT DA s 33 refers to discrimination by a “person”, but it is in relation to employment at a religious school, and so refers to an “official” decision which would be backed up by the institution. NT ADA s 43 allows discrimination by a “person” denying access to sacred sites, as does Qld ADA s 48, and Tas ADA s 42. Tas ADA s 51 allows a “person” to impose an obligation on a worker to be of a specific religion “if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment”.

But apart from these minor exceptions, the main provision giving a general over-ride to the discrimination laws for individuals, as opposed to religious organisations, is Vic EOA s 84.

Religious beliefs or principles

84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

Sadly, the previous equivalent to this provision was interpreted in quite a narrow way in the *CYC v Cobaw* litigation previously discussed.¹⁹ But it has the potential, if properly interpreted (including in light of our international art 18 ICCPR obligations) to provide a good form of religious protection for individuals, and I would recommend that it be generally rolled out to other jurisdictions.

Apart from the *Cobaw* decision, the only other substantial consideration of s 84 seem to be the interesting decision in *Trkulja v Dobrijevic & Anor (Human Rights)* [2013] VCAT 925 (6 June 2013). Here Mr Trkulja had been expelled from an organization associated with his local Serbian Orthodox church, and in effect barred from membership in any Serbian Orthodox church in Australia. This case was a preliminary hearing to determine whether the management group of the St Archdeacon Stefan Serbian Orthodox Church, and the individual respondent Mr Dobrijevic, could rely on the defences in s 82 and 84 of the EOA.

The decision was that there were sufficient uncertainties on the application of the s 84 defence to make it necessary to proceed to a full hearing. It was accepted for the purposes of the argument that the association could be regarded as a “club” for the purposes of the EOA and that Mr Trkulja could be said to have been removed from the club for reasons including his religious views. (The order removing him from membership described him as someone “who obviously does not profess the Orthodox religion and our Lord Jesus Christ in accordance with the decisions First and Second Universal Council of the Orthodox Church”.)

However, there was some debate as to whether there were other motives in removing him- he had been engaged in a property dispute with the local Bishop- see para [5]. The Tribunal held that it needed to be shown what the motives were for his removal, and hence whether it could be said that it was “reasonably necessary” for this to be done to comply with the relevant doctrines of the church.

This seems a sensible decision; I am not aware whether there were any further proceedings or whether the matter has settled.²⁰

¹⁹ See the comment on these issues in Foster (2014), above n 12.

²⁰ These proceedings are only one of many actions brought by Mr Trkulja against the church, most of them in defamation. He has apparently lost most of these actions, been ordered to pay costs, and not

Religious balancing clauses and possible same sex marriage law

Having considered a wide range of balancing clauses in existing discrimination legislation, I think it may be helpful to consider the proposals for recognition of same sex marriage that were put forward in an Exposure Draft Bill by the Government last year (henceforth, the “ED”),²¹ and to note the sort of balancing clauses that were included in this legislation.²²

There are a number of reasons, of course, why a change to the nature of marriage will have an impact on many people with religious convictions about that topic. The mainstream beliefs of all three major “Abrahamic” religions, Judaism, Christianity, and Islam, regard marriage as a fundamental social structure intended by God to take place only between a man and a woman. Similar views are shared by other religious traditions. Until very recently the nature of marriage as understood in Western society in particular uniformly reflected the nature of marriage as a union involving the differential gender of the intended spouses.

In Australia, we have a system of celebration of marriages under the *Marriage Act* 1961 (Cth) (“MA”) which has involved ministers of religion from the very outset as a key category of celebrant. In addition, many others involved in the celebration of marriages, whether as private celebrants or as public officers, will have religious convictions as to the nature of marriage.

While the interpretation of the important provision in s 116 of the Constitution forbidding the Commonwealth Parliament from making “any law... for prohibiting the free exercise of any religion” is still a matter of some debate, it seems plausible that a law of the Commonwealth which required ministers of religion to act in a way which was contrary to a fundamental tenet of their faith would breach this prohibition, as amounting to an “undue infringement” of the right to free exercise.²³

1. The nature and effect of the proposals

So how does the ED deal with these issues? There are some good provisions adequately protecting religious freedom. On the other hand, these provisions do not

paid those costs, having been declared bankrupt. For a summary of these matters see *Trkulja v Dobrijevic (No 2)* [2016] VSC 596 (4 October 2016) where his latest proceedings were halted until he provided security for costs.

