But under Australian law international treaties are not "incorporated" into our domestic law automatically; Parliaments need to take a further step and pass implementing laws. Unless the Commonwealth or a State/Territory enacts specific legislation, the most that can be said (and this argument has been run in a couple of cases) is that as a matter of judicial discretion in interpreting ambiguous legislation, the courts should presume that Parliament would intend to comply with international law (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.) But so far no statute has been found to be sufficiently unclear in the area of religious freedom for this principle to be applied.

One case, however, where international obligations provided at least one reason for the decision was *Evans v NSW* [2008] FCAFC 130. In this decision a major ground for overturning restrictive NSW regulations that had prohibited the 'annoying' of Catholic World Youth Day participants was that they interfered (without explicit Parliamentary authority) with the fundamental common law right of freedom of speech. Branson & Stone JJ commented:

> 74 Freedom of speech and of the press has long enjoyed **special recognition at common law**. Blackstone described it as 'essential to the nature of a free State': *Commentaries on the Laws of England*, Vol 4 at 151-152. …
>
> 76 In its 1988 decision in *Davis v Commonwealth* (1988) 166 CLR 79, the High Court applied a principle supporting freedom of expression to the process of constitutional characterisation of a Commonwealth law. … In their joint judgment Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said (at 100):
>
> Here the framework of regulation … reaches far beyond the legitimate objects sought to be achieved and **impinges on freedom of expression** by enabling the Authority to regulate the use of common expressions and by making unauthorised use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power…
>
> 78 The present case is not about characterisation of a law for the purpose of assessing its validity under the Constitution of the Commonwealth. The judgments in *Davis* 166 CLR 79 however support the general proposition that **freedom of expression in Australia is a powerful consideration fav**ouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow. [**emphases** added]

The evidence in that case disclosed that Evans and other members of the public were planning to demonstrate against what they perceived to be bad policies and doctrines taught by the Roman Catholic Church. The challenged regulations would have restricted their right to do so by requiring them not to 'annoy' participants. The Federal Court held that these regulations should be struck down on the principle that the head legislation enacted by the NSW Parliament should not be interpreted, in the absence of express words, as allowing regulations to be made which interfered with this fundamental common law right. This principle, known somewhat obscurely as the "principle of legality", was also applied by some members of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) and in a related case concerning freedom of speech, *Monis v The Queen* [2013] HCA 4 (27 February 2013).

The Federal Court in *Evans,* however, also incidentally referred to the value of religious freedom, supporting this by reference to the general terms of s 116 of the *Constitution*, and to Art 18 of the UDHR.

> 79 In the context of World Youth Day it is necessary to acknowledge that another important freedom generally accepted in Australian society is freedom of religious belief and expression. Section 116 of the Constitution bars the Commonwealth from making any law prohibiting the free exercise of any religion. This freedom is recognised in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights which, in Art 18, 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 belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Of course international conventions can provide a model to encourage legislation, and as we will see in a moment there is some local legislation that to some extent specifically adopts the ICCPR.

There was an attempt made to develop an argument along these lines in one of the cases noted previously. In *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 (12 August 2011) the applicants argued, in addition to their s 116 point, that the court ought to interpret the native title legislation in accordance with the ICCPR to allow recognition of their freedom of religion. The trial judge and the Full Court rejected this claim. The legislation had no relevant "gaps" that the international obligations could fill. The Full Court said:

> [106] … neither logic nor the judgment in *Teoh* support the use of Australia's international obligations in the interpretation of the provisions under consideration in the absence of any ambiguity in the language of the provisions.
>
> [107] If a provision has a clear meaning then that meaning either reflects Australia's international obligations or it does not. There is no scope for the application of any canon of construction to establish the meaning. But where there is more than one possible meaning of the provision, the canon of construction favouring Australia's international obligations is available to identify the intended meaning. In other words, the canon of construction only has work to do where the provision is open to more than one interpretation. This is the reason for the reference in the judgment in *Teoh* to the use of the canon of construction for the purpose of resolution of ambiguity.
>
> [108] Thus, the primary judge was correct to hold that a statutory provision will be construed so as to conform with Australia's international obligations only in order to resolve ambiguity in the language of the provision.
>
> [109] As explained earlier in these reasons, there is no relevant ambiguity in s 38 and s 39 of the Act, and hence no occasion for resort to the international obligations contained in the ICCPR or the UN Declaration arose. The primary judge was correct to so determine.

A more recent decision where more positive reference was made to international religious freedom principles was *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014).

The circumstances arose out of the fact that a number of congregations ("wards") of the LDS (Mormon) church in the Brisbane area had previously been conducting church meetings in the Samoan language, for the benefit of members of the Samoan LDS community. A re-organisation of the church resources, including it seems a desire to make the church meetings more accessible to the broader community,[12] led to a decision that the previous Samoan services would from now on be conducted in English, and members of the church were forbidden from speaking at the front of the meetings, praying or singing in any language other than English.

This action was brought as a class action by a number of Samoan-speaking church members, against the leadership of the church, with the aim of restoring some at least of the Samoan meetings. The actions were brought under under s 46PO of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), alleging unlawful discrimination by the Church against the applicants as members of the Church. Racial discrimination was alleged, pursuant to s 9 of the *Racial Discrimination Act* 1975 (Cth) ("RDA"). The claim was heard by a Federal Magistrate and failed, and this appeal then ensued to the Full Court of the Federal Court of Australia.

While the claim was one for racial discrimination, freedom of religion was one of the main issues at stake. Under s 9(1) RDA:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of **any human right or fundamental freedom** in the political, economic, social, cultural or any other field of public life. (emphasis added)

The definition of "human right or fundamental freedom" refers to art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, ("the RD Convention") which in turn includes, in para (d)(vii), "The right to freedom of thought, conscience and religion". So the issue came down to whether there had been denial of a religious freedom right on a racially discriminatory basis (although other rights, such a right to "nationality", including use of one's own language, and a right to freedom of expression, were also said to be engaged).

The Full Court noted that at some points the Magistrate had identified the relevant right as a right to have public worship "provided" in the Samoan language, whereas in fact the claim was not simply that it was not "provided" from the front, but also that the congregation members were not able to "join in" with singing and other activities in Samoan. To this extent they ruled that the Magistrate had made an error. The relevant question was best framed as, whether there was a "right to worship publicly as a group in their native language"?[13]

Having identified the question, the Full Court went on to say that there was no such right established by the relevant international instruments. The relevant paragraph of the RD Convention referred to

> (iii) The right to nationality;
>
> …

[12] It was also noted, at [19] that "many of the Samoan youth who attended these wards were unable to speak the Samoan language".
[13] See para [50].

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

(viii) The right to freedom of opinion and expression;

…

As the court said, it was not clear exactly how these three rights, or any alleged combination of them, gave rise to a right to public worship in a particular language:

> 54 The appellant did not explain precisely how it was that an alleged "right" to worship publicly as a group in one's native language existed separately and apart from these three nominated rights. The closest the appellant came to an explanation was senior counsel's statement that the asserted "right" was the expression of one or other or all of the three article 5 rights (ie, article 5(d)(iii), (vii) and (viii)). It was unclear precisely how this was put.

