

PM GLYNN
INSTITUTE

Re-evaluating

Religious
freedom
at common
law



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Religious freedom today

Understanding what religious freedom is and how it should be protected is essential if we want to have better conversations about how we disagree and how we live together.

RELIGIOUS FREEDOM AS A HUMAN RIGHT

Religious freedom is one of a set of fundamental human rights recognised in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

RUDDOCK EXPERT PANEL REPORT

In 2018, the Australian Government appointed an expert panel chaired by a former federal attorney-general, Philip Ruddock, to investigate the extent to which religious freedom is currently protected under Australian law, and what reforms might be necessary to protect it better. One of the panel's recommendations was

the creation of a Religious Discrimination Act to ensure that religious belief enjoyed the same protection as other important freedoms, such as the right to be free of gender discrimination, age discrimination and racial discrimination.

WHERE WE'RE AT TODAY

In response to the recommendations of the Ruddock expert panel, the Australian Government prepared draft legislation including a Religious Discrimination Bill 2019, which is yet to be introduced into the Commonwealth Parliament.

It is important that the merit of such an approach is assessed in the context of the complete picture of legal protection of religious freedom that exists in Australia. This includes understanding the extent to which protection for religious freedom may already exist at common law.

Religious freedom at common law

In 2020–21, Catherine Renshaw (Professor of Law at Western Sydney University and Senior Fellow of the Institute) and Damien Freeman (Principal Policy Advisor at the Institute) undertook research into the approach to religious freedom in English and Australian legal history.

Their findings challenge the received understanding that religious freedom was never protected at common law.

English history demonstrates that parliament and the crown often had a disregard for religious freedom. The courts acquiesced in this not because the common law shared this disregard for religious freedom, but because the common law had always deferred to parliament and the crown. When the opportunity arose to review statutes and executive decisions, however, we find the common law reflecting deep underlying respect for the principle of religious freedom.

CRIMINAL LAW

As early as 1884, in *R v Darling*, courts in New South Wales recognised that, although it was not a statutory offence, disturbing a congregation assembled for religious worship was a criminal offence under the common law, and this applied to any religious group—including, in this case, the Salvation Army.

In *R v Darling*, the Chief Justice explained that where “the law does not prohibit” a religious service “then the common law, for the furtherance and preservation of the public peace, steps in and guards them against unseemly or indecent interference”. What the common law is protecting here is not only the “preservation of public peace”, but the freedom to worship in peace, whatever one’s creed. This is an important instance of the common law’s protection of religious freedom in Australia.

TRUSTS

In *Nelan v Downes* (1906), the High Court, when dealing with a charitable trust for a religious purpose, cited the 1862 English case of *Thorton v Howe* and held that the law is always disposed to enable people of any religion to make financial provision for it.

Establishing trusts and making gifts or legacies to them for religious purposes is a right of everyone under the common law. As the Chief Justice wrote in *Nelan v Downes*, in deciding cases in these matters, “the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contains nothing contrary to law. All religions are equal in the eyes of the law”. The equality of all religions before the law is another important common law protection of religious freedom.

EVIDENCE

The courts have long rejected restrictions on people being able to give evidence on account of their religion. Since *Omychund v Barker* (1744), English courts have accepted that a witness of any religious persuasion can swear an oath and this freedom was affirmed as part of the common law of Australia in *R v Climas* (1999).

While statute now permits evidence to be given under affirmation, without requiring any religious belief, the common law continues to protect the right of any religious believer to make oath, in whatever form prescribed by their religion, and so to give evidence bound in conscience before God or a Supreme Being.

WILLS

In the 1960 case of *Trustees of Church Property of Newcastle v Ebbeck*, the court held that a gift in a will that was contingent on the recipient marrying a person of a particular religious faith was void for being contrary to public policy, as “the law in Australia has no preferences concerning religion.”

Similarly, case law also demonstrates that for Australian courts, it is contrary to public policy for someone to use a gift in their will to influence the religious instruction of the beneficiaries’ children, protecting the right of parents to decide the moral and religious education of their children.

HERESY

There is some uncertainty about whether heresy was a crime at common law. A decision in 1612 affirmed that it was. However, the dissenting judge in that case, the great English jurist and parliamentarian Sir Edward Coke (1552-1634), was adamant that heresy had never been an offence at common law, although it accepted the lawfulness under canon law of heretics being executed, which was authorised under royal warrant.

When common law jurisprudence is considered as whole, it is more typically concerned to protect the rights of religious dissenters, allowing non-Christians to make oaths and give evidence from 1667, and protecting dissenters’ services of worship from disturbance from 1765. These and other cases reflect the common law’s longstanding desire to protect the rights of everyone to adopt and follow their own religious convictions as they see fit.

Relevance for current politics

Renshaw and Freeman's work has a significance beyond the academy for how we think about religious freedom as a legal right deserving of protection.

It is particularly relevant in the current climate, in which there is a vigorous political debate about how religious freedom should be protected and how its protection should be balanced with other competing interests.

If the common law provides the foundation for protection of religious freedom, this protection still remains vulnerable to legislative override. But the common law also provides the courts with scope to develop and elaborate protection of religious freedom on a gradual, case-by-case basis.