²¹ See <https://www.attorneygeneral.gov.au/MediaReleases/Documents/Exposure-Draft-Marriage-Amendment.pdf>.

²² These comments formed part of my submission to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, in 2016. The Select Committee’s report has since been published: see *Report on the Commonwealth Government’s Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (Feb 2017). A link to the report, and to my summary of the report, can be found at my blog post “Report of the Select Committee on Same-Sex Marriage Bill” (Feb 15, 2017) <https://lawandreligionaustralia.blog/2017/02/15/report-of-the-select-committee-on-same-sex-marriage-bill/>. As is well known, the Exposure Draft Bill was not introduced because the Government’s proposed legislation allowing a plebiscite on the matter was rejected by the Senate.

²³ See Latham CJ, *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, at 128. For recent academic support for the view that the “sole purpose” test which has previously been suggested as the appropriate reading of s 116 is too narrow, see Luke Beck, “The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution” (2016) 44/3 *Federal Law Review* 505-529; at SSRN: <https://ssrn.com/abstract=2834486>.

go quite far enough and leave some members of the community unhelpfully unprotected.

(a) On the one hand- there are some good protections

First, it has to be said that there are some sensible provisions in the ED Bill supporting religious freedom.

(i) Protection of ministers of religion as celebrants

The Bill makes it quite clear that ministers of religion will not be obliged to celebrate same sex marriages. A redrafted MA section 47, which already provides a general principle that ministers may decline to solemnise marriages, explicitly deals with the new situation in proposed s 47(3):

- (3) A minister of religion may refuse to solemnise a marriage despite any law (including this Part) if:
 - (a) the refusal is because the marriage is not the union of a man and a woman; and
 - (b) any of the following applies:
 - (i) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister’s religious body or religious organisation;
 - (ii) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
 - (iii) the minister’s conscientious or religious beliefs do not allow the minister to solemnise the marriage.

The similarity of these provisions with the “generic” provisions mentioned above will be noted. It is important to note that this amendment allows refusal of a same sex marriage “despite **any** law”. This means that as well as the *MA* itself not imposing an obligation to solemnise such a union, this provision will over-ride other Commonwealth law that might have been argued to impose such an obligation, as well as competing State or Territory laws.

The main relevant Commonwealth law that might have been argued to oblige a minister of religion to solemnise a same sex union would be the *SDA*, which as noted above makes it unlawful to discriminate against persons in the provision of “services” on the basis of sexual orientation (see s 22 of that Act). But the new s 47(3) will over-ride that provision. To make this completely clear the Bill in Schedule 1, Part 2 amends s 40(2A) of the *SDA* (which already says that decisions taken in “direct compliance with” the *Marriage Act* are not viewed as unlawful) to clarify that decisions taken which are “authorised by” the *Marriage Act* will not be unlawful.

State and Territory laws, as noted above, also make sexual orientation discrimination unlawful. The wording of s 47(3) will make it clear that permission given by the Commonwealth Parliament to a minister of religion not to solemnise a same sex union will over-ride any conflicting subordinate laws (through operation of s 109 of the Constitution or similar provisions governing Territories, discussed further below.) It seems clear that the “marriage” power under the Constitution would authorise this type of direct over-riding of State law if necessary to implement Commonwealth marriage law. (In particular, since it seems possible that requiring a minister of religion to solemnise a same-sex marriage contrary to their religious belief on the matter might be a breach of s 116 of the Constitution, a provision explicitly over-riding State and Territory law on the matter is sensible.)

