

Principles of Religious Freedom and Associated Freedoms

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

— Article 18, Universal Declaration of Human Rights, 1948

Key Issues

*‘An “expert” or an authority on religious law is not the surrogate for an individual’s affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can vary from one individual to another. Requiring proof of the established practices of a religion to gauge sincerity of belief diminishes the very freedom we seek to protect’.*¹ - Justice Iacobucci

Who decides what is reasonable?

The test that a religious believer must ‘reasonably consider conduct or belief to be in accordance with the doctrines, tenets, beliefs or teachings of the religion’ requires judges to construct a hypothetical believer. This is highly problematic as there can be multiple and conflicting reasonably considered views by believers in the same religion as to whether particular conduct or a belief is in accordance with the doctrines, tenets, beliefs or teachings of the religion.

What is required: As accepted amongst leading common law jurisdiction Courts across the world, the focus should remain on the sincerity of the belief. This is consistent with the approach taken by the High Court in the Scientology Case. These sincerity tests recognise that when limitations are to be imposed upon the manifestation of religious beliefs, they should be imposed *after* the sincere belief has been evidenced, rather than through a refusal of the claim as a properly asserted religious claim, which engages the court in an unnecessary exercise of resolving doctrinal disputes. That common law also already provides the test to weed out ‘sham’ religions, such as the Church of the Spaghetti Monster.

Recognition that religious freedom is expressed in association and in order to protect it, religious corporate bodies and associations must be protected as well.

A clause in the Bill (clause 9), introduces an “associates clause” adapted from the *Disability Discrimination Act*.

The clause is novel, untested and lacks the accompanying provisions and definitions found in the DDA necessary to ensure it takes proper effect.

What is required: The ability for incorporated and unincorporated bodies to initiate complaints in their own capacity should be retained in addition to the ‘associates’ clause. If that is done, there needs to be a mechanism by which a religious belief can be attributed to a corporate body, in light of judicial rulings that a corporate body cannot have a belief

¹ *Syndicat Northcrest v Amselem* (2004) 2 SCR 551, [53].

Arbitrary Issues raised in the Bill

When people lose their religious freedom, they lose more than their freedom to be religious. They lose their freedom to be human.”ⁱ – Timothy Shah

No clear protection for employees during work hours or for those employed by businesses earning less than \$50M or government.

There is an implicit assumption that it is reasonable for employers (including government) to limit religious expression during work hours or that it is reasonable for employers under the \$50M threshold to regulate religious expression outside work hours.

What is required: Protection to Employees and Professionals irrespective of turnover and whether they are engaged in government

In order to provide adequate protection, the protections should extend to reasonable statements of belief (as defined in cl 42 and 8(5)) made inside and outside the workplace or in the course of a profession. The presumption that such statements are not reasonable created by the existing provisions should be removed. These protections should also apply to persons irrespective of the turnover of their employer and whether they are engaged by government.

Commercial Activities Test

Religious bodies and institutions primarily involved in commercial activities have been excluded from the Bill's protections. An exception was made for Public Benevolent Institutions in the second draft but these only constitute a small section of the Charities and Not for Profit sector.

Exemptions in anti-discrimination law have never been limited to Public Benevolent Institutions. This proposal would exclude, for example, volunteering and philanthropic bodies, marriage or family counselling organisations, radio stations and religious bookstores amongst others.

What is required: The commercial activities test should be removed. Protections should extend to all bodies which are conducted in accordance with, **or in furtherance of**, the doctrines, tenets and beliefs of a religion.

Freedom of Conscience: Holding different views on marriage, sexuality, gender, sanctity of life and other contentious issues.

Freedom of religion and conscience affirms the dignity, worth, and agency of every human person by freeing us to align “who we understand ourselves to be” with “what we believe actually is,” and then to think, speak, and act in line with these convictions. - Os Guinness

Protection for professionals and individuals

Currently health practitioners and teachers are being investigated and disciplined by qualifying bodies for reasonable statements of belief they make on social media or within their religious groups

It is not clear that prohibition on discrimination in accreditation extends to non-professionals or tradespeople, such as foster carers or adoptive parents.

Those affected include professionals and individuals (such as foster carers or prospective adoptive parents) and

religious schools, tertiary education providers, incorporated student clubs within universities or accredited service providers under government or other contracts.

Religious discrimination legislation has been in place overseas for many years – and in many respects some judges have refused to interpret the protections in a way that meaningfully protects religious believers. Unless this legislation acknowledges and overturns that jurisprudence through precise drafting it will provide an influential set of decisions to which Australian courts will look. Examples from the United Kingdom include: a prison chaplain that was dismissed for preaching the traditional view of marriage was not subject to religious discrimination;² a magistrate that asked to be excused from presiding over adoption applications for same-sex couples was not protected by religious discrimination legislation;³ a births, deaths and marriages registrar that asked to be excused from officiating same-sex civil partnerships where other registrars were willing to do so was not protected by religious discrimination legislation;⁴ a relationships counsellor that asked to be excused from providing counselling to same sex couples was not protected by religious discrimination legislation.⁵ In Canada a public servant compelled to facilitate an abortion was not protected by religious discrimination legislation.⁶

What is required: Greater awareness of the individual curtailments on religious freedom such as those represented in the HRLA catalogue and solutions that address those concerns. Over 30 of the cases are documented here <https://australiawatch.com.au/>

Protection of Charities - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019: cl 4 (page 50)

² *Trayhorn v Secretary of State for Justice* UKEAT/0304/16/RN.

³ *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

⁴ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009) on unsuccessful appeal in *Eweida v United Kingdom* European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013)

⁵ *McFarlane v Relate Avon Ltd* [2010] IRLR 872, on unsuccessful appeal in *Eweida v United Kingdom* European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

⁶ *Moore v British Columbia (Ministry of Social Services)* (1992) 17 CHRRD/426.

Clause 4 of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* amends section 11 of the *Charities Act*, to provide that advocating for a traditional view of marriage will not lead to the loss of a charity's tax status. That Bill has not, however, amended section 6 of that Act, which requires that charities be for the 'public benefit'. Courts have removed the tax exemption of charities that have a traditional view of marriage or sexuality in other common law countries for not satisfying the 'public benefit' requirement. This is an area of the law where developments overseas are uniquely influential. Subsequent to the provision of the Expert Panel's Report, the High Court of New Zealand held in August 2018 that Family First was not a charity on the basis that: 'it cannot be shown that Family First's promotion of the traditional family unit, though no doubt supported by a section of the community, if achieved would be a *public benefit*'.⁷

What is required: Section 6 must also be amended.

Religious Freedom Commissioner:

This is likely to be a problematic role if not clearly defined and appropriate funding provided. The RDB2 should include more detailed appointment criteria, in order to ensure that the appointee to this position is a person who understands religion and the importance of advocating for religious freedom. If this would amount to a violation of s 116 of the *Constitution*, which prevents the imposition of a religious test as a qualification for any office or public trust under the Commonwealth, then the position should not be created.

Acknowledgement: This resource draws largely from the Institute for Civil Society's Submission to the Second Religious Discrimination Bill and the Human Rights Legislation Amendment (Freedom of Religious) Bill 2019.

More detailed information can be found here: http://www.i4cs.com.au/wp-content/uploads/2020/02/ICS_Religious-Discrimination-Bill-2_Submission.pdf

⁷ In the matter of an appeal under section 59 of the Charities Act 2005 from a decision of the Charities Commission dated 21 August 2017 and in the matter of Family First New Zealand, CIV-2017-485-775, High Court of New Zealand, France J.

