

# THE AUSTRALIAN LAW JOURNAL

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## ARTICLES

### THE FUTURE OF RELIGIOUS FREEDOM

#### Patrick Parkinson AM

Religious freedom used to be taken for granted in Australia. It cannot be any longer. A number of serious issues have emerged in recent years, some of which were explored in the Religious Freedom Review chaired by former Attorney-General, Phillip Ruddock. Religious freedom is largely protected by means of exemptions in anti-discrimination laws; but these exemptions are increasingly under attack. It would be better to have a positive affirmation of the right of faith-based organisations to choose or prefer staff who adhere to their beliefs or values and to require staff to abide by norms of conduct that are perceived as consistent with those beliefs. Another question is whether an employer is entitled to control what a person says on matters of faith 24 hours of the day and seven days of the week even where this is entirely unrelated to his or her employment. Freedom of conscience is also emerging as an issue where human rights protections are inadequate. .... 699

### CAN AUSTRALIAN LAW BETTER PROTECT FREEDOM OF RELIGION?

#### Nicholas Aroney

The Religious Freedom Review was established to examine whether the human right to freedom of religion is adequately protected in Australian law. This article expounds the relevant human rights principles and identifies several ways in which Australian law fails adequately to protect freedom of religion. These include problems with the interpretation of religious freedom exemption clauses in antidiscrimination laws and the ineffectiveness of Human Rights Charters. The Expert Panel made two important recommendations to address these problems. The first is that the International Covenant on Civil and Political Rights Siracusa Principles should guide the drafting of laws that would limit the right to freedom of religion. The second is that objects clauses in anti-discrimination laws should be redrafted to reflect the equal status in international law of the human right to freedom of religion. This article argues that while re-drafting objects clauses will provide important guidance to the courts, narrow interpretations of religious freedom protections have been a consequence of providing protection merely by way of exemption. In order for Australian law to implement the Siracusa Principles adequately, anti-discrimination laws should be

amended to positively enshrine the right of religious bodies to select staff who share their religious convictions so as to maintain their religious ethos. .... 708

## PROTECTING RELIGIOUS FREEDOM IN A HUMAN RIGHTS ACT

### **Harry Hobbs and George Williams**

The legal protection of religious freedom in Australia has been subject to significant debate over recent years. In the last four years this question has formed the basis of inquiries by the Australian Law Reform Commission, a Parliamentary Committee, as well as a specially formed Expert Panel, chaired by Philip Ruddock. In this article we outline the international and comparative approach taken to protect freedom of religion, and contrast this to the position in Australia. We find that Australian law does not adequately protect this foundational human right. We then assess the recommendations proposed by the Ruddock Review. We argue that although the Expert Panel recognised the extent of the problem, it did not propose a comprehensive or holistic solution that will resolve existing inadequacies. To protect religious freedom, and indeed human rights more generally, the Commonwealth Parliament should enact a national human rights act. .... 721

## TOWARDS RE-THINKING “BALANCING” IN THE COURTS AND THE LEGISLATURE’S ROLE IN PROTECTING RELIGIOUS LIBERTY

### **Joel Harrison**

This article critically questions “balancing” as the dominant framework for adjudicating issues of religious liberty. Within this framework, the possible friction between rights (in particular, religious liberty and non-discrimination) is assessed on a proportionality basis, leading a court to balance what are characterised as competing interests. The article suggests that balancing may misconceive the nature of a religious community; that abstracting religious claims to interests in the balancing framework may contribute to the inability of courts to comprehend arguments from religious communities; and that a secularisation narrative structures such proportionality or balancing exercises. The article raises whether alternative forms of analysis are possible. It turns to legislative deliberation and action, and how this ideally entails a broader capacity to hear distinctly religious claims and may be well-placed to consider how religious communities contribute to shared goods – even if they do so differently. .... 734