It is also worth noting that s 47(3)(b)(iii) is a sensible provision which will protect the consciences of ministers of religion who may be more theologically

“conservative” than the denominations to which they belong- their own “conscientious or religious belief” will authorise a refusal to solemnise even if their broader group supports same sex marriage.²⁴

(ii) Protection of private civil celebrants

Another important protection provided in the ED Bill for religious freedom is that private “civil” celebrants, appointed in accordance with the provisions of Subdivision C of Division 1 of Part IV of the *MA*, will be able to decline to solemnise same sex marriages if they have a “conscientious or religious” objection to doing so- see proposed new s 47A.

Some of the celebrants appointed under this part of the Act are ministers of religion of smaller religious groups, but they will already be protected under the amended s 47 already noted. So, this provision will be applicable to other citizens appointed as celebrants. Occasionally these people are referred to popularly as “civil celebrants”, and this term is acceptable provided it is recognised it simply means “celebrants not appointed to serve the needs of a religious group, who are not registry officials”. But the word “civil” here does not mean “secular”, as if this category of celebrants were not entitled to protection of their religious freedom.

(iii) Protection of religious groups providing facilities

Proposed new s 47B is also a good provision, allowing religious groups or organisations that make halls or other facilities available for weddings, to decline to do so on conscientious or religious grounds:

47B Religious bodies and organisations may refuse to make facilities available or provide goods or services

(1) A religious body or a religious organisation may, despite any law (including this Part), refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if:

- (a) the refusal is because the marriage is not the union of a man and a woman; and
- (b) the refusal:
 - (i) conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
 - (ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

This principle, that requiring a religious group to provide facilities for a celebration of a relationship which they regard as fundamentally contrary to their moral views, seems sensible and has been reflected previously in Canada in the decision of the British Columbia Human Rights Tribunal in *Smith v. Knights of Columbus*.²⁵

(b) On the other hand- the protections do not go far enough

There are, however, significant areas where the religious freedom protections offered by the Bill do not go far enough.

²⁴ This is a problem that had been identified by Professor Rex Ahdar in relation to the analogous New Zealand legislation: see Rex Ahdar “Solemnisation of Same-sex Marriage and Religious Freedom” (2014) 16/3 *Ecclesiastical Law Journal* 283 – 305 at 285.

²⁵ 2005 CarswellBC 3654, 2005 BCHRT 544.

(i) No protection for public service registry officers

While there is sensible provision made for recognising religious freedom rights of ministers of religion and private civil celebrants, no such provision is made for public servants (usually employed by the States and Territories) who are authorised to solemnise marriages under s 39 of the *Marriage Act*.

This is a topic which of course has been controversial. In the UK the case of the late Lillian Ladele, a marriage registration official with Islington in London who did not wish to register same sex “civil partnerships”, went all the way on appeal to the European Court of Human Rights.²⁶ The Court ruled that her religious freedom had been impaired by the Council’s insistence that she register such partnerships, despite the ease with which her conscientious objection could have been accommodated by rostering on other employees. However, the Court then ruled that the Council were entitled to dismiss her in the interests of supporting “diversity”.²⁷

In the United States of America, similar issues were raised in the case of Kim Davis, registrar from Kentucky, who declined to solemnise same sex marriages where, by local law, her name had to appear on the marriage certificates that were issued.²⁸ Again, there were easy ways to accommodate her beliefs, which had not been implemented. To repeat a couple of comments I made previously about the case:

Religious freedom is about more than the right to hold certain beliefs internally, however; it is about a right of “free exercise” of religion which will mean that a person will live out their religious beliefs in everyday life. Indeed, it is a fair criticism of someone who claims to be a believer that their life does not match their claimed religious beliefs. All of us are grateful when people with deep religious beliefs live out those beliefs in caring for the poor and marginalised, in generous giving to worthy causes, and in looking after people in their local communities. So we need to resist the occasional “reframing” of religious freedom in terms of “a right to worship”; it is much more than that.

Do these same principles apply, then, to a public servant? Or must we require all public servants to park their fundamental religious freedom rights at home when coming to work? The answer is that public servants do have, and should be allowed to exercise, religious freedom. It is not a question, as some have put it in recent days, of a public servant being “allowed to disobey the law”. The law should contain, and in most Western countries does contain, recognition of religious freedom rights, and relying on such a provision means that one would not be disobeying the law, one would be acting **within** the law.