For those who are familiar with the popular movie *The Castle*, the argument here sounds suspiciously like "It's the vibe...!"[14] Nevertheless, the Full Court spent some time carefully examining the relevant instruments to see if indeed such a right could be found.

For our purposes there were some important features of this discussion. It was noted that, in accordance with the general principles of interpretation adopted by Australian courts, extrinsic material such as comments by UN bodies and decisions of other courts and tribunals around the world could be taken into account in determining the content of the fundamental rights and freedoms at stake.

In particular, comments on the meaning of rights under the *International Covenant on Civil and Political Rights* (the ICCPR) could be taken into account, where those rights mirrored those referred to in art 5 of the RD Convention- see [62]. As well as art 18 of the ICCPR dealing with religious freedom, art 27 referred to minority rights. In particular, in addition to referring to the UN material, the jurisprudence of the European Court of Human Rights, on the application of analogous rights under the European Convention on Human Rights, was a valuable source of guidance on the issues- see [70].

In the end, however, the claim failed because the various instruments could not be read to find the claimed right; as the court commented:

> 68 It may therefore be accepted that, as elaborated by article 18 of the ICCPR, the right to freedom of religion referred to in article 5(d)(vii) of CERD includes personal freedom, either individually or as a group, to engage in public worship. Article 27 of the ICCPR also recognises, in the case of a linguistic minority, a personal right to use the minority language amongst the minority group, in private and in public. The argument for the appellants at the hearing of the appeal was, in substance, that these rights merged into a right to worship publicly as a group in Samoan within the Church. For the reasons outlined below, this argument fails.

In effect, the ensuing discussion of the freedom of religion area adopted decisions of the ECHR which held that, while religious freedom was an important right, and indeed while it extended as a right to religious organisations acting on behalf of their members, as well as to the individual members,[15] in essence members of a religious body did not enjoy religious freedom rights that could be asserted against their religious body. The court made the point by the citation of a recent ECHR decision:

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[14] See the first minute of the clip at http://www.youtube.com/watch?v=wJuXIq7OazQ .

[15] See para [76], citing Julian Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227. For more recent work by Professor Rivers on the rights of religious organisations see *The law of organized religions: between establishment and secularism* (Oxford : Oxford University Press, 2010).

> 78 …[I]n the case of dissent from Church rulings, an individual's freedom of religion is protected by the right to leave the Church. Thus, in *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10 ("*Sindicatul "Pastorul Cel Bun" v Romania*"), the Grand Chamber, overturning a controversial and earlier decision, reiterated (at [136] to [137]) that:
>
> > The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable** …
> >
> > In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. **Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his [or her] freedom to leave the community** (see *Mirolubovs and Others v Latvia*, no 798/05, § 80, 15 September 2009).
>
> (Emphasis added)

While conceding that in some cases it may be effectively "impossible" for a person to leave a religious community if they disagreed with the leadership, the Court held that there was no evidence that this was the case here. The religious freedom of the Samoan worshippers was protected by their ability to leave the congregations concerned and to gather in other places where they could worship in their own language. In effect, to grant a right to worship in their own language to a group within the churches, contrary to decisions that had been made by church leaders, would interfere with the freedom of the church leadership to lay down principles for the church. As they later commented in also rejecting an argument based on "minority rights" under art 27 of the ICCPR, at [102], it was important to recognise "the protection afforded by article 18 of the Covenant for the religious freedom of the Church on behalf of its adherents".

In the end, then, the court rejected the claims of racial discrimination, on the basis that there had been no interference with the "fundamental human rights" of the Samoan speakers, including no interference with their freedom of religion.

Nevertheless, the case is very important as one of the first occasions where there has been an extended comment by an appellate court on the application of international religious freedom principles to Australian law.

(It should be noted that there was also some comment on the application of international religious freedom principles in the Victorian Court of Appeal decision of *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). I have previously written on this decision and suggested that on the whole the decision was wrong, and the use of international sources not very impressive. The decision is discussed below on other issues.)[16]

(b) Common law protection for religious freedom?

If international law does not provide strong religious freedom protection, can it be found in the common law tradition? While the common law has a long tradition of

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

protecting freedoms in general, there is not a strong common law religious freedom tradition. In fact, of course, the common law developed in a country (Great Britain) where there was an established church, the Church of England, and at various points in history there were legal disabilities imposed on those from other religions.

Ahdar and Leigh in their important discussion of the issues (see their book on the Further Reading list) are generally sceptical about such a common law right. The closest the common law comes, perhaps, is a series of cases where the courts have interpreted private testamentary gifts by testators that were clearly designed to favour a particular religion in such a way that beneficiaries who were not of that religion might be able to take the gift.[17] However, while one could argue that this approach supports the freedom of religion of the beneficiaries, it may be said that at the same time it undermines the freedom of religious choice made by the testator!

In Australia there was one attempt to invoke an implied religious freedom principle, which effectively failed. In *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376 the Grace Bible Church was running a non-Government school but had not received approval from the State educational authorities. They were convicted of an offence and fined. On appeal their argument was that the Church had a religious objection to being required to have their curriculum approved by the State, and that, as Zelling J summarised it at 377:

> there is an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament.

As might perhaps have been expected, their argument did not succeed. The judgments of the Supreme Court are interesting but all conclude that there is no general "inalienable" right of religious freedom, for the sort of reasons we have already noted. Zelling J commented that s 116 clearly only applies to the Commonwealth, not to the States, and there was no general common law right of religious freedom which could be said to have been inherited by SA, referring to the laws concerning heresy and blasphemy. The comment from Rich J in the *JW's case* at 149, where his Honour said "It may be said that religious liberty and religious equality are now complete", was "not true in public law when Rich J wrote those words, nor is it true now" (Zelling J, at 379).

His Honour gave an interesting review of the early history of South Australia, noting that from an early time the State refused to fund religious bodies. But none of this history established a fetter on the power of the State Parliament.

The other members of the Full Court agreed, although Millhouse J said that he had been interested to read the comment of the High Court in the *Church of the New Faith* decision that I have used at the top of this paper.

There was a very interesting later South Australian decision, which touched on some of these issues. In *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, [1995] SASC 5532 (25 August 1995) there was an attempt to prevent a Commission of Inquiry examining the question whether certain religious beliefs which had been said to be "secret women's business" of the Ngarrindjeri were genuine and long-standing beliefs, or whether, as alleged by some,

[17] See Ahdar & Leigh, 2nd ed at 130.

they had been invented in recent years. (The beliefs had been involved in the question whether a particular bridge should be constructed.)[18]

Since the inquiry was set up by the State government s 116 was not directly relevant. An argument was made, however, that "freedom of religion" was an important common law principle, which the court should not allow to be lightly over-turned. In the end the members of the SA Full Court agreed that simply making an inquiry into whether the beliefs were genuinely held, or not, did not of itself amount to an undue infringement of the freedom of religion of those who were said to hold the beliefs. Nevertheless, there were some interesting comments made about the importance of freedom of religion.