## EVIDENCE OF ABSENCE IN THE RUDDOCK REPORT

### **Jeremy Patrick**

The recommendations made in the Ruddock Report are rather modest when compared to previous reviews of the state of religious freedom in Australia. The Ruddock Panel rejected widespread calls for a general federal human rights act or a specific law protecting religious freedom. What explains the Panel’s reluctance? This article argues that the cause was the Panel’s extremely narrow definition of what legitimately constitutes evidence of a problem. The Ruddock Report often supports its recommendations of inaction by stating that submissions arguing for change consistently relied on a handful of high-profile cases, involved incidents overseas, or just did not provide numerically impressive evidence of complaints to existing human rights bodies. In addition, the Ruddock Report failed in viewing rights protection as purely reactive (solving an existing problem) rather than prophylactic (safeguarding against plausible and significant future threats). By setting such a narrow standard of acceptable evidence and by neglecting the need for foresight, the Ruddock Report did not properly evaluate the important issues it was asked to investigate. .... 747

RELIGIOUS SCHOOLS AND DISCRIMINATION AGAINST STAFF ON THE BASIS OF SEXUAL ORIENTATION: LESSONS FROM EUROPEAN HUMAN RIGHTS JURISPRUDENCE

**Anja Hilkemeijer and Amy Maguire**

The Sex Discrimination Act 1984 (Cth) (SDA) allows religious schools to discriminate against staff and contractors on the basis of their sexual orientation, as well as a range of other grounds, in order to “avoid injury to religious susceptibilities”. These provisions are inconsistent with international human rights law – as expressed in the jurisprudence of the European Court of Human Rights – for several reasons. First, the wording is impermissibly vague. Second, the provisions fail to take into account that the nature of the work is relevant in determining whether a staff member is subject to a heightened duty of loyalty. Finally, the provisions do not incorporate a balancing of staff and contractors’ rights against those of the religious school. To bring federal law in to line with international human rights law the broad exemption in s 38 of the SDA needs to be replaced with one that allows for a careful balancing of all rights in each individual case. The article ends by highlighting some legislative models that provide a balance between religious schools’ right to religious institutional autonomy and employees’ rights to equality, privacy and family life. ....

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RELIGIOUS SCHOOLS, RELIGIOUS VENDORS AND REFUSING SERVICES AFTER RUDDOCK: DIVERSITY OR DISCRIMINATION?

**Alex Deagon**

The Ruddock Review recommended that the Commonwealth should pass legislation allowing religious schools to refuse to provide marriage services if the refusal conforms with the religion and is necessary to avoid injury to religious adherents. However, the Panel did not recommend that similar legislative protections be provided to religious vendors. This article argues there is no principled basis for this differential treatment. It proposes two criteria for a permissible refusal of marriage services: the service must be directly connected to the marriage, and the entity refusing the service must be truly and consistently religious in nature. This framework provides a unified conception for a consistent approach to refusing services which takes into account the similarities between religious vendors and religious schools in this context. ....

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ENFORCING CONFORMITY: CRIMINALISING RELIGIOUSLY INSPIRED ACTS

**Michael Quinlan**

This article considers current and foreshadowed Australian exclusion zone laws against the religious freedom, freedom of expression and peaceful assembly protections in the International Covenant on Civil and Political Rights (ICCPR). Exclusion zone laws criminalise activities which occur within designated areas around facilities which terminate pregnancies. Proscribed activities include communication and encompass public prayer, the offer of counselling and protest (no matter how quiet, respectful or caring). To date those prosecuted under these laws have been Christians whose actions were non-violent and motivated by their religious faith. The article argues that there is insufficient evidence that such actions cause harm sufficient to justify their criminalisation. It concludes that, at least to the extent that they criminalise public prayer and the offer of counselling, it is at least arguable that such laws are not necessary within the terms of Arts 18(3) and 21 and that they are contrary to Arts 18 and 21 of the ICCPR. ....

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## THE GOOD OF RELIGION

**Joshua Neoh**

This article seeks to answer the question of why the relationship between anti-discrimination principles and freedom of religion is so controversial in Western democracies today. The answer lies partly in the gradual erosion of the distinctive good of religion in the liberal democratic state. Having lost sight of the distinctive good of religion, it is a matter of course that religious freedom too will lose its place in the pantheon of political rights. Hence, when faced with the claims of anti-discrimination, claims of religious freedom seem to have lost their bearing. To regain their bearing, advocates of religious freedom have to reassert the distinctive good of religion in the liberal democratic state, not merely as a private right, but as a public and political right. However, that reassertion requires a reconstruction of the normative justification for religious freedom. The new justification must rationalise the singling out of religion and religious freedom for special protection in the secular age. .... 791

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