In recognition of the fact that religious freedom as a principle applies to all Australians, even public servants, there should be a similar provision to proposed s 47A, extending to registry officials. Arrangements can no doubt be made to ensure that adequate services to meet the needs of same sex couples are available in each registry office; such offices are well staffed and located at major population centres.

(ii) No protection provided for small businesses in the wedding industry

There are a number of small business operators who service the “wedding industry”- bakers, florists, photographers, stationary designers, wedding organisers- who may have conscientious or religious objections to being required to devote their

²⁶ See *Eweida v. United Kingdom* - 48420/10 36516/10 51671/10 59842/10 - HEJUD [2013] ECHR 37 (15 January 2013).

²⁷ See my paper commenting on this case in more detail, with links to earlier discussion: Neil J Foster, “Decision in Eweida, Ladele etc appeal” (2013) at: http://works.bepress.com/neil_foster/65/.

²⁸ See my blog post, “Jail time for Kentucky County Clerk” (Sept 5, 2015) at <https://lawandreligionaustralia.blog/2015/09/05/jail-time-for-kentucky-county-clerk/>.

artistic and other talents to the celebration of a relationship they see as contrary to God’s purposes for humanity. These are not merely theoretical issues; there a number of decided court cases from overseas that have already seen people in these circumstances sued for illegal discrimination.²⁹ Recently a particularly stark example of the discrimination faced by small business owners due to their views on this issue has arisen in a case involving a farmer in Michigan, *Country Mill Farms, LLC v. City of East Lansing* (WD MI, filed 5/31/2017).³⁰ When a farmer outside the city of Lansing declined to host a same wedding on his farm, the city changed the rules governing who could sell produce at their markets to exclude those who allegedly discriminated on the basis of sexual orientation.

It cannot be stressed too strongly that those who suggest some allowance should be made for such cases are **not** saying that there should be some general exemption from all laws aimed at preventing discrimination on irrelevant grounds against same sex attracted persons. No-one is suggesting that bakers should be able to generally decline to provide pavlovas or pizzas to gay people, or that same sex attracted persons should not be served in a florist’s shop simply on the ground of their sexual orientation. Many of the cases overseas have involved businesses who were perfectly happy to serve gay customers generally. But when it comes to a specific ceremony, the sole aim of which is to celebrate and rejoice over the entry into a long-lasting same sex relationship, which is contrary to the moral teaching of most mainstream religious groups: then these people have simply wanted to be able to politely decline to be dragooned into providing their support.³¹

As Brady puts it in an analysis of the US law:

Conservative believers do not object to serving gays and lesbians generally... They are commanded by God to love them. What they object to is taking actions that affirm what God has forbidden.³²

In Australia, as noted previously, we have long-standing balancing clauses in discrimination law protecting religious organisations (such as proposed s 47B to be introduced by the Bill); but we also have some laws protecting the rights of individual

²⁹ For example, the Giffords were ordered to pay \$13,000 for declining to make their venue available for a same sex wedding ceremony, and a New York State appeal court upheld the verdict: see *Gifford v McCarthy* (NY Sup Ct Appellate Divn, 3rd Dept; 14 Jan 2016; matter no 520410) (the case is also referred to as *Gifford v Erwin*); see also *Elane Photography, LLC v Willock*, 309 P3d 53, 62 [Sup Ct NM 2013]; *State of Washington v Arlene’s Flowers Inc*, *Ingersoll & Freed v Arlene’s Flowers Inc* (Ekstrom J, Nos 13-2-00871-5, 13-2-00953-3; 18 Feb 2015), upheld on appeal in *In State of Washington v Arlene’s Flowers Inc and Stutzman*, (Wash SC, En Banc, No 91615-2; 16 Feb 2017); *Re Klein dba Sweetcakes by Melissa and anor* (Commissioner of the Bureau of Labor and Industries, State of Oregon; Case Nos 44-14, 45-14; 21 April 2015) (cake shop owners ordered to pay \$135,000 for failing to provide a same sex wedding cake.)