Doyle CJ commented:

> I accept that **freedom of religion is one of the fundamental freedoms** which entitles Australians to call our society a free society. **I accept that statutes are presumed not to intend to affect this freedom**, although in the end the question is one of Parliamentary intention. But in my opinion it cannot be said that conduct of the sort in question here (the institution and conduct of a mere inquiry), to the extent that it affects freedom of religion is, as such, unlawful at common law. Nor, in my opinion, does this freedom so limit the powers of the executive government that this inquiry, which it considers appropriate in the public interest, is beyond the power of the executive government if or to the extent that it affects freedom of religion…
>
> For the purpose of these reasons I have assumed, without deciding, that the "women's business" the possible fabrication of which is the subject of inquiry, is an aspect of Aboriginal culture which is protected by the fundamental principle of freedom of religion. I likewise assume, without deciding, that the **inquiry will in fact intrude upon the freedom** of certain Ngarrindjeri people to hold and practise their religion, because of the practical compulsion to submit to scrutiny the substance of their beliefs and to disclose matters which they regard as secret. I stress that I have not decided either of these matters. (at 64 SASR 552-553) (emphasis added)

It seems to have been arguable that the conduct of the inquiry might have infringed upon a religious belief that information had to be kept secret, but even if so the strength of any common law presumption was not sufficient to over-ride the specific power of the executive government to cause the issue to be inquired into.

Debelle J agreed with the Chief Justice, but expanded on some issues:

> For the purposes of this action only, I am prepared to assume that the **freedom of religion is a fundamental freedom in our society**. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society: *Church of the New Faith v The Commission of Payroll Tax (Victoria)* (1983) 154 CLR 120, per Mason ACJ and Brennan J at 130. But the freedom of religion like a number of other fundamental freedoms is **not absolute**. The freedom is not inalienable and may be regulated by statute: *Grace Bible Church v Reedman* (1984) 36 SASR 376. The extent to which this fundamental freedom renders other conduct unlawful at common law is open to serious question. Even if the holding of the Royal Commission constitutes an impairment of the freedom of religion, it is not clear whether as a matter of law it has the consequence that the impairment is unlawful or otherwise gives rise to any right which avails the plaintiff… (at 554-555)
>
> The Royal Commissioner has the power to coerce witnesses: see s11 of the Royal Commissions Act 1917. It may be a grave insult or at least an affront to a person who professes a particular belief to be required under pain of some penalty to attend and answer questions in respect of that belief. Compulsion to attend before a commission of inquiry and answer questions as to one's belief leads to justifiable concerns of a potential to interfere with the freedom to adopt and practise a religion of one's choice. The line between a mere inquiry and a step which impairs freedom of

[18] Those interested in Constitutional issues will note that this was part of the well-known "Hindmarsh Island Bridge" litigation, different aspects of which were considered in *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.

> religion may be very fine and at times be very difficult to draw. But that is the kind of task which the courts are not uncommonly called upon to undertake. Having regard to the nature of the inquiry, I do not think there is any impairment of the free exercise of religion.
>
> The inquiry stems from allegations that the women's business is a fabrication. Included in those who allege that the women's business is a fabrication are persons who say they are members of the Ngarrindjeri nation. The inquiry may, therefore, involve an examination of the beliefs of Ngarrindjeri women to determine the content of their belief. **That inquiry does not require an examination of the truth or falsity of the belief**. It is not concerned to establish whether the beliefs are consistent with that part of Aboriginal customary law and tradition which constitutes the religious beliefs of the Ngarrindjeri nation. It is not concerned to establish whether the belief is a rank heresy**. Instead, it is concerned with determining whether the asserted women's business has been recently manufactured by a group of Ngarrindjeri women**. One of the reasons for the inquiry is that a group of Ngarrindjeri women deny that the asserted women's business ever formed part of the religious beliefs of the Ngarrindjeri. The inquiry whether the asserted women's business forms part of the beliefs of Ngarrindjeri women will involve, among other things, an examination of the allegations as to fabrication, an examination of how long the belief as to the asserted women's business has existed and, if it is a recent held belief, when and how it came into existence. There may be difficulties in proving these matters, difficulties which are compounded because Aboriginal law and tradition is an oral tradition. But these are matters which are capable of being established by evidence of extrinsic facts. It is the limited nature of this inquiry which prevents it from being an impairment of the freedom of the Ngarrindjeri women to exercise their religious belief.
>
> **It is necessary to maintain a balance between the legitimate interests of those who seek to pursue a course of conduct and those who have a religious belief which seeks to prevent the desired course of conduct**. If it is not possible to inquire whether the tenets of the asserted religious belief require that the conduct cease or to inquire whether the person who proclaims the belief genuinely believes it or to inquire whether it has been fabricated, those who are prevented from pursuing their legitimate interests are adversely affected without a proper opportunity of examining the case against them. As already mentioned, the freedom of religion is the paradigm freedom of conscience. No civilised society would seek to impose an improper restraint upon that freedom. Equally, no civilised society would wish to permit the freedom to be unfairly or improperly used as a means of preventing others from pursuing their legitimate interests. If an inquiry is constituted on the ground that the asserted belief is a fabrication, great care must be undertaken to ensure that there are proper grounds for the inquiry and that allegations of fabrication are not used as a cloak to hide the fact that the intention is to circumscribe the free exercise of that religion. The secret aspects of Aboriginal law and tradition deserve proper respect and care must be taken to ensure that there is no unlawful impairment of the freedom of Aboriginal people to practise their religion. But the nature of this particular inquiry and the manner in which it is being conducted do not impair the freedom of the Ngarrindjeri women to exercise their religious beliefs. (at 555-557) (emphasis added)

The decision is an interesting one, because it at least raises the possibility that a common law protection of free exercise is possible within the bounds of the "principle of legality", although of course it can be over-ridden if Parliament (or, perhaps, the Executive) choose to do so.

To sum up on this question: we have seen it is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law making by Parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a "presumption" which would inform courts when interpreting legislation. The "principle of legality" means that a court, when reading an Act, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that "freedom of religion" is, or perhaps has now become, a fundamental common law right,

as "the essence of a free society", then it may provide guidance for courts interpreting legislation.

(c) Protection under specific State and Territory charters of rights

As most people are aware, Australia has no general Federal "Charter of Rights" (unlike the US or even, today, the UK where the European Convention on Human Rights has to some extent been incorporated into local law.) But individual jurisdictions have chosen to implement such charters, and both the State of Victoria (*Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 14) and the Australian Capital Territory (*Human Rights Act* 2004 (ACT) s 14) have enacted general human rights instruments which contain explicit protections for religious freedom.[19]

So far there have been few decisions considering these provisions.

