

The Forgotten Freedom: Threats to Religious Liberty in Australia

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Executive Summary

The campaign for what has been dubbed ‘marriage equality’ is gaining ground in many Western countries, including Australia, despite religious and secular people not always sharing a common point of view on the matter. In an accompanying development, the cause of marriage equality has become something of a proxy for those who advance an aggressive secularism and dismiss the religious reservations of believers.

The Australian Greens have been at the forefront of this assault on religious liberty. For example, in 2011, Cate Faehrmann, a Greens MP in the NSW Parliament, insisted that religious freedom must never be permitted to trump discrimination on the basis of sexual orientation; in March 2014, WA Greens Senator Scott Ludlam condemned Prime Minister Tony Abbott’s principled, faith-based opposition to same-sex marriage as homophobic.

The right of Australian religious groups and communities to order their affairs in accordance with their beliefs and traditions is recognised in every state by anti-discrimination legislation. The exemptions afforded by these Acts do not exist simply to justify what would otherwise be unlawful discrimination; rather, they are there to protect a fundamental human right, namely the right to religious liberty, and to ensure that right is balanced against other rights. Nevertheless, these very protections are under threat from the organised forces of secularism. This enthusiasm for securing equality in all human relationships and social interactions continues to drive the state to impose new virtuous standards of conduct and thought upon the citizenry.

Contemporary debate about religious freedom usually concerns the extent to which the liberal state should permit the free expression of religious ideas in the public square. However, a key source of pressure on religious liberty comes from the emergence of a new ‘statist’ form of liberalism that is more concerned with the pursuit of equality than with the empowerment and freedom of individuals to express themselves and order their lives as they choose. Statist liberalism regards religious faith as little more than a subjective preference of taste rather than as the organised expression of a form of life for engaging with what is believed to be of ultimate meaning.

Many religious believers are concerned that aggressive secularism seeks to drive religion, particularly Christianity, completely from the social and cultural realm where faith is practised, into the private and confined realm of the mind. Secular virtues such as equality are now being imposed by the state in the name of tolerance and dignity.

There is an additional concern that issues of equality and sexual orientation will always prevail when they come into conflict with freedom of religion. The pursuit of equality imposes nothing less than a tyranny of tolerance upon the individual citizen. This tyranny, in turn, threatens the freedoms the citizen has long enjoyed under the liberal state to pursue his or her conception of the good life.

Rather than constructing and imposing models of equality upon the individual, the political and cultural framework of the liberal state needs to allow believers and non-believers alike, with differing and even conflicting points of view, to live together peacefully.

Introduction

Religious freedom doesn't just concern our role as citizens in the public square. Religious liberty also concerns our freedom to choose in numerous non-political aspects of our lives, ranging from whether we attend church on a given day of the week, to what we choose to purchase.¹

— Samuel Gregg

Contemporary enthusiasm for securing equality in all human relationships and social interactions has fuelled many legislative initiatives whereby the state seeks to impose virtuous standards of conduct and thought upon the citizenry. One of the most egregious forms of 'secular sin' that these initiatives have sought to purge is discrimination on the basis of race, gender or sex. The drive to legislate for various forms of non-discriminatory behaviour in contemporary Australia began under the Whitlam Labor government with the passage of the *Racial Discrimination Act 1975*, which drew upon the International Covenant on Civil Political Rights 1966 (ICCPR) to which Australia is a signatory.² Although the *Racial Discrimination Act 1975* was intended as a means to eradicate racism, it has become the cornerstone of Australia's multicultural policy, and its values have set the tone for subsequent debates about equality and social inclusion.³

Proponents of same-sex marriage, who campaign for the extension of the meaning of marriage to include two people of the same sex, draw on a similar set of social and political values. They argue that the state should act to uphold the freedom and the right of people of any sexual orientation to live and love as they choose.⁴ They also argue that the state should not discriminate against gay and lesbian relationships by forbidding them to marry, thereby denying them equal status before the law. Critics of this position maintain that the state should have no part in imposing an artificial construction of marriage upon the citizenry. As Gerard Calilhanna has argued:

Here we have a major example of extreme statism, where a crucial pre-state institution that limits the power of the state is suppressed and replaced by an institution that depends on the state for its existence.⁵

Nonetheless, the campaign for what has been dubbed 'marriage equality' is gaining ground in many Western countries, including Canada and Australia, despite religious and secular people not always sharing a common point of view on the matter. In an accompanying and parallel development, the cause of marriage equality has become something of proxy for those who advance an aggressive secularism. This campaign seeks completely to drive away religion, particularly Christianity, from the social and cultural realm where faith is practised, to the private and confined realm of the mind. This drive brings into sharp focus one of the key issues that underlies it, namely, religious liberty or freedom of religion.⁶

