



NEITHER SWORD NOR SHIELD

Religious freedom in
principle and legislation

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Executive summary

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The same-sex marriage survey and Israel Folau’s controversial Instagram post highlighted conflicting views of religious freedom: it was misrepresented either as a sword with which religious people might cause harm, or as a shield with which they might protect themselves from harm.	
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Religious freedom in principle and legislation

SWORD OR SHIELD?

Is legal protection of religious freedom a sword or a shield?

The issue of religious freedom in Australia re-entered the public consciousness forcefully in 2019, when Israel Folau, a well-known rugby player in the Wallabies and a devout Christian, made a controversial post on Instagram in which he declared that a number of different groups of people, including “drunks, homosexuals, thieves, atheists, and adulterers” would go to hell unless they repented of their sins. Folau’s contract with the Wallabies was eventually terminated on the grounds that he had breached Rugby Australia’s code of conduct, and the parties later settled the dispute privately.

Both Folau’s conduct and Rugby Australia’s response raised the question of the extent to which religious freedom is currently protected under Australian law, and the extent to which employers can determine what their religious employees can or cannot say outside work.

Public reaction to Folau’s post generally followed two main lines of interpretation. For some, his post was discriminatory, offensive, and harmful to LGBT people. In this instance, the harm was amplified by the fact that Folau was a prominent sportsman with a large following. People who interpreted his post this way were distressed by the fact that it was possible for a public figure like Folau to express these kinds of ideas, and saw in the post a combination of archaic and bigoted thinking that should not receive legal protection, notwithstanding the possibility that the post may have been a genuine expression of Folau’s faith. For these people, the potential harm occasioned by the post outweighed the value of Folau’s freedom to express his faith. For them, religious freedom constitutes a sword with which religious people might cause harm to others.

For others, Folau’s post, however uncivil or unsophisticated it may have seemed, should have been protected by the law *because* it was a genuine expression of his faith. People who interpreted the post this way insisted that the value of Folau’s freedom to express his faith outweighed the potential harm it might cause to LGBT people (as well as the potential harm to “adulterers, thieves, atheists, and drunks”). These people saw in the reaction to Folau’s post a reflection of the attitudes of many towards religious believers and institutions more generally, and worried that similar kinds of recriminations might follow attempts by these believers and institutions to practice and express their faith in public. Unsurprisingly, people in this

group also tended to think that Rugby Australia's response was an unacceptable infringement of Folau's religious freedom. For them, religious freedom constitutes a shield with which religious people might protect themselves from harm.

Religious freedom is not, however, a weapon, whether defensive or offensive. It is in fact a fundamental human right, which, like other rights, both protects and enables. As this paper explains, religious freedom enables people to express and live out their faith, and protects them from penalty or discrimination in doing so, within the limits required by respect for the rights of others and the common good. It is neither a sword nor a shield. It simply does what other rights do and should be understood as such.

However, it was difficult to keep this in view in the heated dispute over Folau's tweet and the fallout from it. While Folau's case was not unique, it was high-profile, and, along with the postal survey on same-sex marriage, was a factor in the federal government's decision to call for submissions to examine whether or not Australia needed a religious discrimination bill. This followed recommendations by an expert panel formed in 2017 and headed by a former federal attorney-general, Phillip Ruddock. The expert panel investigated the question of whether religious freedom was adequately protected in Australia. On the basis of recommendations from the Ruddock expert panel, the government released a draft of a religious discrimination bill. This, and a subsequent draft, received both support and criticism from many different public advocacy groups, churches and other religious bodies, and academics. While the government has not yet finalised the bill from the consultation on its second revision, it is possible that the government may decide to present it to the parliament if it is returned at the next election.

It is in this context that the question of whether religious freedom is adequately protected in Australia has been considered most recently. Our consideration of this question will be enhanced by keeping in mind what religious freedom is—a fundamental human right—and what it is not—neither sword nor shield.

STATUTORY OPTIONS FOR PROTECTING RELIGIOUS FREEDOM

In 2018 the PM Glynn Institute published *Chalice of Liberty*,¹ a collection of essays by Frank Brennan, Michael Casey, and Greg Craven, on the topic of protecting religious freedom in Australia. In that book, Brennan and Casey set out ten principles of religious freedom that were to inform the Institute's approach to religious freedom legislation, as well as submissions by Australian Catholic University to the Australian Government Consultation on Religious Discrimination Bills.

The ten principles of religious freedom outlined in *Chalice of Liberty* include universality, freedom, dignity, solidarity, witness, integrity, service, equality, justice, and democracy. They are listed and summarised briefly at the beginning of each section in this paper, and set out in full in the appendix.

This paper offers various illustrations of how statutory drafting can accord with the ten principles. These options are presented on the assumption that the ten principles are a worthy and legitimate basis upon which to think about what it might mean for religious freedom to be properly protected in Australia. As such, the paper is not an attempt to resolve the more fundamental political problem reflected in the dispute over the Folau case or to provide model legislation. It takes a position from within a certain point of view about what it means to respect religious freedom, the philosophical case for which is outlined in *Chalice of Liberty*. This paper suggests some avenues for the practical application of that view.

WHAT IS RELIGIOUS FREEDOM?

In 1965 the Second Vatican Council promulgated its famous declaration on religious freedom, *Dignitatis humanae*. In it, the Council Fathers declared that:

the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.²

This declaration represents what most people think is the essence of religious freedom: that the practice and expression of faith should be free from coercion, either by secular or ecclesiastical authorities. It also represents the idea that secular laws should be framed in a way that respects the dignity of the human person as it is manifested in the forms of life cultivated by religious belief.

WHY IS RELIGIOUS FREEDOM IMPORTANT?

Religious freedom is a universal human right. Its universality arises from the way faith articulates those aspects of our lives which point to the spiritual and the transcendent. Religious faith—like love, hope, and grief—is a deep measure by which we come to understand what is truly valuable in life, beneath the restless surface of passing thoughts

and desires and our own mortality, and move to order our lives and conduct in a way which embodies this understanding.

Faith is also something we share in communion with others, and in this sense as private conviction it cannot be separated from its public manifestation. The public nature of faith means that religious belief is not, as is often assumed, merely a private choice that need not affect one's relationship with others or with the law. For people of faith, there is an objective character to the form of life they are called to live; one that arises from deeply held convictions about the nature of ultimate reality. This means that religion cannot be reduced to a set of mutable individual interests to be 'balanced' with other individual interests. Religion is also the way that we form and are grafted onto "communities of solidarity, fraternity, and charity, oriented to God and neighbour."³

Because it is in the nature of democratic communities to deliberate about the way in which they are to be maintained in light of their members' different conceptions of the good life, it is essential that religious communities be free to contribute robustly to these discussions, not least because many of our ideas about what it means to live a good and virtuous life are drawn from religious traditions. To respect religious contributions to public life is, in this sense, to participate in a shared commitment to form the good society democratically. Religious freedom, then, is essential to democracy.