A fascinating attempt to use s 14 of the Victorian Charter was made in *Valentine v Emergency Services Superannuation Board (General)* [2010] VCAT 2130 (29 July 2010), although ultimately unsuccessful. The widow of a former ambulance driver had her pension terminated on re-marriage, some time before 2008 when the Charter commenced. She was later told that the pension would be reinstated if she divorced her current husband or he died! She complained that, in effect, she was being penalised on the basis of her religion, because her religious beliefs meant that she could not in all conscience seek a divorce**.**

The Tribunal ruled against her because all the relevant events had happened before the Charter commenced. But there were interesting comments made at the end of the judgment:

> [102] An argument … may be made, namely the provision of a penalty for Mrs Valentine for living in lawful matrimony with Mr Valentine rather than *'in sin'* is in violation of her religious beliefs based on the right protected by Section 14 of the Charter. The oral argument in this proceeding did not take me to authorities on the scope which this protected right has been accorded in international human rights jurisprudence. In light of the conclusions which I have reached as to the non-operation of Section 32 of the Charter for the purposes of this dispute it is inappropriate therefore for me to say too much, beyond noting that there does seem to be some plausibility to the contention that a legal interpretation which would impose a significant financial penalty upon a citizen who adhered to her religious beliefs relative to matrimony could be regarded as a coercion or a restraint in her freedom to have or adopt a religion or belief in practice.

While it did not directly involve the application of s 14, the decision in *Aitken v The State of Victoria, Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) mentioned the provision in passing. In this case, parents of children at a State school objected to the fact that Scripture classes (special religious instruction) were offered at the school their children attended, but their children were "singled out" because they had withdrawn them from the class. The Tribunal found that there had been no adverse impact on the children, and hence that there was no breach of the Charter or the legislation on discrimination.

However, the Tribunal commented briefly on the accepted approach to applying the Charter in interpreting Victorian legislation:

[19] There are moves to introduce similar legislation in Queensland, though at the time of writing no legislation had been introduced.

> [97] The parties and the Commission submitted, that on current authority, the proper application of the Charter required first, ascertaining the ordinary meaning of the provision applying normal principles of statutory construction. Secondly, if on its ordinary construction the provision limits a right protected by the Charter, in this case those recognized by ss 14(1), 8(2) and (3), the next step is to determine whether the limitation of that right is demonstrably justified as a reasonable limit in accordance with s 7(2) of the Charter. Thirdly, if the limitation is not justifiable, an attempt had to be made to give the provision a meaning that is compatible with human rights and that is also consistent with the purpose of the provision. The respondent bore the onus of demonstrating that the limitation on the right was justifiable.

The decision of the trial judge here was upheld on appeal in *Aitken & Ors v State of Victoria* [2013] VSCA 28 (22 February 2013).

A significant reference to s 14 of the Victorian Charter was found in the decision of the Victorian Court of Appeal in *Hoskin v Greater Bendigo City Council* [2015] VSCA 350 (16 December 2015). This was an appeal from a decision of the Council to allow the construction of an Islamic mosque in Bendigo. The Court of Appeal held that the Council had appropriately considered the relevant "social impacts" in approving the mosque. In the course of the judgment, however, they noted that the Council had been obliged to take into account important human rights provisions, including s 14:

> [22] In support of this case, the permit applicant submits that the P&E Act is to be construed in a manner which gives effect to the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter').
>
> [23] Sections 14 and 19 of the Charter seek to protect the human rights to freedom of culture, religion and belief. Section 14 states:
>
> (1) *Every person has the right to freedom of thought, conscience, religion and belief, including—*
>
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
>
> (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private*.
>
> (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.[20]
>
> [24] Section 19(1) of the Charter states:
>
> *All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language*.[21]
>
> [25] Section 32(1) of the Charter provides:
>
> *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*.[22]

---

20 Emphasis added.
21 Emphasis added.
22 Emphasis added.

> [26] We accept that the provisions of ss 14 and 19(1) of the Charter inform the construction of the objectives of planning as they are stated in s 4 of the P&E Act and the terms of s 60(1)(f) of the Act relating to significant social effects upon which the debate in this matter ultimately focussed….
>
> [31] The Charter is relevant in this case not only to the proper construction of the objectives of planning in Victoria and to the proper understanding of the notion of significant social effects. It also imposed an obligation upon the Council and, on review, the Tribunal to have regard to the human rights of the proposed future users of the mosque when deciding whether or not to grant the permit.

The court also noted similar comments about the need to support religious freedom which had been made by McHugh J in *Canterbury Municipal Council v Moslem Alawy Society Ltd*[23], although those comments were made in the context of general principles rather than a specific statement of human rights. An earlier Tribunal decision involving a mosque application, *Rutherford & Ors v Hume CC* [2014] VCAT 786 (14 July 2014) had also referred to s 14 in stressing that religious freedom rights supported the right to build a place for religious worship.

There is an important recent book by N Villaroman, *Treading on Sacred Grounds: Places of Worship, Local Planning and Religious Freedom in Australia*. (Leiden: Brill, 2015) dealing with these issues.[24]

A very interesting and challenging set of facts involving a claim based (in part) on s 14 is to be found in *Fraser v Walker* [2015] VCC 1911 (19 November 2015). A person who was standing outside an abortion clinic in Melbourne was displaying a poster that featured pictures of aborted fetuses. She was charged with, and convicted of, "displaying an obscene figure in a public place" contrary to s 17(1)(b) of the *Summary Offences Act* 1966 (Vic). There were a number of interpretive and human rights issues raised in her defence; the County Court, for example, decided that something could be "obscene" even if it had no sexual connotations, but was simply "offensive or disgusting" – para [21].

But one of the grounds of defence was that display of the poster was part of her "right to freedom of conscience and religion"- [38]. This, along with other human rights defences, was rejected. The Judge commented:

> 49 I accept Miss Ruddle's submission that the appellant's right to religious freedom does not provide a legal immunity permitting her to breach the provision of the Act in question. Assuming the appellant's stance on abortion comes from her religious belief, the display of obscene figures is not part of religion nor can it be said the display is done in furtherance of religion.

I think there might be more to be said on this point, especially as opposition to "abortion on demand" is a well-known religious stance of the Roman Catholic church. Clearly it is a difficult question, and the court ought to have weighed up the religious freedom rights of the activist here in light of the emotional and other harm that might be caused to those seeking to use the services of the clinic. But I am not so sure that it should have been summarily dismissed as in no way connected with her religion.

The decision of the County Court in this case was upheld on appeal to a single Judge of the Supreme Court of Victoria, in *Fraser v County Court of Victoria & Anor*

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[23] (1985) 1 NSWLR 525.

[24] For a review of the book, see 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) *J of Church and State* 387-389; DOI: https://doi.org/10.1093/jcs/csw013.

[2017] VSC 83 (21 March 2017). The application of the right to religious freedom was not considered as one of the grounds of appeal.[25]

In the ACT, there is an interesting decision of Refshauge J in *R v AM* [2010] ACTSC 149 (15 November 2010) which considers some elements of s 14 of the ACT HRA. I will not go into it in detail, as the claim there related to freedom of "conscience" rather than religion, but it is well consulting to see how his Honour attempts to spell out when something may be a matter of "conscience". He concludes that there needs to be something of a well-thought-out view rather than a mere opinion. In the circumstances the attempt by AM to use a right of "conscience" to avoid the consequences of breaching a domestic violence order failed, partly because there was no clearly articulated "conscience" issue involved.