The right of Australian religious groups and communities to order their affairs according to their beliefs and traditions is recognised in every state by anti-discrimination legislation such as the *Anti-Discrimination Act 1977* (NSW).⁷ This is not merely a national or cultural quirk: The US *Civil Rights Act 1964* and the Universal Declaration of Human Rights 1948 both specifically protect freedom of religion. Exemptions do not exist simply to justify what would otherwise be unlawful discrimination; rather, they are there to protect a fundamental human right, namely the right to religious liberty, and to ensure that right is balanced against other rights. Nevertheless, these very protections are under threat from the organised forces of secularism.

Religion and the concomitant requirements of anti-discrimination law present Australia with competing and conflicting demands. Even though formal participation

The cause of marriage equality has become something of proxy for those who advance an aggressive secularism.

in religious institutions in this country is declining, the contribution they make to Australian society remains strong. In addition to the 12,174 religious organisations that comprise the largest single group of not-for-profit organisations, a substantial number of religious charities (sometimes known as faith-based organisations) provide services in education, health, disability and aged care.⁸ Notwithstanding the place that religion clearly continues to occupy in the Australian public square, there is a lively debate about the extent to which it should do so. Few, if any, in a liberal state would mount an argument for religious intolerance or the removal of the freedom to practise one's religion in peace. However, religious liberty in Australia is under attack in other and more insidious ways. Religion may have refused to be cast into the dustbin of secularism, but believers are nonetheless under constant pressure to demonstrate that religious belief is a positive rather than a negative feature of liberal society.

Clashing creeds and dogmas: Imposing secular virtues

The expectation that religious belief would atrophy when exposed to the sun of twenty-first century scientific criticism has proven false. The rapid spread of traditional, conservative expressions of religions, such as Christianity and Islam, in recent years, together with a heightened awareness of the terrible consequences of religious zealotry in the early years of the twenty-first century, has been accompanied by a greater readiness of religious believers to assert their right to the free expression of their beliefs. It is not hard for the blowback against the secularist agenda to develop political weight. In their best-selling book *God is Back*, John Micklethwait and Adrian Wooldridge argue that secularisation theorists were wrong to claim that modernity and religion are incompatible but right to warn of religion as a dangerous political force. As such, they maintain that religion flourishes best when it operates in a world of free choice, and that this also means one of the challenges facing the secular liberal state is 'to construct a constitutional regime that makes room for religion without sacrificing the fundamental principles of liberal pluralism.'⁹ This resurgence of religion, both at an individual and a societal level, has obliged philosophers such as Jürgen Habermas to admit to the emergence of 'post-secular societies':

In these societies, religion maintains a public influence and relevance, while the secularistic certainty that religion will disappear worldwide in the course of modernization is losing ground.¹⁰

Paradoxically, religious believers are under greater pressure to defend the right to religious liberty as more religions emerge in the twenty-first century marketplace. These religions offer competing claims to truth and inerrancy, and because they often assert themselves vigorously in the public sphere, there is now a heightened need for tolerant accommodation of pluralism.

A key source of pressure on religious liberty comes from what Rex Ahdar and Ian Leigh have identified as the supplanting of an older form of liberalism, largely concerned with the empowerment of individuals and protection against encroachment of the state, by a new 'statist' form. Statist liberalism, they argue, is more concerned with the pursuit of equality and substantive outcomes such that 'religious passions ought to be quelled; faith is best treated by good liberal citizens as a mere subjective, individual preference of taste among many, a mere "hobby".'¹¹

One consequence of this 'subjectivisation' of religious belief is that the mark of a good citizen of the liberal state is no longer the display of personal conviction but, rather, the deliberate and even ostentatious display of what might pass for open-mindedness—one that is, in reality, a form of moralistic relativism concerned

Believers are under constant pressure to demonstrate that religious belief is a positive rather than a negative feature of liberal society.

with elevating the rights and interests of any who are perceived to be victims of discriminatory or marginalising behaviour. Concerned by the eclipse of conviction, Michael McConnell has warned that the new statist, secularist form of liberalism has no place for those whose ways of life are guided by the search for the ultimate meaning of religious truth:

The ideal of the liberal citizen ... conflicts with the ideal of belief in religion or in any other comprehensive faith or ideology. To the extent that the state pursues this new vision of the liberal citizen and enforces its vision by force, religious freedom is gravely endangered ... [Liberalism becomes] a narrow and sectarian program enforcing its dogmas by force.¹²

In the event that the search for the ultimate meaning and truth leads, say, to the convinced and sincerely held belief that homosexuality is immoral, religious believers are now more likely to find themselves clashing with the coercive values of the aggressively secular liberal state and facing accusations of equality denial, hate speech, and homophobia.¹³ Yet these are the very circumstances in which believers may demand the freedom to express their religiously inspired views about human sexuality publicly or to oppose the recognition of gay rights. It's not difficult to see that if those actions are met with the coercive force of the state, broader rights of freedom of association and freedom of expression may also be at risk.