³⁰ For a note with links to the court filings, see “Farmers’ Market’s Exclusion of Vendor Over Same-Sex Marriages Views Is Challenged” (June 2, 2017) at Religion Clause, <http://religionclause.blogspot.com.au/2017/06/farmers-markets-exclusion-of-vendor.html> .

³¹ For similar distinctions in the US context, see the recent helpful paper by Professor Thomas C Berg, “Religious Exemptions and Third-Party Harms” (2016) 17/3 *Federalist Society Review* 50-60, available at <http://www.fed-soc.org/publications/detail/religious-exemptions-and-third-party-harms> , at 55.

³² Kathleen Brady “The Disappearance of Religion from Debates About Religious Accommodation” (December 2, 2016); 20 *Lewis & Clark L. Rev.*, Issue No. 4, in *Symposium, Law and Religion in an Increasingly Polarized America*, Forthcoming; available at SSRN: <https://ssrn.com/abstract=2879512> at 17.

believers, such as Vic EOA s 84. In my view this sort of provision, broadly and not narrowly interpreted to recognise the serious importance of the internationally recognised right to religious freedom of all Australians, should be included into the proposed Bill. Parliament could include, for example, s 47C providing that:

{**Suggested draft provision**} A person may, despite any law, refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if

- (a) the refusal is because the marriage is not the union of a man and a woman; and
- (b) the refusal conforms with the doctrines, beliefs or principles of their religion.

Clash between Commonwealth and State laws in this area

We have noted above that, while there are balancing clauses in most laws governing discrimination in Australia, the terms and limits of those clauses can be quite different. One issue this raises is how to resolve a possible conflict. If a Commonwealth law, for example, allows a certain liberty to a religious organisation to do something which would otherwise be discriminatory, can that organisation be penalised under State law for doing that?

I have written previously on this issue when there were proposals before the Victorian Parliament to introduce an “inherent requirements” test into some of the balancing clauses applicable in the Vic EOA.³³ I would like to take the opportunity here to revisit this issue, based on a possible clash that can be seen in the current laws, and to offer a view as to how this should be resolved.

The clash I would like to explore is this: as noted above, the Tasmanian ADA s 52 allows something similar to the usual “generic religious body” balancing clause, but restricts its operation to discrimination on the basis of religion. So a church which refused to appoint a youth worker because that person was in a de facto, heterosexual relationship outside marriage, would not have any exemption from the operation of the law forbidding “marital status” discrimination (Tas ADA s 16(f).) But viewed under the Cth SDA, s 37 of that Act would provide an exemption in those circumstances as the decision of the church would either be covered by s 37(1)(c), or the more general 37(1)(d) “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 religion”.

How would this clash be resolved? To sum up, it is likely in my view that the Tasmanian provision, in these circumstances, would be held to be constitutionally inoperative, as a result of s 109 of the *Commonwealth Constitution*.

The logic is as follows. The Commonwealth Constitution has as one of its functions the allocation of law-making responsibility between the Federal and the various State and Territory Parliaments. Where there are multiple legislative bodies there is always the dilemma of conflicting commands. The Constitution s 109 resolves that clash in favour of the Commonwealth Parliament.

Section 109 renders State law inoperative where it clashes with Federal law. One recognised type of clash is where the Federal law has “covered the field”. This

³³ See “Some of Victoria’s “inherent requirements” amendments may be unconstitutional” (Oct 2, 2016) <https://lawandreligionaustralia.blog/2016/10/02/some-of-victorias-inherent-requirements-amendments-may-be-unconstitutional/> .

type of clash, however, is **not** applicable to this case. In *Viskauskas v Niland* (1983) 153 CLR 280 the High Court ruled that the NSW provisions of the *Anti-Discrimination Act 1975* relating to racial discrimination were inoperative due to the covering of the relevant field by the Commonwealth *Race Discrimination Act 1975*. To overcome that problem, and allow State law on the area of discrimination to have concurrent operation, since that time all the Commonwealth discrimination laws have contained a “non-covering” clause to make it clear that State law on the matter is to be allowed to operate generally, so long as it does not clash in other ways. Such a provision is to be found in s 10 of the SDA:

SDA 10 (2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is **capable of operating concurrently** with this Act. (emphasis added)

This means that Tasmanian law on discrimination may continue to operate, so long as it is “capable of operating concurrently” with the SDA. But what does this mean? Clearly where a person is *bound* to do an act under the Commonwealth law, but *forbidden* from doing it by the State law, that the State law will be inoperative. But the further question that arises here is, suppose a person is *permitted* to do something under the Commonwealth law, but *forbidden* from doing it under State law, is there a relevant clash? In short, the authority of the High Court is that in such a case, the State law is also inoperative. There can be no concurrent operation in such a situation.

One example may be seen, outside the specific area of discrimination law, in *Bitannia Pty Ltd & v Parkline Constructions Pty Ltd* [2006] NSWCA 238. A defence, which was available under Commonwealth law, would have been precluded from being raised if the relevant State law was operative. The NSW Court of Appeal held that, since this was the case, the State law was inoperative to that extent. This was because of “the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law”- at [115]. Another, older, example of this sort of principle can be seen in *Colvin v Bradley Brothers Pty Ltd* [1943] HCA 41; (1943) 68 CLR 151. There Commonwealth law gave a right to employers to employ women on certain machines, but State law prohibited such employment. In the circumstances, the State law was inoperative, as it would have impaired the enjoyment of a right given by the Commonwealth law.

Another case where this issue arose was *Dickson v The Queen* [2010] HCA 30. There Commonwealth law made a conspiracy to steal Commonwealth property a crime in certain circumstances, but Victorian law imposed criminal liability in a broader set of circumstances. The High Court ruled that the Victorian provision was inoperative. At paras [13], [15] they summed up previous authority on the matter in this way:

[13] The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth*³⁴ was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*³⁵ as follows:

"In *Victoria v The Commonwealth*³⁶, Dixon J stated two propositions which are presently material. The first was:

'When a State law, if valid, would **alter, impair or detract** from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.' ...

[15] The passage in *Telstra* which is set out above was introduced by a discussion of earlier authorities which included the following³⁷:

"Further, there will be what Barwick CJ identified as 'direct collision' where **the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided**³⁸. Thus, in *Australian Mutual Provident Society v Goulden*³⁹, in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act 1945 (Cth)*'. A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question⁴⁰. But that is not this case." (emphasis added)

The Court stressed, at [19], that this operation of s 109 was important:

not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.

They concluded that the State law was inoperative in the following passage:

[22] The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian Crimes Act renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth Criminal Code. In the absence of the operation of s 109 of the Constitution, the Victorian Crimes Act will **alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law**. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*⁴¹, the case is one of "direct collision" because **the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law**. (emphasis added)

³⁴ (1937) 58 CLR 618 at 630; [1937] HCA 82.

³⁵ (1999) 197 CLR 61 at 76-77 [28]; [1999] HCA 12. See also *Local Government Association of Queensland (Incorporated) v State of Queensland* [2003] 2 Qd R 354 at 373 [51]; *Loo v Director of Public Prosecutions* (2005) 12 VR 665 at 688 [40].

³⁶ (1937) 58 CLR 618 at 630.

³⁷ (1999) 197 CLR 61 at 76 [27].

³⁸ *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259; see also at 270 per Taylor J, 272 per Menzies J; [1968] HCA 2; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406; [1977] HCA 51; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 335, 338-339; [1987] HCA 13.

³⁹ (1986) 160 CLR 330 at 339; [1986] HCA 24.

⁴⁰ *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 57-58; [1986] HCA 42.

⁴¹ (1968) 117 CLR 253 at 258. See also at 272 per Menzies J.

These remarks are directly applicable the situation created by the “overlapping prohibitions” which would be set up if the Tasmanian law were allowed full operation.

The Cth s 37 SDA would allow a religious organization to adopt a policy that would involve not hiring a person advocating and living out a policy that favoured sex outside marriage (arguably their "marital status"), because hiring such a person would either inflict “injury to the religious susceptibilities” of believers, or not be in conformity with the “doctrines, tenets or beliefs” of the religion.