Section 14 was mentioned, although in the end it was not necessary to apply it, in *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council* (Administrative Review) [2012] ACAT 81 (21 December 2012). There the Roman Catholic Diocese was applying to revoke a heritage declaration over a parish church so that it could undertake a redevelopment. However, 3 members of the parish wanted to apply to be heard on the heritage proceedings because they wanted to support the declaration. The Tribunal noted that arguably their rights under s 14 might be relevant (especially the rights involving "worship… as a community"), but concluded that even without taking s 14 into account the parishioners all had a sufficient "interest" in the matter to be able to be heard.

There appears to have been no other substantive consideration of the ACT s 14, although it was mentioned briefly in passing in *Buzzacott v R* [2005] ACTCA 7 (1 March 2005), where it seems that a possible claim based on freedom of religion was being used an excuse for the theft of a bronze coat-of-arms from Parliament House and its installation at a "tent embassy"- but it was not given any detailed discussion.

There seems little doubt that, as time goes on, these Charter provisions will provide further examples of claims for religious freedom. In general they do not provide "direct" remedies, but they do provide an avenue whereby a court may declare that a breach of a right has occurred, and they certainly provide an "interpretative" framework, which may influence the way legislation is to be read.[26]

It should be noted also that there is a very little-known provision in the Tasmanian Constitution, s 46 of the *Constitution Act* 1934 (Tas), which "guarantees to every citizen" "free profession and practice of religion… subject to public order and morality". The provision had apparently never been considered by the courts until the decision of the Federal Court in *Corneloup v Launceston City Council* [2016] FCA 974 (19 August 2016) at [38].

In that case Mr Corneloup (who was one of the plaintiffs in the *Adelaide Preachers case*, *AG (SA) v Adelaide City Corpn* (2013) 249 CLR 1 dealing with religious free speech) wanted to preach public in Launceston in Tasmania. He was prevented from doing so by an officer of the Council refusing him a permit, applying what she thought

[25] For a detailed analysis of the appeal, see my blog post, "Abortion, Obscenity and Free Speech" (March 26, 2017) https://lawandreligionaustralia.blog/2017/03/26/abortion-obscenity-and-free-speech/ .
[26] For further comment on these provisions see ch 5 of the Evans text, and the discussion in Evans & Evans (2008).

were relevant Guidelines, which regarded "religious spruikers/hawkers" as not able to speak. In fact, when the relevant by-laws were examined the Federal Court (Tracey J) held that the officer had not been authorised to make the decision, and in any event had been unlawfully applying a "blanket prohibition" when the by-laws required a reasoned decision to be made on each occasion. As a result the order refusing a permit was quashed, and the Council directed to apply the law properly.

Mr Corneloup had also challenged the decision on Federal Constitutional grounds (impairment of right to freely communicate on political matters), and on the basis of s 46 of the Tasmanian *Constitution Act*. Since the refusal was being quashed on administrative law grounds Tracey J did not give the constitutional grounds detailed consideration. But he said this about the s 46 arguments:

> [36] Mr Corneloup's other constitutional ground was pressed in reliance on s 46 of the *Constitution Act 1934* (Tas). This section, which was introduced into the State Constitution in 1934, provides that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."
>
> [37] Again, Mr Corneloup's argument focussed on the Guidelines rather than the Malls By-Law. He claimed that, as a citizen, he was entitled to the "benefit" of s 46. Preaching was one aspect of the practise of his religion. The Guidelines prevented him from preaching in the malls and, as a result, contravened s 46(1) of the Constitution Act.
>
> [38] Given the inapplicability of the Guidelines it is not necessary to pursue this ground in any detail. Had it been necessary to do so Mr Corneloup's argument would have confronted a number of difficulties. The first is that s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified "guarantee" has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice: see *McGee v Attorney-General* [1973] IESC 2; [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the "guarantee". In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.

It is submitted that, even if s 46 does not have an "over-riding" role, it might have a part to play as an "interpretive" principle under the doctrine of "legality" mentioned before, so that a court should strive to read any Tasmanian legislation as not interfering with religious freedom to the maximum extent possible. It will be interesting to see if s 46 plays a role in the future.

(d) Discrimination laws and "Balancing provisions"

Finally, freedom of religion is also protected in two different ways under legislation that prohibits discrimination around Australia.

The **first** is that in most jurisdictions (all except NSW and the Commonwealth), one of the grounds of unlawful discrimination is religious belief, so that it would be unlawful to sack someone, or deny them services, on the grounds of their religious belief, where this was irrelevant to their employment or receiving the relevant services.

The jurisdictions where it is currently unlawful to discriminate against someone on the grounds of their religious commitment are:

- Qld- *ADA* 1991, s 7(i) "religious belief or religious activity";

- Tas- *ADA* 1998, s 16 (o) and (p): (o) "religious belief or affiliation;" (p) "religious activity";
- Vic- *Equal Opportunity Act* 2010, s 6(n) "religious belief or activity";
- WA- *EOA* 1984- Part IV of the Act deals with discrimination on the ground of "religious or political conviction" (see s 53);
- ACT- *Discrimination Act* 1991, s 7(i) "religious or political conviction";
- NT- *ADA* 1992, s 19(1)(m) "religious belief or activity".
- SA- no broad protection, but a specific provision in s85T(1)(f) of the *Equal Opportunity Act* 1984 (SA) which prohibits discrimination in certain defined areas on the basis of "religious appearance or dress."

There are not many decisions on these provisions.[27] There are two that go into the issues in a bit more detail, however.

In *McIntosh, Ahmad v TAFE Tasmania* [2003] TASADT 14 (10 November 2003) a claim for religious discrimination was made against the TAFE for refusing to provide a separate "prayer room" which the Muslim employee could use for prayer. The Tribunal concluded that there was no discrimination, on the basis that any other member of staff who wanted a room set aside for their own purposes would also have been declined! The case notes that some accommodation had been made in rostering to allow the employee to attend a Mosque on Fridays.

The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 also raised an issue of discrimination on the basis of religion. Here a lady who was in charge of a local St Vincent de Paul branch was told that she had to step down as she was not a Roman Catholic. There was an attempt to apply the provision of the Qld legislation which allowed a "religious body" to be exempt from the Act in terms of appointment of priests and ministers, training of such, and appointment of people to carry out "religious observances".[28]

In the end the Tribunal found that the provision did not apply because the St Vincent de Paul Society was not a "religious body"! This somewhat surprising conclusion was expressed as follows:

> [76] On my reading of the constitution documents, the Society is not a religious body. It is a Society of lay faithful, **closely associated with the Catholic Church**, and one of its objectives (perhaps its **primary objective) is a spiritual one**, involving **members bearing witness to Christ** by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. **That is not enough**, in my opinion, to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).
>
> [77] Likewise, and despite the particulars which have been provided of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves "religious observance or practice". (emphasis added)

[27] For comment on some, see C Evans, *Legal Protection of Religious Freedom in Australia* (Sydney: Federation Press, 2012) at 144-147.