The meaning of religion and freedom of religion

Civil societies are necessarily tolerant to a degree, and intolerant to a degree; they punish what they cannot afford to tolerate, tolerate what they cannot afford to punish.¹⁴

— Oliver O'Donovan

The importance of freedom of religion might not be readily apparent in contemporary Australia. Indeed, generalising about religion in this country is complicated because, in the words of the Australian Human Rights Commission (AHRC), 'Australia is partly a Christian country, partly a multifaith country, and partly a secularist country.'¹⁵

According to the 2011 Census, Christianity remains the most commonly reported religion in Australia even though the number of people identifying as Christian continues to fall, down from 63.9% of the population in 2006 to 61.1% in 2011. In addition, the number of people not reporting a Christian faith rose from 36.1% in 2006 to 38.9% in 2011. The 2011 Census also showed that the number of people reporting 'No religion' increased significantly between 2006 (18.7%) and 2011 (22.3%). The most common non-Christian religions in 2011 were Buddhism (accounting for 2.5% of the population), Islam (2.2%), and Hinduism (1.3%). Of these, Hinduism has experienced the fastest growth since 2006, increasing from 148,130 to 275,534, followed by Islam from 340,394 to 476,291, and Buddhism from 418,749 to 528,977.¹⁶ More recent research indicates that attitudes to religious affiliation continue to change, and that the long-term prospects for Christianity in Australia do not look healthy. From October to December 2013, just 52.6% of Australians said they were Christian, while 37.6% said they had no religion.¹⁷

Even the term *religion* is vague and elusive, but the AHRC has offered the following very workable definition:

Religion can be taken to refer to an organised form of maintaining, promoting, celebrating and applying the consequences of engagement with what is taken to be ultimately defining, environing, totally beyond, totally other, and yet profoundly encountered within life.

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These activities are usually done by or in association with a group, an organisation and/or community.¹⁸

According to the Macquarie Dictionary:

[Religion is] the belief in a supreme supernatural power or powers thought to control the universe and all living things, and a particular formalised system in which this belief has been embodied.

However, this definition obviously excludes non-theistic religions such as Buddhism and Confucianism. A broader definition of religion was recognised by the US Supreme Court in *Torcaso vs Watkins* where, for the purposes of legally protecting the free exercise of religion, the court listed a number of religious belief systems, such as Taoism, Buddhism and Secular Humanism, that do not include the existence of God.¹⁹ Secularists who are intent upon expelling religion from the public square are therefore not necessarily rejecting all types of faith. Rather, by imposing their own systematic worldview, they are privatising all religions except their own, which they have privileged above all others.²⁰ Russell Blackford loosely adopts the definition proposed by Canadian philosopher Charles Taylor, accepting Taylor's four points defining religion as:

... an otherworldly order of things and an otherworldly dimension to human lives; an ultimate good that transcends worldly kinds of flourishing; the possibility of spiritual transformation ... and the existence of transcendent and transformative powers, such as the Abrahamic God.²¹

Australian courts have also worked hard to define religion satisfactorily. However, a court may be required to do so, and with some precision, when called upon to resolve practical matters such as the provision of educational services or taxation exemption status. The most comprehensive discussion of religion by the High Court of Australia arose in a case about tax exemption known as the *Scientology* case, in which the Church of Scientology challenged the decision of the tax commissioner that the church was not a religion for the purposes of exemption from taxation.²²

In the *Scientology* case, no definition of religion attracted the support of a majority of the justices, although that formulated by Mason ACJ and Brennan J is considered to be the clearest definition for legal purposes. They adopted a two-part test according to which a religion must consist, first, of belief in a supernatural Being, Thing or Principle, and second, of the acceptance of canons of conduct giving effect to that belief. This definition has proved both to be precise enough to be workable and expansive enough to be adaptable to monotheistic and polytheistic religious groups. Although the five justices did not agree on a single definition of religion, they all held that Scientology was in fact a religion for the purposes of payroll tax exemption.