PRINCIPLE OF LEGALITY

When interpreting legislation, the principle of legality requires the courts to presume that parliament does not intend to interfere with fundamental common law rights unless it expressly states an intention to do so.

FUNDAMENTAL COMMON LAW RIGHTS

Australian courts have applied the principle of legality to protect a variety of fundamental rights at common law, including the rights to private property, personal liberty, freedom of expression, freedom of movement, natural justice, and access to the courts.

RELIGIOUS FREEDOM AS A FUNDAMENTAL RIGHT

The common law's approach to religion in cases relating to criminal law, equity, and evidence suggest that religious freedom should be regarded as a fundamental common law right. As with all common law rights, the scope and reach of this right remains to be worked out as cases come before the courts.

COMMON LAW PROTECTION FOR RELIGIOUS FREEDOM

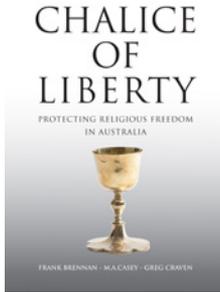
If religious freedom is accepted as a fundamental common law right, then it enjoys a greater level of protection at common law than commentators have suggested is apparent in *Grace Bible Church v Reedman* (1984).

STATUTORY REFORM

When considering what legislation is required to protect religious freedom, the starting point should be the common law's approach to it as a fundamental right, and how best to build upon it so that all Australians can continue to enjoy this protection.

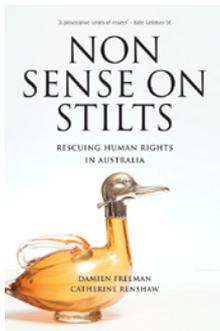
Human rights religious freedom

The Institute has developed a number of resources that approach religious freedom as a philosophical concept worthy of political attention and as a human right in need of legal protection.



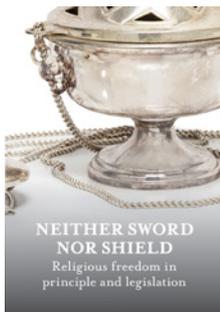
CHALICE OF LIBERTY

In 2018, the Kapunda Press published *Chalice of Liberty: protecting religious freedom in Australia*. The Institute's Director, Michael Casey, joins with Frank Brennan and Greg Craven (Distinguished Fellows of the Institute) to explain why freedom of religion remains important for the way of life enjoyed in a secular liberal democracy like Australia, and how it might be better protected.



NONSENSE ON STILTS

In 2019, the Kapunda Press published *Nonsense on Stilts: rescuing human rights in Australia*. Six essayists including the Liberal Party's Tim Wilson and the Labor Party's Terri Butler, respond to Damien Freeman and Catherine Renshaw's proposals for rescuing human rights in Australia. The collection offers a range of perspectives on what it means to recognise and protect human rights in Australian law and politics today.



NEITHER SWORD NOR SHIELD

In the 2021 PM Glynn Institute Occasional Paper, *Neither Sword nor Shield: religious freedom in principle and legislation*, Lukas Opacic (Visiting Fellow at the Institute) and Damien Freeman discuss statutory options for implementing the ten philosophical principles of religious freedom advanced in *Chalice of Liberty*.

The common law's approach to religious freedom

The common law is a body of principles or rules of law worked out on a case-by-case basis by courts in England and later in Australia. The common law includes protection of some important human rights, such as the right to access the courts, the right to personal liberty, the right to freedom of speech and the right to freedom of association. Parliament can limit fundamental common law rights through legislation. There is a presumption, however, that parliament does not intend to do so. Very clear legislation is required when parliament intends to limit common law rights.

DOES THE COMMON LAW RECOGNISE FREEDOM OF RELIGION?

In recent years, the consensus among judges and academics has been that the common law does not protect religious freedom. The strongest support for this view comes from a South Australian case called *Grace Bible Church v Reedman*. In this case, the Full Court of the Supreme Court of South Australia held that there was no implied principle of religious freedom constraining state laws. Justice White stated that

“the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression.” What a careful study of legal history reveals, however, is that, although there is no inalienable (i.e. constitutional) right, and although whatever right there is at common law can be removed by statute, the common law has, in fact, demonstrated a concern for protecting religious freedom.

SOURCES OF LAW FOR PROTECTING RELIGIOUS FREEDOM

The debate about legal protection of religious freedom has proceeded on the basis that the common law does not afford protection for religious freedom, and so any protection under Australian law will have to be found in legislation.

If there is no protection for religious freedom at common law, then it is important that we consider what kind of protection it should be given in legislation.

If there is some protection for religious freedom at common law, then awareness of this ought to feed into the debate about how religious freedom is best protected by Australian law.

The PM Glynn Institute was established by Australian Catholic University (ACU) in 2016 as a public policy think tank to analyse issues of concern the Catholic Church and the wider Australian community. Its focus is public policy for the common good.

pmg@acu.edu.au

pmglynn.acu.edu.au

Cover image: 20th century replica bronze 'Medici' bell; unknown, Italian; c. 1901-2000.
Australian Catholic University Art Collection.

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