[28] The relevant provision was s 109 of the Qld ADA, which was virtually identical to s 37 of the Commonwealth SDA (although since the Commonwealth does not have a prohibition on religious discrimination, s 37 itself is not directly relevant- it relates to sex discrimination.)

While most people would see "Vinnies" as providing services to the poor rather than religious services, it does seem a bit odd that an organisation which can be described as it is in para [76] is not "religious".[29]

A recent case where a claim of "religious discrimination" failed was *Jason Camp on behalf of Charlotte Camp v Director General, Department of Education* [2017] WASAT 79 (29 May 2017), where the Tribunal held that it was not discriminatory against an atheist pupil for a school to offer a "school creed" to be recited at fortnightly assemblies, which contained a line mentioning God. The students had been told they need not recite this line.[30]

Second, and related to this, all jurisdictions whose laws prohibit discrimination on various grounds, have included provisions that are designed to "balance" religious freedom with the right not to be discriminated against.[31] So that, for example, while there is a general prohibition on employment decisions being made on the basis of gender, all jurisdictions allow ***churches or other religious organisations*** to decide only to appoint male clergy, because that is seen by some religious groups as a key part of their teachings.[32] Agree with these teachings or not, the law takes the view that it reasonably preserves the religious freedom of believers in these groups, and the groups as a whole, to allow their religious freedom to be exercised in this way.

Interestingly, as well as these general provisions covering religious bodies, there is one that seems to be unique to Queensland governing access to "sacred sites". Section 48 of the ADA 1991 (Qld) provides:

> **48 Sites of cultural or religious significance**
>
> A person may restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction—
>
> (a) is in accordance with the culture concerned or the doctrine of the religion concerned; and
>
> (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

While this provision applies to a "person" generally, presumably it will mostly be used by those in charge of religious groups. One can certainly imagine it being invoked by an elder from an indigenous clan wanting to keep, say, female tourists away from a site sacred to men.

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[29] This decision seems similar to, and perhaps something of a precursor to, the later decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014), where CYC were held not to be "a body established for religious purposes" under s 75 of the *Equal Opportunity Act* 1995 (Vic). See my note, above n 16, for comment on this issue.

[30] For more detailed comment, see "No religious discrimination where school has optional clause in creed" (21 June, 2017) https://lawandreligionaustralia.blog/2017/06/21/no-religious-discrimination-where-school-has-optional-clause-in-creed/#more-5848 .

[31] For a general academic paper on these sort of provisions, see N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430. For a more detailed review of all "religious balancing clauses" in Australian discrimination legislation, see N Foster, "Protecting Religious Freedom in Australia Through Legislative Balancing Clauses" *Occasional papers on Law and Religion* (2017) at: http://works.bepress.com/neil_foster/111/ , presented at the *Freedom 17: Religious Freedom in a Secular Age?* Conference, Freedom for Faith, 14 June, 2017; Canberra, ACT.

[32] See, eg, s 37 of the *Sex Discrimination Act* 1984 (Cth).

However, in most jurisdictions there is a major "gap" in discrimination legislation "balancing provisions" (as I prefer to call them), which is that few recognize that ***individual members of the public***, as well as religious organisations and what we might call "religious professionals", have religious freedom rights that may be impaired by uniform application of discrimination laws.[33]

So, for example, if you run a business and want to apply Christian principles in your business, it may not always be possible to do so, depending on the type of issue that comes up. In NSW, an early decision under the *Anti Discrimination Act* 1977 in *Burke v Tralaggan* [1986] EOC 92-161 held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of "marital status" under s 48 of the Act. (The interesting article by Moens comments on this case.)

Suppose, instead of renting out a flat, you offer accommodation in your own house to casual visitors, in a "bed and breakfast" situation. Do you as an individual have the right under the law, on the basis of religious convictions about sexual behaviour, to decline to accept a booking for a double bed from a gay couple, or from an unmarried couple?

An issue of this sort came up in the UK, in *Bull v Hall* [2013] UKSC 73 (27 November 2013). The Bulls ran a boarding house, and had refused, on grounds of their religious views, to give double bed accommodation to a same sex couple. The Supreme Court upheld the decisions of lower courts fining them for breaching a regulation prohibiting discrimination on sexual orientation grounds. There was a slight difference of opinion within the Court- 3 members found that this was "direct" discrimination, whereas 2 members of the court hold that it was "indirect" discrimination (in my view a better opinion, since the ground of their refusal was expressed to be that the couple were not married, not that they were homosexual.) But even those who held it was indirect discrimination took the view that it could not be justified.

However, it is interesting to note that it may *not* be unlawful to do this in NSW. Under s 48 and s 49ZQ of the ADA 1977 (NSW), which deal with provision of accommodation, there is an exemption that applies where the accommodation in question is one in which the provider also resides, and where less than 6 beds are provided. So it seems that the NSW Parliament has explicitly decided not to require someone who offers accommodation in what is in effect their own house, to comply with the discrimination law in this area. Section 23(3)(a) of the Cth *SDA* 1984 contains a similar exemption, although interestingly it only applies where there are no more than **3** beds provided. (Since the Commonwealth provision will over-ride the State one where there is a clash, the "3 bed" rule is the one that will have to be applied, of course.)

There is something of an irony in the fact that, so far as I can discover, the only major provision in anti-discrimination legislation designed to provide protection for

[33] There is a narrow group of organisations outside those formally classified as "religious organisations" which are able to rely on balancing provisions in the religious area, namely "educational institutions" conducting religiously based schools. See eg *Discrimination Act* 1991 (ACT) ss 33, 44 and 46; ADA 1992 (NT), s 30(2); EOA 1984 (SA) s 34(3). In NSW there are a number of broad exceptions under the legislation applying to "private educational authorities", which would seem to generally exempt all non-Government schools, including most religious schools. But since most religious schools would be run by groups that most members of the public would call "religious" these provisions may not add very much to the protection for religious organisations.

religious freedom for general citizens (as opposed to religious organisations or "professionals") is contained in the law of Victoria.[34] The irony lies in the way that the scope of a similar prior provision has been so narrowly interpreted in a decision of the Victorian Court of Appeal.

The current provision is s 84 of the *Equal Opportunity Act* 2010 (Vic):

> **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.

The former Victorian Act contained a similar provision, s 77 of the *Equal Opportunity Act* 1995 (Vic):

> 77. Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

It was this provision was subject to a very narrow reading in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014). There a Christian camping organization, and its representative Mr Rowe, were sued for sexual orientation discrimination when Mr Rowe indicated that the organization would not accept a booking for a program which would be run for same-sex attracted young people and present homosexuality as a normal and ordinary part of life.