As with all publicly contested issues in a democracy, however, religious freedom frequently becomes an anvil for a number of ideological hammers. The unfortunate effect of this is that the value of everyday faith to the many millions of believers in this country is often forgotten. It is easy to lose sight of the real importance of faith to these people amidst the din of political battle. Faith genuinely held is not a mere intellectual accessory that can be donned or discarded at will. Rather, it represents considered conclusions about the fundamental reality of existence, about what is true and good, providing foundations for both their moral life and sense of identity. It is the ground of their hope and the fulfilment of their life's purpose. In this sense, to respect and protect religious freedom is a profoundly humanitarian duty, and so it is not surprising that a society's protection of religious freedom is often an accurate measure of the extent to which that society respects human rights more generally. It is in contribution to the pursuit of that humanitarian duty that this paper is offered.

A note on international law

With the exception of references to the major international covenants and treaties to which Australia is a party, this paper does not consider religious freedom legislation in other comparable countries like Canada, the United Kingdom, or South Africa, for the reason that religious freedom in these countries is generally protected under human rights acts or charters (some of which, like Canada's, are embedded in constitutions). Australia does

not have a federal human rights act, even though some States and Territories have enacted human rights legislation. Moreover, it is clear that the federal government does not wish to enact substantive human rights legislation, and has opted to protect religious freedom more organically through an addition to existing anti-discrimination law. This makes Australia relatively unique in the way it approaches the issue of religious freedom, in that it has chosen to give the judiciary less of a determinate say (than is typical of other comparable countries) in how the human right of religious freedom is to be interpreted. It also makes the legal status of religious freedom in comparable countries less relevant to the Australian context.

A note on the statutory examples

After each of the following sections, boxed examples are included to illustrate some ways in which the ten principles could feature in current or proposed legislation. The examples are not meant to be exhaustive, and are illustrative, not prescriptive. Some are adaptations of existing legislative provisions, made to illustrate either consistency or inconsistency with the principles, including some which are loosely based on clauses in the proposed Religious Discrimination Bill (Cth). The examples do not feature much of the detail usually found in legislative provisions (including specific exceptions, qualifications, references to other laws, and so on). In certain cases, the examples reflect the fact that legislative provisions are not always self-contained, so they take the form of a general statement about what might be added to existing laws in order to make them consistent with the ten principles (for example, a suggestion that religion or religious belief be added to the list of protected attributes in anti-discrimination law). In other cases, the examples reflect the idea that a lack of protection for religious freedom may manifest itself in legislation as the absence of an exemption to a general rule (for example, an absence of an exemption for religious institutions in the context of anti-discrimination provisions relating to employment). In this sense, the boxed examples are a guide only, and should not be taken as a final and complete statement of what religious freedom legislation should look like.

UNIVERSALITY

*Freedom of religion and belief is a universal human right because looking for answers to questions of meaning and value in something greater than ourselves is part of who we are. Many religious people look to God, but non-religious people too draw on ideas such as human dignity, justice, freedom, equality, and the environment as sources of supreme meaning. We seek the truth, revere it when we find it, and live our lives according to it. In this sense, questions of meaning and value are religious questions, even when our answers are not.*⁴

The freedom to practise a religion is a universal human right,⁵ and so it is fitting that religious freedom legislation in Australia should apply to all people. Legally, this is in accordance with Australia's international human rights obligations, but it is also a moral good, in and of itself.⁶

The freedom to practise religion is a moral good, in part because this freedom allows us all to manifest our common desire to find and know what is fundamentally true, good, and beautiful. In this broad sense, we can think of 'religion', in Paul Tillich's words, as being about that which is of 'ultimate concern' to us.⁷ The principle of universality reflects the fact that it is in our nature as human beings to seek an ultimate source of meaning and value in our lives—whether that source be sacred or secular. Accordingly, of all the ten principles, the principle of universality is at once the most obvious and the most important, because it acknowledges the special kind of moral value that human beings have as beings who can seek and know the transcendent.

The principle of universality is also essential because it protects those who change their minds about what is of ultimate concern to them, whether this takes the form of an adoption or abandonment of formal religious practice. That religious freedom is open to everyone is as much reflected in the fact that it is available to those who worship as it is to those who do not.

Examples of provisions consistent with the principle of universality

- 1 The objects of this Act are:
 - a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and
 - b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and
 - c) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.
- 2 In giving effect to the objects of this Act, regard is to be had to:
 - a) the indivisibility and universality of human rights, and their equal status in international law; and
 - b) the principle that every person is free and equal in dignity and rights.

Source: clause 3 of the Religious Discrimination Bill 2019 (Cth).

In this Act:

religious belief or activity means:

- a) holding a religious belief; or
- b) engaging in lawful religious activity; or
- c) not holding a religious belief; or
- d) not engaging in, or refusing to engage in, lawful religious activity.

Source: clause 5(1) of the Religious Discrimination Bill 2019 (Cth).

Examples of provisions inconsistent with the principle of universality

Any absence of an exemption for religious bodies relating to conduct that would otherwise be considered discriminatory under an Act, if such conduct is consistent with the doctrines, tenets, beliefs, or teaching of a religion, and is necessary to uphold the doctrines, beliefs, or teachings of a religion.

Context

Currently, anti-discrimination laws at the State and Federal level provide exemptions for religious institutions engaged in the provision of health services, aged care, community services, and education. For example, section 35 of the *Age Discrimination Act 2004* (Cth) exempts religious bodies (including educational institutions established for religious purposes) from general prohibitions in the Act regarding discrimination on the basis of age.

Source: section 35 of the *Age Discrimination Act 2004* (Cth).

The religious confessions privilege does not apply in proceedings for an offence against s 184 of the *Children, Youth and Families Act 2005* (Vic) or s 327(2) of the *Crimes Act 1958* (Vic).

Context

Section 184 of the *Children, Youth and Families Act 2005* (Vic) provides that “a mandatory reporter who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment ... forms the belief on reasonable grounds that a child is in need of protection ... must report to the Secretary that belief and the reasonable grounds for it as soon as practicable—

- a) after forming the belief; and
- b) after each occasion on which he or she becomes aware of any further reasonable grounds for the belief.”

Section 327(2) of the *Crimes Act 1958* (Vic) provides that “a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a police officer as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.”

Source: section 18(2) of the *Children Legislation Amendment Act 2019* (Vic).

FREEDOM

Religious freedom is based on respect for individual freedom. It is the right to believe or not to believe, to adopt, reject or change beliefs as we decide for ourselves. It protects freedom by protecting people from having the beliefs of others—religious, secular, or political—imposed on them. While religious belief has often been coerced in history, this contradicts the nature of religious faith. Our deepest convictions about reality and meaning have to be our own, freely thought and freely embraced. Religious belief must always be proposed, never imposed.