However, such an organisation, if the Tasmanian law were operative, would be acting unlawfully. It seems fairly clear that this would be a “direct impairment” by a State law of a right given by a Commonwealth law. To adapt the language of the *Dickson* judgment, the Tasmanian law would “alter, impair or detract from the operation of the federal law by proscribing conduct of the [organization] which is left untouched by the federal law”, and “the State law, if allowed to operate, would impose upon the [organization] obligations greater than those provided by the federal law”.

As a result, it seems likely that these provisions of the Tasmanian law would be “inoperative” in this sort of case by virtue of s 109 of the Constitution.

There is also support for this view from one of the main Australian discrimination law textbooks. In Rees, Rice and Allen *Australian Anti-Discrimination Law* (2nd ed; Federation, 2014) at para [3.3.11] the authors explicitly refer to s 38 SDA (providing a general exemption to religious schools) and the fact that the Commonwealth law is “more generous” to employers than some State laws. They say:

There are also instances in which State legislation, if valid, appears to remove or diminish an entitlement granted by Commonwealth law to various organisations to engage in conduct which would otherwise be unlawful discrimination. For instance, s 38 of the Cth SDA... [citing the defence]. In some States, however, conduct of this nature is unlawful because it falls within a general prohibition against discrimination in employment on these particular grounds and the exceptions granted to educational institutions established for religious purposes to engage in conduct which would otherwise be unlawful if performed by others are not as broad as those which exist in the Cth SDA. (emphasis added).

In effect, the authors are saying that s 109 would probably invalidate these differing State provisions. See also previous para [3.3.10] where the authors say that, from an “employee rights” perspective, provisions of the NSW ADA limiting discrimination actions by excluding small businesses (in contrast to the Cth SDA which applies to all businesses) are probably invalid- they say the NSW Act “purports to diminish” the right given to employees. The same language can be about this right given to religious organisations by the Commonwealth SDA, that the Tasmanian law would “purport to diminish” the right.

To sum up, in general, in those areas where the prohibited grounds of discrimination set out in the Commonwealth SDA and State laws overlap- particularly in the specific areas of sex, sexual orientation, marital status, and gender identity – any State laws which provide a more restrictive set of criteria than the Commonwealth law, would remove a liberty given to religious organisations by the Commonwealth law, to make hiring and firing determinations in accordance with the criteria of their actions “conform[ing] to the doctrines, tenets or beliefs of that religion” or doing what is “necessary to avoid injury to the religious susceptibilities of adherents of that religion”. These State laws would would impair the operation of the Commonwealth law, and in respect of those overlapping grounds would be inoperative in accordance with s 109 of the Constitution.

Conclusion

The balancing clauses contained in State, Territory and Commonwealth laws on discrimination are an important part of the current protection of religious freedom in Australia. We have seen in this paper, however, that they are often inconsistent with each other, and have an odd and sometimes apparently arbitrary coverage, or lack of coverage. It would seem to be sensible for there to be national law on this matter, rather than this patchwork of differing provisions. I have recently argued, in my submission to the Federal Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade *Inquiry into the status of the human right to freedom of religion or belief* (as have many others), that it is past time for Australia to have a more rational and wide-ranging protection of religious freedom.⁴² Such protection can really only be given by Federal legislation, based on the external affairs power and Australia’s international obligations on the topic, under art 18 of the ICCPR, and in accordance with other important UN instruments on the topic.

Until that happens, however, it will be important for those who act on behalf of religious organisations and persons to be aware of the specific protections applicable in each jurisdiction. It will also be important to note where any restrictions on freedom of action given by Commonwealth law, are removed by narrower State or Territory law (which may hence be inoperative). And where new proposals are put forward which will have a serious impact on religious freedom, such as in the area of same sex marriage reforms, it will be important for legislators to give high priority to ensuring an appropriate balance of the important human rights involved.

⁴² My submission is No 7 on this page of submissions:
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Submissions .