I have discussed the *CYC* decision in some detail in a previous note.[35] But let me briefly summarise the ways in which the Court of Appeal here provided a very narrow reading of the apparently generous provisions of former s 77 of the 1995 Act, which will also impact on future readings of s 84 of the 2010 Act. I will also note the dissenting view of Redlich JA, which may provide guidance in the future should the majority view not remain authoritative. (His Honour's views may also provide guidance in other jurisdictions, where appellate courts at least will need to decide whether or not the *CYC v Cobaw* decision is "clearly wrong" or not, if it is applicable to similar provisions elsewhere.)

On the question of the **necessity** of the relevant action for compliance with beliefs, Maxwell P ruled that Mr Rowe could not rely on s 77, as it was not "necessary" for him to apply sexual standards of morality from his religious beliefs, to other persons. The rule that sex should only be between a heterosexual married couple was a rule of "private morality" and even on its own terms did not have to be applied to others- see [330]. This of course ignored the fact that Mr Rowe was being asked to support a

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[34] There is a provision in s 52(d) of the *Anti-Discrimination Act* 1998 (Tas) which allows a "person" to discriminate "on the ground of religious belief or affiliation or religious activity" insofar as it is in relation to an "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." This provision, then, only applies as an exemption to discrimination on the basis of religion, and so is substantially narrower than the Victorian provision discussed in the text. So far as I am aware there are no reported decisions dealing with the Tasmanian provision.

[35] See above, n 16.

message of the "normality" of homosexual activity with which he fundamentally disagreed.

As Redlich JA in dissent noted:

> [567] … What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community.

Neave JA discussed the meaning of the phrase "necessary… to comply" and concluded that, while there was a subjective, honesty, element in the criterion, it also required some objective consideration. She summed up the requirement as "what a reasonable person would consider necessary … to comply with his genuine religious belief", at [425]. This seems to be correct, so long as "reasonable" means "a reasonable person who belongs to the particular religion".

Redlich JA seems to have adopted a similar criterion:

> [520]…the word 'necessary', in its application under s 77 to religiously motivated action, must mean action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles.

Does the new wording of s 84, "reasonably necessary… to comply", imply that the previous wording of s 77 was a purely subjective criterion? No, Neave JA concluded at [427]. The implication is that the change in s 84 was simply clarifying something that was already present in s 77. On this question Redlich JA seems to have taken a slightly different view. At [531]-[532] his Honour suggested that the contrast with the later provision supported a more "subjective" interpretation of the earlier one. On the other hand, he went on to comment that even if the provision required a showing of "reasonable necessity":

> [533] This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal.

In other words, the narrow approach of the Tribunal would still be inappropriate under the reformulated s 84.[36]

Another aspect of the question of "necessary to comply" was an issue concerning the content of the religious beliefs. How was this to be determined? And was it sufficient if an action was "motivated" by belief, or did it have to be "required".

Maxwell P again took a narrow view of these questions. He accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that "doctrines" of the Christian faith were to be confined to matters

[36] There was some discussion of the differences between the 1995 and the 2010 legislation in the application for special leave to appeal to the High Court: see *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). Counsel for CYC noted that the provisions were very similar, but in the end the High Court refused leave, and one ground seemed to be the fact that it was a question of the interpretation of the old Act. For a review of the Special Leave application see Neil J Foster, (2014) "High Court of Australia declines leave to appeal CYC v Cobaw", at: http://works.bepress.com/neil_foster/89 .

dealt with in the historic Creeds, none of which mentioned sexual relationships- see [276]-[277].

His Honour then further went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact "doctrines". He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise- see [284]. Hence in his Honour's view a refusal of accommodation cannot have been "required" by Christian doctrine. On this point he held that "conforms to" doctrine must mean that there is "no alternative" but to act in this way- [287]. In relation to Mr Rowe his Honour commented at [331]: "The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey."

Neave J at [435] also distinguished between some behaviour being "motivated by … religious beliefs" and being "necessary".

Redlich JA, in contrast to the majority, ruled that it was not necessary or appropriate for the court to make a decision about the "centrality" or "fundamental" nature of religious beliefs.[37] Nor was it necessary to show that the beliefs "compelled" the believer to do the act in question.[38]

In what **spheres of life** is religion allowed to matter?

In the analysis offered by Neave JA at [429] what was at stake was said to be "protecting the right of individuals to hold religious beliefs and express them in worship *and other related activities* and protecting the rights of other members of a pluralist society to be free from discrimination". I have added the emphasis there to highlight words of some concern. There is an unfortunate tendency in some commentary on religious freedom to see it as merely dealing with what goes on in church meetings. This description of religious freedom as relating to "worship and other related activities", where "worship" is no doubt intended to mean "church meetings", gives a very narrow scope to religious freedom.

That this is indeed what her Honour intended can be seen in the next paragraph, where she purports to rely on European jurisprudence to say:

> [430]….Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs *in the context of worship or other religious ceremony*. That is because a person engaged in commercial activities can continue to manifest their beliefs in the *religious sphere*. (emphasis added)

As I point out in my previous paper, there were some European and UK decisions which came very close to holding the very harsh view that the right to freedom of religion in the employment context, for example, could be perfectly well protected by the fact that an employee whose religious freedom was impaired could leave and find another job. But those views have now substantially been rejected by the decision of the European Court of Human Rights in *Eweida v The United Kingdom* [2013] ECHR 37 (15 January 2013)

[37] See [525]: "Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety."
[38] See [520]. It would be sufficient that it be an action that the person "undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles".

at [83] where the court accepted that a person who was sacked for their religious beliefs had indeed experienced a restriction on their religious freedom.

The narrow view, then, that somehow religious freedom protection does not apply in the commercial sphere, or only in a very attenuated way, does not receive support from current European jurisprudence. More importantly, it received no support from the wording of s 77. There were no words excepting "commercial activity" from the requirement to protect an action seen as necessary to comply with religious beliefs.

In effect, as Redlich JA noted in his dissenting judgement on this point in *CYC v Cobaw*, Neave JA was endeavouring to conduct the "balancing" process involved herself. But in fact that balancing process had **already** been conducted by Parliament, which had placed s 77 in its then-applicable form, into the legislation. As Honour noted:

> [474] The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the 'right to religious freedom.' Where the legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has struck a balance between two competing human rights, the task for the Court is not then one of determining how the balance should be struck. The Court must faithfully construe and apply the provisions without preconception or predisposition as to their scope so as to give effect to the legislative intent.

And later:

> [515] When, as is so obviously the case with s 77, Parliament adopts a compromise in which it balances the principle objectives of the Act with competing objectives, a court will be left with the text as the only safe guide to the more specific purpose.[39] Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.[40]

Redlich JA, contrary to the other members of the Court of Appeal, concluded that Mr Rowe *could* make out a defence under s 77. He said that the Tribunal had given an unjustifiably narrow reading of religious freedom, wrongly subordinating the provisions in ss 75 and 77 to "non-discrimination" rights. Instead, Parliament's language had to be read as it stood. There was to be no presumption that religious freedom only applied in a "non-commercial" sphere. Indeed, the other provisions of the 1995 Act showed clearly that the non-discrimination obligations were intended to apply in the workplace and the marketplace. Hence the limits on those obligations drawn by ss 75 and 77 were clearly also operational in those areas.