Religious freedom legislation must protect the freedom of all Australians to practise and express their faith, should they choose to do so. Freedom, however, can be thought of in two ways: positive and negative. Positive freedom is best thought of as the freedom *to* do or express something; whereas negative freedom is best thought of as freedom *from* restraints on doing or expressing something. Given this, the purpose of religious freedom legislation should be twofold:

- i. To ensure, as far as possible while respecting the rights of others and the common good, that all Australians can practise and express their faith, even in contexts where that practice or expression may appear offensive or irrational to non-believers.
- ii. To ensure, as far as possible, that every Australian can practise and express their faith without fear of undue discrimination or any other kind of punishment.

In this sense, religious freedom legislation should be sensitive to both the positive and negative aspects of the freedom it protects.

In respecting a person's right to believe or not believe, any religious freedom legislation must prohibit (or, if it is federal legislation, at least be consistent with the Constitution's prohibition on) the establishment or imposition by the state of any particular religion on those who do not wish to practise it.⁸ However, this general prohibition on the state must be interpreted in light of (for example) the principles of witness and integrity discussed below, so that religious institutions may still validly impose certain obligations on—or maintain certain expectations of—their employees, if doing this is grounded in the religious beliefs, tenets, and traditions of that institution. For example, it would not be contrary to the principle of freedom for religious freedom legislation to allow an Anglican school to require its teachers to attend a chapel service every week during the school term. However, it *would* be contrary to the principle of freedom for religious freedom legislation to prohibit Anglican schools from maintaining such a requirement.

It is also important that legislation not impose an undue burden on religious believers and institutions to engage in practices contrary to their faith (for example, by withholding appropriate exemptions from anti-discrimination legislation). Such legislation also should not place undue restrictions on the capacity of religious believers and institutions to publicly express their views on moral issues. For example, religious freedom legislation should protect the right of religious institutions to distribute publications and make public arguments on morally contentious issues like abortion or marriage.

Examples of provisions consistent with the principle of freedom

Statement of belief: a statement is a *statement of belief* if:

- a) the statement:
 - (i) is of a religious belief held by a person (the *first person*); and
 - (ii) is made, in good faith, by written or spoken words by the first person; and
 - (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

Source: clause 5(1) of the Religious Discrimination Bill 2019 (Cth). See also clause 42.

Divisions 1 and 2 of the *Sex Discrimination Act 1984* (Cth) do not apply to:

- a) the ordination or appointment of priests, ministers of religion, or members of any religious order;
- b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
- d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Source: section 37(1) of the *Sex Discrimination Act 1984* (Cth).

Example of a provision inconsistent with the principle of freedom

Any provision that removes or in some other way diminishes existing exemptions from anti-discrimination laws for religious institutions engaged in the provision of health services, aged care, community services, and education.

Context

Currently, anti-discrimination laws at the State and Commonwealth level provide exemptions for religious institutions engaged in the provision of health services, aged care, community services, and education. For example, section 56 of the *Anti-Discrimination Act 1977* (NSW) exempts religious bodies (including educational institutions established for religious purposes) from general prohibitions in the Act regarding discrimination on the basis of sex.

DIGNITY

Religious freedom protects human dignity by protecting people who think, believe, worship, and live differently. It helps people to resist pressure to hide their beliefs or self-censor, or to limit their participation in society to avoid bullying or intimidation. It defends them against discrimination, exclusion, or punishment because of their beliefs. Religious freedom is especially important in protecting people whose beliefs or ideas others find strange, ridiculous or even offensive, and particularly communities which may be hated and feared because of their beliefs.

The purpose of the principle of dignity is to protect those who practise a religious faith from vilification and other forms of harmful discrimination on account of their religion. To consider someone as having dignity is to think of them as worthy of respect in and of themselves. According to many moral traditions, dignity is an inalienable part of what it means to be a human being.⁹ Religious belief is similarly worthy of respect, as it constitutes one of the most profound expressions of our humanity. When considering the role of religious freedom legislation in light of the principle of dignity, the major practical implication is to ensure that legislation treats religious individuals and communities, and the expression of religious convictions, in the same way as other individuals and associations and expressions of secular conviction are treated in our society.

It might be claimed that satisfying the principle of dignity is simply a matter of recognising religion or religious belief as a protected attribute for the purposes of anti-discrimination law.¹⁰ After all, anti-discrimination law (to varying degrees) prohibits discrimination on the basis of

religion in all States and Territories.¹¹ However, there are two problems with this claim. First, anti-discrimination protections at the State and Territory level do not extend to conduct that would otherwise be prohibited by law, and this enables State legislatures to enact laws that make certain acts associated with religious practices illegal. In this way, State legislatures can enact laws that have the effect of circumventing more general prohibitions on discrimination on the basis of religion.¹² Secondly, recognising religious belief as a protected attribute in anti-discrimination law may not constitute sufficient protection of religious beliefs and practices, because protected attributes generally relate to individuals, not institutions, which require protection under religious freedom legislation as well.

Protecting the dignity of individuals is not possible without according religious institutions and services due respect, both for the contribution they make to our life in common, and as manifestations of people's faith and religious convictions. Practically speaking, this means that religious freedom legislation should include provisions that protect churches and other religious institutions from unfair or discriminatory treatment, as well as individuals.

The principle of dignity would not support the enactment of blasphemy laws in Australia. The purpose of religious freedom legislation should not be to impose restrictions on what ordinary citizens can say about particular deities (or deities in general), or to provide for compensation to be paid to religious people or institutions if someone blasphemes against their faith. Such laws would, in any case, be inconsistent with the principle of freedom. Nevertheless, it is still possible that legal protections for religious practice and expression may come into conflict with other legal rights and duties. Here, it is important to remember that one piece of legislation cannot be expected to resolve all these potential conflicts. It is quite likely that these conflicts will be resolved in different ways depending on their precise nature and the fora in which they are disputed.

Examples of provisions consistent with the principle of dignity

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

- a) of a kind recognised as necessary or desirable by people of the same religious conviction as that of the employee; and
- b) the performance of which during working hours is reasonable having regard to the circumstances of the employment; and
- c) that does not subject the employer to unreasonable detriment.

Source: section 11 of the *Discrimination Act 1991* (ACT).

A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Source: section 153(1) of the *Fair Work Act 2009* (Cth).

Example of a provision inconsistent with the principle of dignity

Any provision that *repeals* exemptions from anti-discrimination law or otherwise diminishes the extent to which practices or expressions of religious belief by religious persons and institutions are protected from discrimination would be inconsistent with the principle of dignity.

Context

Currently, State and Commonwealth anti-discrimination laws uphold religious freedom either by protecting the manifestation of religious belief by religious persons and institutions from certain kinds of discrimination, or by granting exemptions for conduct which may otherwise be considered discrimination.

