

3. Freedom of Religion

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A common law right

3.1 Freedom of religion protects not only the freedom to observe or practise religious beliefs, but also the freedom not to observe or practise any religion or belief.¹ This chapter discusses the source and rationale for protecting freedom of religion; how this freedom is protected from statutory encroachment; and when laws that encroach on this freedom may be justified.

3.2 The ALRC calls for submissions on two questions about this freedom.

Question 3–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

Question 3–2 Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

3.3 Freedom of religion is recognised in the common law. In *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983), in the context of defining the meaning of ‘religion’ for taxation purposes, Mason ACJ and Brennan J commented:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society ... [A] definition of religion ... mark[s] out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.²

1 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120; *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559; *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145.

2 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

3.4 Broadly speaking, religious freedom involves positive and negative religious liberty. Positive religious liberty involves the ‘freedom to actively manifest one’s religion or beliefs in various spheres (public or private) and in myriad ways (worship, teaching and so on)’.³ Negative religious freedom, on the other hand, is freedom from coercion or discrimination on the grounds of religious or non-religious belief.⁴

3.5 The freedom to observe and practise religious faith protects the inherent dignity of individuals, acknowledging the autonomy of individuals to make decisions about the way they live their lives.⁵

3.6 The protection of religious freedom recognises the existence of multiple identity groups in a pluralist democratic society.⁶ Respect for another person’s religious beliefs has been described as ‘one of the hallmarks of a civilised society’.⁷

3.7 The 17th century philosopher, John Locke, wrote about the importance of tolerating other religious beliefs:

The Toleration of those that differ from others in Matters of Religion, is so agreeable to the Gospel of Jesus Christ, and to the genuine Reason of Mankind, that it seems monstrous for Men to be so blind, as not to perceive the Necessity and Advantage of it, in so clear a light.⁸

3.8 Thomas Jefferson, writing in his *Notes on the State of Virginia* (1781—2), advocated for religious freedom on the basis of natural law:

Our rulers have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit, we are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.⁹

3.9 Common law protection for freedom of religion developed significantly towards the end of the nineteenth century in England, predominantly in deceased estate cases where testators had attempted to influence the religious tendencies of their beneficiaries by attaching conditions to a legacy.¹⁰

3 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press) 128.

4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(2).

5 *Universal Declaration of Human Rights 1948* preamble.

6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

7 ‘Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other’s beliefs. This enables them to live in harmony’: *R v Secretary of state for education and employment; ex parte Williamson* [2005] UKHL 15 [15] (Lord Nicholls of Birkenhead).

8 John Locke, ‘A Letter Concerning Toleration (1685)’ in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1998) 174.

9 Thomas Jefferson, ‘Notes on the State of Virginia (1781—2)’ in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1989) 219.

10 There are a large number of reported cases on such facts from the late Victorian period: Peter James Hymers, *Halsbury’s Laws of England* (Lexis Nexis Butterworths, 4th ed, 2008) vol 50, [379]. In some cases, such clauses have been found to be contrary to public policy, although this is not precedent at Australian law: *Trustees of Church property for Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394.

Protections from statutory encroachments

Australian Constitution

3.10 Section 116 of the *Australian Constitution* provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.¹¹

3.11 This provision has been read narrowly by the High Court.¹² For example, in *Krygger v Williams* (1915) the High Court upheld a law requiring attendance at compulsory peacetime military training by persons who conscientiously objected on religious grounds. The court found the law requiring attendance at military training did not infringe s 116:

To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.¹³

3.12 Given the limitations of s 116 as a protection of religious freedom, and the limited protection at common law, there is some debate about the extent to which freedom of religion is protected by Australian law.¹⁴

Principle of legality

3.13 The principle of legality provides some protection to freedom of religion.¹⁵ When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously clear.¹⁶ McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society* (1985) suggested that Australian courts should show restraint in upholding provisions which interfere with religious equality:

If the ordinance is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so, I think that a court should prefer that construction to one which will prevent them from doing so.¹⁷

11 *Australian Constitution* s 116.

12 *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559, 604 (Gibbs J); *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 268. See also, Tony Blackshield, George Williams and Michael Coper (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 93–4.

13 *Krygger v Williams* (1915) 15 CLR 366, 369 (Griffith CJ).

14 Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) 88.

15 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

16 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

17 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA). See also, DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [5.15].

International law

3.14 Article 18(1) of the *Universal Declaration of Human Rights* 1948 enshrines freedom of religion:

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.

3.15 Article 18(1) of the ICCPR states that ‘everyone shall have the right to freedom of thought, conscience and religion’.