His Honour concludes a very illuminating discussion on these issues as follows:

> [572] Section 77 excuses an act of discrimination in the marketplace when it is known that to perform the act will facilitate a purpose that is fundamentally inconsistent with the person's belief or principles. The application of the exemption does not depend upon CYC having advertised that it was a religious organisation or provided some means of forewarning that particular uses of their facility would be refused. The absence of such steps could not give rise to the inference that their religious principle or belief did not necessitate the refusal of the request. As adherents to the faith of the Christian Brethren the applicants' beliefs dictated their response upon being informed of the intended use of their facility. Once the applicants were invested with knowledge of the purposes of the WayOut forum and the matters which, as Ms Hackney acknowledged, would inevitably be discussed, the applicants were bound by their principles and beliefs to refuse the use of their facility for that purpose.

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39 *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).

40 *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

It is greatly to be regretted that the majority did not approve these comments. An application for special leave to appeal the decision to the High Court of Australia was refused.[41]

It is perhaps worth noticing at this point the odd fact that the whole *CYC* decision very rarely refers to the fairly similar NSW litigation in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010.)[42] While that case, like *CYC*, involved a "religious organisation", comments also had to be made on the issues concerning the content of doctrine and its relevance to behaviour.

In particular, one of the issues in that case was whether a belief that marriage between a man and a woman was the ideal way for a child to be raised, could be justified as being a "doctrine" of the Wesley Mission. After an initial Tribunal finding to the contrary, the Court of Appeal directed a new hearing, noting that there was a need to consider "all relevant doctrines" of the body concerned.[43] On referral to the Tribunal, it held that the word 'doctrine' was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included moral as well as religious principles.[44] It may be that the Victorian Court of Appeal considered that this final decision, being one of an administrative tribunal not a superior court, was not binding; but it seems unusual that it was not even noted. Certainly some comments of the NSW Court of Appeal were relevant, and in accordance with the High Court's directions to intermediate appellate courts in Australia,[45] should have been taken into account unless regarded as "plainly" wrong. This seems to imply that a future appellate court in Australia which is not in either Victoria or NSW will have choose between these two competing readings of similar legislation, and courts in those States will be required to take differing approaches. All that can be said with confidence is that these issues are still matters of some uncertainty.

3. The future of religious freedom in Australia

Of course there is a great deal more that could be said about all these areas, but hopefully this will provide a useful overview of religious freedom protection in Australia. On the whole our history has been fairly free from serious religious conflicts, and it is be hoped that we can continue to enjoy the freedom to live in accordance with our fundamental beliefs, while respecting the rights of others.

Nevertheless, it seems clear that religious freedom issues will emerge, especially (if examples from other parts of the Western world are taken into account), in connection with anti-discrimination laws relating to sexual orientation, and the possible recognition

[41] See above, n 36.
[42] And see the final stage of the litigation in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010). The one and only reference to the litigation in the *Cobaw* appeal is to be found in a very brief footnote, n 141, to the judgment of Maxwell P, on the fairly technical issue of what "established" means.
[43] See the CA decision, per Allsop P at [9].
[44] *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].
[45] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135]- while the comment relates directly to "uniform national legislation", it would seem to apply here where legislation in most States, while not completely uniform, usually includes some defence relating to "doctrine".

of same sex marriage. It would seem to be wise to increase the domestic protection for religious freedom by legislation that recognizes the strength of this important human right. One option would be to improve and clarify the balancing clauses now contained in Federal and State-based discrimination legislation, to better recognize the legitimate religious freedom interests of believers. Another possibility would be more general religious freedom legislation applying across the Commonwealth by enactment of broad protection based on the external affairs power and specific religious freedom treaties.

I would like to suggest that, given the "patchwork" protection for freedom of religion noted above and in the attached papers, it is past time for consideration to be given at the Commonwealth level for protection of religious freedom to be the subject of specific legislation. The Commonwealth has undertaken to provide serious religious freedom protection by acceding to the ICCPR and under art 18 in particular. It would be appropriate that this commitment be translated into law. Apart from other sources of Commonwealth power, it would seem fairly clear that the external affairs power would support implementation of the international human right to free exercise of religion, limited in the specific ways provided under art 18 but not in other ways that currently narrow its scope.

In the past, ironically, religious groups have been some of the strongest voices resisting formal protection of religious freedom through statute.[46] But it seems likely that many of those concerns can be met by adoption of clear guidelines for judicial decision-making (rather than leaving open-ended discretions to judges), by legislating clear and workable "balancing clauses" to ensure that the religious freedoms of different groups are reasonably accommodated, and by fully (not partially) implementing the narrow "limitations" provisions of art 18(3) ICCPR. The challenge of formulating principles for such legislation should be put to a law reform body in the near future.

Of course in the current atmosphere positions supporting increased religious freedom laws are not popular.[47] It will no doubt require continued public support from various actors to demonstrate the case for such changes. Hopefully those lawyers who themselves are convinced of the importance of religious freedom can have the courage to speak out and lead proposals for reform.

Further Reading

- Ahdar, R & Leigh, I *Religious Freedom and the Liberal State* (2nd ed; Oxford: OUP, 2013)
- Australian Human Rights Commission, *Freedom of religion and belief in 21st century Australia* (Research Report, Canberra, 2011)
- Blackshield, Tony "Religion and Australian constitutional law" in Radan, Peter, Denise Meyerson and Rosalind F. Croucher *Law and religion: God, the state and the common law* (London; New York: Routledge, 2005) 75-106
- Blake, G "God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century" (2009) 31 *Aust Bar Review* 279

[46] See, eg, Patrick Parkinson, "Christian Concerns with the Charter of Rights" (August 31, 2009), Sydney Law School Research Paper No. 09/72; available at SSRN: https://ssrn.com/abstract=1465125.

[47] Compare the popular outcry in the United States when the State of Indiana attempted to introduce a fairly standard version of religious freedom legislation previously adopted by many other States.

- Bruce, Alex "Do Sacred Cows Make the Best Hamburgers?: The Legal Regulation of Religious Slaughter of Animals" [2011] *UNSWLawJl* 16; (2011) 34(1) *University of New South Wales Law Journal* 351
- Dingemans, Sir J et al *The Protections for Religious Rights: Law and Practice* (Oxford: OUP, 2013), esp ch 4, "Comparative Perspectives", Part A "Australia" by P Babie (pp140-159)
- Evans, C & Evans S *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, 2008)
- Gray, Anthony "Section 116 of the Australian Constitution and Dress Restrictions" [2011] *DeakinLawRw* 15; (2011) 16(2) *Deakin Law Review* 293
- Kenny, Justice Susan "The right to freedom of religion" (FCA) [1999] *FedJSchol* 2 available at http://www.austlii.edu.au/au/journals/FedJSchol/1999/2.html
- Moens, G "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195-217
- Pannam, C L "Travelling s 116 with a US Road Map" (1963) 4 *Melb Uni L Rev* 41 {a classic early discussion of the issues}

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