As an example of an exemption, section 38(1) of the *Sex Discrimination Act 1984* (Cth) provides:

it [is not] unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

SOLIDARITY

Religious freedom should be exercised in solidarity with other people. It is not an absolute. It is limited by respect for the rights of others and the common good. Because our sense of autonomy is often stronger than our sense of the common good, agreeing on the limits of rights can be difficult. Wherever possible we should try to resolve these tensions with mutual respect—not suspicion—and with generosity towards beliefs and ways of life we do not share or even oppose. Restrictions on religious freedom should be made only on the basis of principles which apply to everyone, religious or not.

The Latin root of the word ‘religion’ is *religio*, which means ‘to bind’. The principle of solidarity represents two aspects of religious belief, both developed from this Latin root. First, religious belief is usually something practised in association with others. This means that claims of religious freedom need to be predicated on membership of a group, all of whose members share a common conviction about the true ends of life and the means by which one participates in them. In this sense, religion is never truly private. It cannot be reduced to the opinions or preferences of particular individuals. This enables religious freedom legislation to set some boundaries for the determination of whether or not someone’s religious belief is properly a *religious* belief genuinely held. At the very least, it should be possible to identify that person as a member of a group, all of whom share a religious belief and practice. For example, if someone claims to be a Muslim for the purposes of a religious freedom claim, it should be possible to provide some evidence (other than merely personal testimony) that shows the person can be reasonably identified as a Muslim. This is not without precedent. It is quite possible that a common law test for religiosity could be formulated by the courts akin to the test for Aboriginality set out by the High Court in *Mabo v Queensland (No. 2)*.¹³ In this sense, the way in which (and whether) someone expresses their faith should not be incidental to their claims about religious freedom. Of course, this process becomes easier when dealing with religious institutions, which are set up and operate on a religious basis.

Secondly, the principle of solidarity draws our attention to the idea that modern Western societies are generally populated by people who affirm many different and often conflicting beliefs. This fact inevitably erodes our awareness of the common good, which is predicated on the sense that we can all participate in shared ends that are greater than the wants and desires that we pursue as individuals. In diverse and complex societies such as Australia, preserving the common good means that claims of religious freedom must be seen in light of rights and duties that apply to citizens generally. This means claims of religious freedom cannot be absolute. They do not automatically override other rights-claims, for example. However, this does not mean that claims of religious freedom must always be subordinated to other rights-claims. For example, rights of employers to set conditions of employment on their employees should not necessarily override the freedom of employees to practise their faith at work, within reasonable limits.

In practice, conflicts between other rights and religious freedom will have to be managed by courts or by alternative dispute resolution, and it will fall to judges to decide how claims made on the basis of religious freedom are to be weighed against the claims of other rights and the common good. In this way, courts will be able to develop a more substantive common law jurisprudence in relation to religious freedom. Of course, this means that it is likely that the decisions in some cases will be controversial. Nevertheless, it is important that we do not expect legislation to completely resolve all legal issues that arise in relation to religious freedom before the legislation is tested in the courts. This also means that we should give courts time to develop their interpretation of the legislation, and parliament an opportunity to periodically review the legislation as well. This review could be done by the Parliamentary Joint Committee on Human Rights, or the Senate Committee on Legal and Constitutional Affairs.

Examples of provisions consistent with the principle of solidarity

Divisions 2 and 3 do not make it unlawful to discriminate against a person on the ground of the person's religious belief or activity if:

- a) the person has expressed a particular religious belief; and
- b) a reasonable person, having regard to all the circumstances, would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence; and
- c) at the time the discrimination occurs, it is reasonable to assume that the person holds the particular belief.

Source: clause 28(1) of the Religious Discrimination Bill 2019 (Cth).

A prohibition on discrimination on the basis of religious dress or appearance does not apply if the discrimination arises as a consequence of a person's refusal to reveal their face for the purposes of identification, and the request to reveal their face is reasonable in the circumstances.

Source: Section 85ZN of the *Equal Opportunity Act 1984* (SA).

Example of a provision inconsistent with the principle of dignity

The absence of an appropriate exemption for religious bodies concerning conduct relating to discrimination on the basis of sex, sexual orientation, marital status, and so on, that would otherwise be considered discriminatory under the Act, if such conduct is consistent with the doctrines, tenets, beliefs, or teachings of a religion, and is necessary to uphold the doctrines, beliefs, or teachings of a religion.

Context

Currently, anti-discrimination laws at the State and Commonwealth level provide exemptions for religious institutions engaged in the provision of health services, aged care, community services, and education. For example, section 40(2A) of the *Anti-Discrimination Act 1992* (NT) exempts religious educational institutions from general prohibitions in the Act regarding discrimination.

WITNESS

Religious freedom is more than freedom of worship or a right to tolerance. The persecution of religious groups in different parts of the world shows how important these basic protections are, but religious freedom does not end there. It is a much larger freedom which makes it possible for individuals and faith communities to witness to their beliefs with integrity and as full members of society, not only in worship but in professional life, public life and service to the wide community.

INTEGRITY

Religious freedom allows individuals to practise their religion freely and publicly as citizens, and not just in private life. The claim that religious people should quarantine their beliefs from public debate and even from the way they carry out their profession or occupation is unfair and discriminatory, because it allows everyone except religious people to act on their beliefs. No human being lives in neatly divided public and private worlds. Beliefs about meaning and truth, right and wrong—religious and non-religious alike—are conclusions about what is real and important in life. For everyone, they serve as a basis for action in the world.

Religious belief is not merely a private affair. The practice and expression of faith involves both a person's private and public life, because human beings order their lives by what

they believe most deeply, and put their beliefs into action in association with others. The principles of witness and integrity reflect the fundamental fact that there is no meaningful distinction between *holding* and *manifesting* religious belief.¹⁴ To illustrate: if holding a religious belief makes no difference whatsoever to a person's daily conduct, then it is reasonable to doubt the depth of conviction with which a person claims to hold that belief. This also reflects the fact that religious belief cannot be reduced merely to a set of propositions to which a person gives their private assent. It may be possible to associate certain creeds or tenets with a religion (for example, the Nicene Creed with mainstream Christianity), but an assent to these creeds and tenets does not exhaust what it means for a person to practise and express their faith.

This idea can be summarised in the notion that religion is a form of life shaped by the experience of the divine or of the deeper order of things beyond this life, not just a set of propositions.¹⁵ Practically speaking, it may not always be possible to point to specific doctrines or tenets of a religion when searching for the source or justification of a particular kind of conduct engaged in by adherents of that religion. Sometimes the conduct of religious believers and institutions proceeds in accordance with unwritten tradition or ancient custom that is part of the common stock of knowledge available to those believers and institutions. Religious freedom legislation must make some accommodation for this when setting out conditions under which certain conduct by religious believers or institutions is exempt from (for example) anti-discrimination law.

Because we do not only pursue our beliefs in private, but often in concert with others, religious institutions play a major role in the life of most religious believers. Many religious believers express their faith through service to these institutions, attendance at ceremonies or other significant events organised or conducted by these institutions. This means that another aspect of the principles of witness and integrity is that religious freedom legislation should protect institutions as well as individuals.