3.16 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.¹⁸ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.¹⁹

Bills of rights

3.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes protect freedom of religion in the United States,²⁰ the United Kingdom,²¹ Canada²² and New Zealand.²³ An example is s 15 of the New Zealand *Bill of Rights Act*, which provides:

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.²⁴

3.18 The *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) also include protection for religious freedom.²⁵ For instance, s 7 of the Victorian charter requires that in the event of a conflict between rights, lawmakers can place limits on rights, taking into account: ‘the nature of the right; the importance of the purpose of the limitation’; ‘the nature and extent of the limitation’; and ‘any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’.

18 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

20 *United States Constitution* amend I.

21 *Human Rights Act 1998* (UK) c 42, sch 1 pt 1, art 9(1).

22 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) c 11, sch B pt 1, s 2(a).

23 *Bill of Rights Act 1990* (NZ) s 15.

24 *Ibid.*

25 *Charter of Human Rights and Responsibilities 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.

Justifications for encroachments

3.19 Like all freedoms, the freedom of religion is not absolute: ‘it is subject to powers and restrictions of government essential to the preservation of the community’.²⁶ As White J of the South Australian Supreme Court has stated:

the common law has never purported to prevent the Parliament from asserting and exercising absolute right to interfere with religious worship and the expression of religious beliefs at any time that it liked ... the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression.²⁷

3.20 Similarly, in the UK case of *R v Secretary of state for education and employment; ex parte Williamson* (2005), Lord Nicholls of Birkhead stated that

under article 9 there is a difference between freedom to hold a belief and freedom to express or ‘manifest’ a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified. This is to be expected, because the way a belief is expressed in practice may impact on others.²⁸

3.21 Legal protection of religious freedom depends on balancing respect for different religious values and beliefs with those principles and laws that underpin other freedoms, non-discrimination and equality in a pluralist, secular democracy:

As a practical matter, it is impossible for the legal order to guarantee religious liberty absolutely and without qualification ... Governments have a perfectly legitimate claim to restrict the exercise of religion, both to ensure that the exercise of one religion will not interfere unduly with the exercise of other religions, and to ensure that practice of religion does not inhibit unduly the exercise of other civil liberties.²⁹

3.22 International law provides that freedom of religion may be limited where it is ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.³⁰

3.23 While some discrimination in employment practices— by religious schools for example—has been tolerated and even protected by law,³¹ limits on discrimination on religious grounds have been justified to ensure the protection of vulnerable people. Freedom of religion is fundamental, but so too is freedom from discrimination on the grounds of gender, race, sexual orientation or some other protected attribute. Freedom from discrimination is also a fundamental human right.³²

3.24 Where there is conflict between religious teaching and the rights of citizens to engage in public life without fear of persecution, religious freedoms may be limited.

²⁶ *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).

²⁷ *Grace Bible Church v Reedman* (1984) 36 SASR 376, 385, 388.

²⁸ *R v Secretary of state for education and employment; ex parte Williamson* [2005] UKHL 15 [16].

²⁹ Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204.

³⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3); United Nations Human Rights Committee, General Comment No 22 (1993) on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion, CCPR/C/21/Rev.1 22.

³¹ *Sex Discrimination Act 1984* (Cth) s 38.

³² *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [1] (Maxwell P).

This arises in Commonwealth anti-discrimination legislation.³³ Such a conflict may arise for example between religious teaching concerning sexuality, and the non-discrimination principles which inform unlawful dismissal provisions in employment law.

3.25 Religious freedom may be limited where one person's religious observance may cause harm to another person. In Victoria, for instance, medical professionals who have a conscientious objection to performing a lawful termination of pregnancy are legally obliged to refer a patient to a doctor whom they 'know does not have a conscientious objection to abortion'.³⁴

3.26 Encroachments on religious freedom are also sometimes said to be required to prevent an individual from causing themselves harm when following certain religious practices, particularly if that person is a minor.³⁵ For instance, the decision of a minor to refuse life-saving therapeutic medical treatment on the basis of religious beliefs may be overruled by a court exercising its *parens patriae* jurisdiction.³⁶

3.27 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.³⁷

3.28 Some laws that limit freedom of religion may be justified. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why they are not justified.

33 See, for example provisions in the *Sex Discrimination Act 1984* (Cth) ss 37 and 38. These provisions provide exemptions to the requirement of non-discrimination on the grounds of gender, marital status and pregnancy in relation to the ordination of priests, and an exemption for employing staff in religious educational institutions.

34 *Abortion Law Reform Act 2008* (Vic) s 8(1)(b). For some, this requirement may conflict with their religious objection to abortion by requiring them to indirectly help a woman to procure an abortion.

35 Evans, above n 14, 10.

36 *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294.

37 *Canada Act 1982 c 11, Sch B Pt 1* ('Canadian Charter of Rights and Freedoms') s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.