The reason for this is that religious belief is often given shape and structure within institutional settings. For example, the sacrament of confession, for Catholics, requires the ministry of a priest validly ordained according to the laws and traditions of the Catholic Church. The moral and spiritual development of the life of a Catholic, depending as it does on the freedom to seek and receive the sacraments of the church, makes the living out of their faith inseparable from the institution and the community it serves. Moreover, it is not possible for any institution to maintain its integrity if it is disallowed from maintaining the beliefs and teachings which govern its operation. In this sense, religious freedom legislation should protect the capacity of religious institutions to maintain the integrity of their governing laws and traditions, including in their agencies and services, subject to the common good.

This application of the principles of witness and integrity to institutions may be controversial, because some of the beliefs and teachings of religious institutions appear to some commentators as archaic, irrational, or even immoral. For example, *halakha*, the body of law

that governs Orthodox Jews, imposes restrictions on women which are considered by some to be a discriminatory and unjustified practice that conflicts with Australia's general commitment to the equality of the sexes.¹⁶ Other religious bodies, such as religious schools or hospitals, may prefer to employ people from the same or similar faith backgrounds, and this may also be considered controversial by those who regard this as discrimination.¹⁷ Nevertheless, the principles of witness and integrity require that we accept that religious institutions are allowed to conduct their affairs according to the beliefs of the community which established them, within just limits protecting the rights of others and the common good.

Examples of provisions consistent with the principles of witness and integrity

- 1 A religious body does not *discriminate* against a person under this Act by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.
- 2 Without limiting (1), conduct mentioned in that section includes giving preference to persons of the same religion as the religious body.
 - a) A religious body does not discriminate if it engages in conduct that gives preference to persons of the same religion as the religious body.

Source: clause 11(3) and (4) of the Religious Discrimination Bill 2019 (Cth).

- 1 A person discriminates against another person on the ground of the other person's religious belief or activity if:
 - a) the person imposes, or proposes to impose, a condition, requirement or practice; and
 - b) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who hold or engage in the same religious belief or activity as the other person; and
 - c) the condition, requirement or practice is not reasonable.

Source: clause 8(1) of the Religious Discrimination Bill 2019 (Cth).

Examples of provisions inconsistent with the principles of witness and integrity

If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must—

- a) inform the woman that the practitioner has a conscientious objection to abortion; and
- b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.

Comment: There is no exemption here for health practitioners who conscientiously object (on religious or non-religious grounds) to referring patients who request an abortion to health practitioners who they know will perform an abortion, as a form of co-operation with what they consider to be gravely wrong.

Source: section 8(1) of the *Abortion Law Reform Act 2008* (Vic).

An employer may impose an employee conduct rule that has the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee's employment if doing so is necessary to avoid financial loss to the employer.

Source: adapted from clause 8(3) of the Religious Discrimination Bill 2019 (Cth).

SERVICE

Religious freedom means people are entitled to live out their beliefs in the way they serve the rest of the community. Coming together around a common purpose and shared beliefs to help those in need is one of the main ways in which religious communities encourage participation in society and work to build up a sense of solidarity. Religious freedom protects not only the right of people to live out their beliefs in cooperation with others who share their faith, but also the right to establish and operate services for the wider community that are faithful to the beliefs which inspired them, and which reflect those beliefs in their services.

The principle of service reflects the idea that religious believers and institutions often live out their faith by establishing and operating charitable services for the wider community. These charitable endeavours are ways in which religious believers and institutions can manifest their beliefs and pursue the shared ends that characterize their faith. It is fundamental to this religious idea of service, however, that it be done in a manner consistent with the moral and social teachings of the religions that engage in it. Two implications arise here.

First, the social and charitable work done by religious institutions often includes commercial activity, but this should not be considered the primary purpose of such institutions. For example, the St Vincent de Paul Society and the Salvation Army operate (in part) by selling goods to the general public at very low prices, but this is done in service of their primary aim, which is to care for the poor and vulnerable. Religious freedom legislation should acknowledge that, notwithstanding their commercial activities, religious charities are formed for non-commercial purposes. This means that there should be room within the definition of 'religious body' or 'religious institution' in such legislation for charities whose work encompasses activities which are commercial in support of their mission. Similarly, religious freedom legislation should include hospitals and aged care providers in its definition of a 'religious body' or 'religious institution', as these institutions are established on the basis of a religious conviction and a kind of service which is an essential part of the way in which religious belief is manifested in the wider world. This does not prevent (for example) Catholic hospitals from being held to the same standards as public hospitals in

respect of the quality of medical care they provide, but it does mean that these hospitals will not be sanctioned if they do not provide services that would constitute a violation of the religious beliefs and tenets on which they are founded.

Secondly, it is important that religious freedom legislation take account of the idea that the operation of these kinds of charities should be able to continue in line with the religious tenets that underlie them without that operation being considered discriminatory according to law. This was a problem in the case of *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,¹⁸ in which a Christian camp centre refused to hire out their campsite to a same-sex attracted suicide prevention event. The Victorian Supreme Court held that this constituted unlawful discrimination because there was not a sufficient connection between the activity of hiring out a campsite and the religious beliefs of the camp's owners. This decision rested in part on the Court's opinion that an organisation can be said to have a religious purpose if and only if the organisation or its activities are set up for the purpose of propagating or advancing a religion.¹⁹

However, it is clear that an institution can have a religious purpose without that purpose being the promotion of a certain religion, because religious purposes encompass far more than the advancement of certain tenets or propositions associated with religious belief. If a religious school is established for the purpose of providing education (including religious education) to children, this purpose cannot be separated from its religious roots, notwithstanding the fact that it is possible to establish schools for the purpose of educating children independently of any religious foundation, because what it means to educate children, for religious believers, is to inculcate them into a certain religious tradition and form of life. In this way, education in English or mathematics becomes a means of pursuing a religious purpose, even though education in these subjects appears to have very little to do with the advancement of any particular religion.

Example of a provision consistent with the principle of service

‘Religious body’ means:

- a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs, or teachings of a religion; or
- b) a registered public benevolent institution that is conducted in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion; or
- c) a hospital or residential aged care facility established and conducted in accordance with the doctrines, tenets, beliefs, or teachings of a religion
- d) any other body that is conducted in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion.
 - i) This definition includes bodies closely associated with religious communities which support a clear religious and charitable purpose, including those primarily engaged in commercial activities.

Source: adapted from clause 11(5) of the Religious Discrimination Bill 2019 (Cth).

Example of a provision inconsistent with the principle of service

For the purposes of this Act, a ‘religious body’ is a body established for the purposes of worship or religious observance.

Comment

A provision such as this would confine ‘religious bodies’ to places of worship only, and excludes educational institutions, public benevolent institutions, and hospitals and residential aged care providers established and conducted in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion.

Source: based on an observation made in ACU’s submission to Australian Government Consultation on Religious Discrimination Bills.

EQUALITY

Religious freedom is not a claim for special treatment. It is a basic form of fairness for people to be able to put their beliefs into practice and not to be forced to act against them. Religious freedom protects this basic fairness. It is not a claim for a special privilege or an exemption for religious communities from laws which apply to everyone else. Describing it in these terms is misleading. Religious freedom is a fundamental right which ensures there is a space for religious communities to live out their beliefs, while also respecting the dignity and freedom of other people.

The purpose of the principle of equality is to underscore the importance of ensuring that religious believers and institutions are treated in the same way as other groups who come together around deeply held convictions and undertake activity for the good of society, and not be forced by law to act in a way inconsistent with or injurious to their beliefs. Because religious belief often involves distinct kinds of practices and traditions that may appear at odds with prevailing social morality, it can seem as though the protection of these practices and traditions in law is a form of unjustified special treatment. Rather than constituting a claim for special treatment in the law, religious freedom is in fact a claim for equal treatment. In this sense, a recourse to religious freedom is no more a claim for special treatment than a recourse to age, sex, disability, or any other protected attribute. It is important that religious freedom legislation at least includes religious belief in the list of protected attributes in anti-discrimination law in order to reflect the fact that protecting the practice and expression of religious belief ensures equal treatment for religious believers and institutions with other individuals and organisations in our society.

The principle of equality should inform religious freedom legislation in a number of different areas. On an individual level, for example, health practitioners should not be forced to engage in conduct to which they conscientiously object on religious (or non-religious) grounds. On an institutional level, religious schools and other religious educational institutions should not be penalised for engaging in conduct that accords with the beliefs and tenets of their religion. Much of this should be familiar from the material above on the principles of freedom and dignity. These kinds of applications of the principle of equality do not give religious believers and institutions a ‘licence to discriminate’, as some have argued.²⁰ Rather, they allow these believers and institutions to contribute to public discourse and the common good on an equal footing with non-religious individuals and secular organisations. It is precisely because we now expect the law to resolve public debates about social morality that it must allow religious believers and institutions to continue to contribute to those debates without requiring them to disavow their beliefs as a condition for doing so.

Religious freedom, like most rights, is not an absolute, and it is limited by having regard to the common good and the rights and freedoms of others.²¹ Nevertheless, substantive protections should be included in religious freedom and anti-discrimination legislation

to ensure that within these limits, religious people, and the agencies and institutions their religious convictions lead them to establish for the service of the community, can put their beliefs into practice without being punished for doing so, and without fear of being coerced to act against them—just like everyone else. These protections should operate in such a way as prohibits State and Territory laws from overriding them in ordinary circumstances. In describing acceptable limitations on these kinds of exemptions from anti-discrimination law, religious freedom legislation must define what those limits are, in order to avoid general limitations clauses being used to defeat protections for discrimination or conscientious objection on religious grounds.²²

Examples of provisions consistent with the principle of equality

A conduct rule that requires a health practitioner to engage in conduct that is injurious to their religious susceptibilities is not reasonable unless compliance with the rule is necessary:

- a) to maintain the ability of the person imposing, or proposing to impose, the rule to provide the health service; or
- b) to preserve the life of any person who would otherwise be provided with the health service by the health practitioner.

Source: adapted from clause 8(7) of the Religious Discrimination Bill 2019 (Cth).

A provision in anti-discrimination law that adds religion to the list of protected attributes would be consistent with the principle of equality.

Context

Currently, anti-discrimination law includes a number of specified attributes which are provided special protection by the law. Discrimination made on the grounds of one of these attributes is unlawful. For example, section 8(1) of the *Anti-Discrimination Act 1977* (NSW) provides that discrimination at work on the ground of a person's race is unlawful.

Source: section 8(1) of the *Anti-Discrimination Act 1977* (NSW).

Examples of provisions inconsistent with the principle of equality

A provision that repeals section 109 of the *Anti-Discrimination Act 1991* (Qld), which currently allows:

- 1 The Act does not apply in relation to—
 - a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
 - b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
 - (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

Comment

Divisions 1 and 2 of the Act make it unlawful to discriminate on the basis of sex at work, in the provision of goods and services, the provision of accommodation, and so on.

A provision that *repeals* s 47(3) of the *Marriage Act 1961* (Cth) which currently allows:

- 3 A minister of religion may refuse to solemnise a marriage despite anything in this Part, if any of the following applies:
 - a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation;
 - b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
 - c) the minister's religious beliefs do not allow the minister to solemnise the marriage.

JUSTICE

Religious freedom reinforces other fundamental rights because it is part of a larger whole. It does not sit in isolation but is an integrated and essential part of human rights. Because these rights protect the different things we need to make a full life possible, they have to go together and they should not be placed in opposition to each other. Freedom of religion both depends on respect for rights such as freedom of conscience, freedom of thought, freedom of expression, and freedom of assembly, and supports and reinforces them in turn. Placing religious freedom in doubt places these other rights in doubt as well.

DEMOCRACY

Religious freedom makes democratic societies stronger. It protects not only the right of individuals and religious communities to participate fully in democracy, but also the contribution they make to building it up. Because religious freedom and related protections such as conscientious objection protect people from being compelled to cooperate with activities which they hold, as a matter of conviction, to be wrong, they also help to encourage people to speak out against injustice and evil when no one else will. Good societies need these voices.

Religious freedom legislation should reinforce and protect other important rights, like those set out in the *International Covenant on Civil and Political Rights*.²³ For example, protecting religious believers from discrimination on the grounds of their beliefs supports Article 26 (equal protection of the law without discrimination) as well as Article 18 (which includes the rights to freedom of thought and conscience) of the ICCPR. More generally, religious freedom legislation can give effect to Australia's obligations under a number of different international instruments, including the ICCPR, the *International Covenant on Economic, Social and Cultural Rights*,²⁴ the *Convention on the Rights of the Child*,²⁵ the *International Convention on the Elimination of all Forms of Racial Discrimination*,²⁶ and so on.²⁷

In protecting rights and freedoms like freedom of speech and association, religious freedom legislation also makes democratic societies stronger. Supporting the rights of religious individuals and institutions to contribute robustly to public life and discourse is not a matter of giving religious freedom priority over other rights or of purporting to prioritise religion, but of ensuring that in a diverse and secular society, all are treated equally. In this sense, it is important that religious freedom legislation maintains that statements of belief made in good faith do not constitute discrimination.

The purpose of the principles of justice and democracy is to ensure that all citizens, whether they are religious or not, can enjoy the kinds of freedoms necessary for the maintenance

of a strong civil society. In this sense, religious freedom legislation is one part of a broader framework of laws that enable people to go about their daily lives in a way consistent with their most deeply held beliefs. Of course, in a modern liberal society some people will disagree with those beliefs or find some of them objectionable, but it is part of the purpose of religious freedom legislation to ensure that these disagreements are kept alive and not stifled by the law or social pressure to conform or be silent. One way in which this can be done in religious freedom legislation is to protect statements of belief made by employees outside work, so that these employees do not feel as though they cannot express their faith in public for fear of recrimination by their employer. These kinds of provisions can also form an important part of the way in which employers can resist external or internal pressure to fire or otherwise sanction employees who make controversial public professions of faith in good faith.

Example of a provision consistent with the principles of justice and democracy

An employer conduct rule that:

- a) is imposed, or proposed to be imposed, by a government or non-government employer; and
- b) would have the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee's employment;

is not reasonable unless compliance with the rule by employees is necessary to *prevent malicious or otherwise unlawful speech or conduct.*

Source: adapted from clause 8(3) of the Religious Discrimination Bill 2019 (Cth) (emphasis added).

Example of a provision inconsistent with the principles of justice and democracy

An employer conduct rule that:

- a) is imposed, or proposed to be imposed, by a government or non-government employer; and
- b) would have the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee's employment;

is not reasonable unless compliance with the rule by employees is necessary to *avoid unreasonable financial expenditure by the employer*.

Source: adapted from clause 8(3) of the Religious Discrimination Bill 2019 (Cth) (emphasis added).

CONCLUSION

Religious freedom will continue to be a controversial issue in Australia, and for this reason it is important to strive for an informed and reasonable approach to the discussion that does not collapse into mere ideology or partisanship.

From one perspective, it is strange that this has come to be the case. Religious freedom has long been recognised as one of a small number of fundamental human rights, closely interlocked with the rights we take to be the markers of a democratic society, including freedom of thought, freedom of conscience, freedom of expression and speech, and freedom of association and assembly. It is a right which sits at the centre of a free society, even if that society is a secular democracy. For some, however, it is firmly established as a suspect right, a dangerous right, one which needs to be constrained closely for fear that it will be used as a sword against the rights of others. The suspicion and hostility towards religious freedom in some quarters is part of a wider hostility towards religion more generally, reinforced by the failure of faith communities to live up to what they preach, by the violence and abuse of power associated with religion from historical experience and experience today, and by a growing incomprehension in societies like Australia about both religious beliefs and teachings and the place of religion in the human condition. It is not difficult for believers to feel under siege in these circumstances, and the pressures brought to bear against them on some issues are real and formidable. It is no surprise then that for these people, religious freedom is seen as an indispensable shield.

More recent tensions in Australia regarding religious freedom have galvanised many different groups of people to articulate their views about what they believe to be the proper place of religion in the public sphere. The resulting debate has revealed deep rifts between sections of the Australian population regarding this issue, and, more broadly, their visions of the good society. It is unlikely that these tensions will be resolved any time soon, but this is partly due to the fact that we do not yet fully understand what it would mean to resolve them democratically. It need not mean that one side ‘loses’ to the other, for example. Neither need it mean that both sides reach a happy compromise.

Progress on the issue of religious freedom will probably not take the form of final and lasting agreement. Incremental achievement is still possible, however, even if an ideal resolution is not. In that vein, this paper has outlined a number of statutory drafting options for the protection of religious freedom in Australia in accordance with the ten principles of religious freedom articulated in *Chalice of Liberty*. It is in the nature of the intersection of religion, law, and politics that it is a place of contention, and the options put forward here are certainly not intended to be the final word. They constitute an invitation to dialogue as much as a practical application of a particular approach to religious freedom. What will make this dialogue possible—and hopefully fruitful—is the recovery of the idea of religious freedom as a fundamental human right, first and foremost. This means treating religious freedom not as sword or a shield but as a right like the many others we value; a right which like those other rights protects and enables—makes things possible—so that we can live together and flourish together despite everything that makes us different.

NOTES

- 1 Frank Brennan, M. A. Casey and Greg Craven, *Chalice of Liberty: Protecting religious freedom in Australia* (Kapunda Press, 2018).
- 2 Second Vatican Council, *Dignitatis humanae* (1965), at [2].
- 3 Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020), p. 225.
- 4 This and subsequent italicised passages set out the ten principles of religious freedom from *Chalice of Liberty*, as summarised and explained in the pamphlet “10 principles of religious freedom”, published by the PM Glynn Institute in 2019. For completeness, the principles as they first appeared in *Chalice of Liberty* are included in the appendix.
- 5 *Universal Declaration of Human Rights 1948*, Art. 18; *International Covenant on Civil and Political Rights 1966* ([1980] ATS 23), Art. 18.
- 6 See *Chalice of Liberty*.
- 7 P. Tillich, *Dynamics of Faith* (Harper, 1957), pp. 4-5.
- 8 Section 116 of the Constitution.
- 9 In the 20th century, this thought was codified in the *UDHR*, *ICCPR*, and other international covenants, but the concept is, of course, much older.
- 10 This was a recommendation in a number of submissions to the Ruddock Expert Panel on Religious Freedom (2018) and the federal government’s consultation process regarding its Religious Discrimination Bill 2019 (Cth). See for example, Public Interest Advocacy Group, Submission to the Religious Freedom Review, 14 February 2018, p. 2.
- 11 For example, New South Wales legislation protects the attribute of ‘ethno-religion’ (see *Anti-Discrimination Act 1977* (NSW), Part 2); and South Australian legislation protects against discrimination on the basis of religious dress or appearance at work (see *Equal Opportunity Act 1984* (SA), s 85T(1)).
- 12 See *Discrimination Act 1991* (ACT), ss 32-33; *Anti-Discrimination Act 1996* (NT), ss 37A, 51; *Anti-Discrimination Act 1991* (Qld), Part 4; *Anti-Discrimination Act 1998* (Tas), Part 5; *Equal Opportunity Act 2010* (Vic), Part 4; *Equal Opportunity Act 1984* (WA), s 73; *Equal Opportunity Act 1984* (SA), s 85ZN; *Anti-Discrimination Act 1977* (NSW), s 56. For example, the South Australian Act states that the prohibition on discrimination on the basis of religious dress or appearance does not apply if the discrimination arises as a consequence of a person’s refusal to reveal their face for the purposes of identification, and the request to reveal their face is reasonable in the circumstances.

- 13 (1992) 175 CLR 1.
- 14 This is at odds with the Australian Human Rights Commission's view on the matter. See AHRC, Religious Freedom Review Submission, February 2018, pp. 3, 10.
- 15 This is consistent with the High Court of Australia's definition of religious belief as comprising belief in a supernatural being or principle, as well as canons of conduct to give effect to that belief. This definition implicitly recognises that religious belief necessarily involves *doing* something concretely as well as assenting to something intellectually. See *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at [17].
- 16 See for example, Discrimination Law Experts Group, 'Inquiry: Religious Freedom Review', Submission to the Expert Panel on Religious Freedom, 14 February 2018, p. 8.
- 17 See for example, Equality Australia, 'A freedom from discrimination, not a licence to discriminate: Equality Australia's submission to the consultation on the exposure drafts of the religious freedom bills', 2 October 2019. pp. 21–22.
- 18 (2014) 50 VR 256.
- 19 *Ibid*, at [249] per Maxwell P.
- 20 See Equality Australia, above.
- 21 This is not to say that the way in which this should be done by courts is through 'proportionality analysis', or similar methods in which religious beliefs are treated as mere individual interests alongside many others. See J Harrison, "Towards Re-Thinking 'Balancing' in the courts and the Legislature's Role in Protecting Religious Liberty", (2019) *Australian Law Journal*, Vol. 93, No. 9.
- 22 See, for example, the lack of definition of 'unjustifiable adverse impact' in the Religious Discrimination Bill 2019 (Cth), s 8(7).
- 23 1966 ([1980] ATS 23).
- 24 1966 ([1976] ATS 5).
- 25 1989 ([1991] ATS 4).
- 26 1965 ([1975] ATS 40).
- 27 In this way, federal religious freedom legislation would be supported by s 51(xxix) of the Constitution (the 'external affairs' power).

APPENDIX

The Ten Principles of Religious Freedom

In 2017 the PM Glynn Institute published *Chalice of Liberty: Protecting Religious Freedom in Australia* (Kapunda Press). The ten principles as formulated in *Chalice of Liberty* are set out below.

1 Freedom of religion and belief is a universal human right

Religious freedom belongs to every person, because most people look for answers to questions of meaning and value in something greater than themselves. Many religious people look to God, but non-religious people also draw on ultimate sources of meaning which are not of their making, such as ideas about human dignity, justice, freedom, equality, and the environment. In one sense, questions of meaning and value are religious questions even when our answers are atheism or agnosticism.

2 Religious freedom is based on respect for individual freedom

“The act of faith is of its very nature a free act” (*Dignitatis humanae*, §10). Religious freedom is the right to believe or not to believe, to adopt, reject or change beliefs as we decide for ourselves. It protects freedom by protecting people from having the beliefs of others —religious, secular or political — imposed on them. Catholic beliefs too are not to be imposed on anyone, but proposed for people to accept or reject as they decide freely for themselves.

3 Religious freedom protects human dignity

Religious freedom upholds the intrinsic dignity of people who think, believe, worship and live differently. It protects them against pressure to hide their beliefs, or from being forced to censor themselves or limit their participation in society to avoid bullying or intimidation. It defends them from discrimination, exclusion or punishment because of their beliefs. Religious freedom is especially important in protecting people whose beliefs or ideas others find strange, ridiculous or even “offensive”, and particularly communities which may be hated and feared because of their beliefs.

4 Religious freedom should be exercised in solidarity with other people

Like many rights, religious freedom is not an absolute. It is limited by respect for both the rights of others and the common good. Because our sense of autonomy is often stronger than our sense of the common good, agreeing on the limits of rights can be fraught. Tensions between rights should be resolved wherever possible in a spirit of mutual respect, not suspicion, and with generosity towards beliefs and ways of life we do not share or even oppose. Restrictions on religious freedom should be made only on the basis of principles which apply to everyone.

- 5 Religious freedom is more than freedom of worship or a right to tolerance**
The persecution of people in different parts of the world because of their religious beliefs shows how important basic protections such as freedom to worship and the right to be tolerated are, but religious freedom does not end there. It is a much larger freedom which makes it possible for individuals and faith communities to witness to their beliefs with integrity and as full members of their society, not only in worship but in professional life, public life and service to the wider community.
- 6 Religious freedom allows individuals to practise their religion freely and publicly as citizens, and not just in private life**
The claim that religious people should quarantine their beliefs from public debate and even from the way they carry out their profession or occupation is unfair and discriminatory, because it allows everyone except religious people to act on their beliefs. No human being lives in neatly divided public and private worlds. Beliefs about meaning and truth, right and wrong—religious and non-religious alike—are conclusions about what is real and important in life. For everyone, they serve as a basis for their action in the world.
- 7 Religious freedom means people are entitled to live out their beliefs in the way they serve the rest of the community**
Coming together around a common purpose and shared beliefs to help those in need is one of the main ways in which religious communities encourage participation in society and work to build up a sense of solidarity. Religious freedom protects not only the right of people to live out their beliefs in co-operation with others who share their faith, but also the right to establish and operate services for the wider community that are faithful to the beliefs which inspired them, and which are reflected in their work.
- 8 Religious freedom is not a claim for special treatment**
It is a basic fairness for people to be able to put their beliefs into practice and not to be forced to act against them. Religious freedom protects this basic fairness. It is not a claim for a special privilege or an exemption for religious communities from laws which apply to everyone else, and describing it in these terms is misleading. Religious freedom is a fundamental right which ensures there is a space for religious communities to live out their beliefs, while also respecting the dignity and freedom of other people.
- 9 Religious freedom reinforces other fundamental rights**
Religious freedom is part of a larger whole. It does not sit in isolation but is an integrated and essential part of human rights. Because these rights protect the different things we need to make a full life possible, they have to go together and they should not be placed in opposition to each other. Freedom of religion both depends on respect for rights such as freedom of conscience, freedom of thought, freedom of expression, and freedom of assembly, and supports and reinforces them in turn. Placing religious freedom in doubt places these other rights in doubt as well.

10 Religious freedom makes democratic societies stronger

Religious freedom protects not only the right of individuals and religious communities to fully participate in the life of a democratic society, but also the contribution they make to building it up. Because religious freedom and related protections such as conscientious objection protect people from being compelled to co-operate with activities which they hold, as a matter of conviction, to be wrong, they also help to encourage people to speak out against injustice and evil when no one else will. Good societies need these voices.

Neither Sword Nor Shield: Religious freedom in principle and legislation

This paper develops the PM Glynn Institute's work on religious freedom, by providing examples from legislation which illustrates the philosophical principles of religious freedom published in *Chalice of Liberty*.

This is the fifth occasional paper to be published by the PM Glynn Institute, Australian Catholic University's public policy think-tank. It has been prepared by Lukas Opacic and Damien Freeman, under the guidance of an advisory committee comprising:

- Dr Michael Casey, Director of the PM Glynn Institute
- The Reverend Frank Brennan SJ AO, Rector of Newman College and Distinguished Fellow of the PM Glynn Institute
- Emeritus Professor Greg Craven AO GCSG, Emeritus Professor of Constitutional Law and Distinguished Fellow of the PM Glynn Institute
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- Professor Nicholas Aroney, Professor of Constitutional Law at the University of Queensland
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5. NEITHER SWORD NOR SHIELD: Religious freedom in principle and legislation

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Granda Silversmiths (Spain), silver-plated censer c.2014–16.
Australian University Art Collection.

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