Broadly, then, the phenomenon of religion can be understood as having its roots in the awareness of a command from a supreme being that spurs a quest for the values of the ideal life expressed, or manifested, in terms of dutiful obedience. Religion may be characterised by a belief in supernatural, transcendent agents and powers that makes demands of, and produces transformations in, its adherents by imposing a standard of moral behaviour on the believer that sets criteria of conduct for him or her.

Just as patterns of religious affiliation in Australia are changing, so is the nature of the *freedom* to apply what the AHRC describes as those 'consequences of engagement with what is taken to be ultimate'—that is, freedom of religion. Ahdar and Leigh suggest that a significant and helpful definition of religious freedom was offered by the Supreme Court of Canada in the *Big M Drug Mart* case:

Secularists are privatising all religions except their own, which they have privileged above all others.

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.²³

The Supreme Court held that coercion could take the form of direct commands but included ‘indirect forms of control which determine or limit alternative courses of conduct available to others.’²⁴ Both the behaviour and the conduct of believers are important in examining the scope of religious liberty because it is a freedom that may be conceived both in terms of free choice and assumed duty. Religious freedom is a freedom given to fulfil a duty in response to a divine command.²⁵ Religious belief and religious practice are inseparable. Freedom to believe must always be accompanied by the freedom to speak, by the freedom to believe or disbelieve, and by the freedom to associate or dissociate. However, as Nick Spencer has remarked, the right to religious liberty ‘does not serve as a get-out-of-jail free card, trumping all other “rights”. Much depends ... on what precisely is being manifested and how important that manifestation is to the underlying belief.’²⁶

Negative religious liberty and positivist threats

Most definitions of religious freedom begin with, or at least take into account, that set out in the United Nations Universal Declaration of Human Rights 1948 (the Universal Declaration), which includes the freedom to believe and disbelieve, and the freedom to refuse to participate in religious practice.²⁷ The Universal Declaration recognises that the purely internal freedom of individuals to believe or think whatever they like is beyond the reach of the state. But it does define two external freedoms: a) a positive religious liberty whereby an individual enjoys the social freedom to manifest belief in private and in public, and b) a negative religious liberty whereby an individual enjoys freedom from coercion or discrimination on the grounds of religious belief. The negative liberty was articulated in the ICCPR, which set out a specific freedom from coercion. The ICCPR also permits the state to set limitations to religious freedom, although this applies only to the external expression of belief rather than the internal freedom of belief.²⁸

The Universal Declaration and the ICCPR are two principal treaties setting out protections of religious freedom, and both have been ratified by Australia. However, while ratification by Australia entails a legal obligation to act consistently with the treaty, it does not automatically make the treaty provisions part of Australian law, nor does it create rights that are directly enforceable in Australian courts. Indeed, such treaties do not form part of the Australian law unless they are specifically included in written laws by the federal Parliament. Even so, ratification does create obligations in the international sphere, which must be adhered to on pain of suffering reputational loss in the event of criticism from the United Nations or other international bodies (depending on how convincing the criticism is and on what standing the body making it has). ‘In addition, criticism by United Nations bodies may fuel further political debate in Australia about particular laws or practices that have been found to breach human rights.’²⁹

Even though Australia may have ratified an international treaty dealing with religious freedom, no power is automatically conferred upon the federal Parliament

Freedom to believe must always be accompanied by the freedom to speak, by the freedom to believe or disbelieve, and by the freedom to associate or dissociate.

to pass legislation to regulate that freedom. Neither religion nor human rights fall under the heads of power that confer legislative power upon Parliament. As with all other powers, however, the High Court of Australia has generally adopted an expansive approach to the construction of 'external affairs' so that the external affairs power has been used as a platform to expand federal legislative power. Of course, certain aspects of regulation of religion might also be achievable under the taxation or corporations power, but a more comprehensive protection of religious freedom is likely only to be possible under the external affairs power conferred by section 51(xxix) of the Australian Constitution, which does allow the Commonwealth to pass legislation to implement a treaty obligation. Yet as Carolyn Evans observes:

The fact that there is a treaty in existence that deals with religious freedom does not give the Commonwealth comprehensive power to deal with religious freedom as it wishes. The power is only to implement the relevant treaty provisions.³⁰

Evans also notes that thus far, the Australian government has not used the external affairs power to create more comprehensive protections of religious freedom, even though it does have the power to do so.³¹ The government may, indeed, do so in the future while being careful not to breach the constitutional prohibition and protection of religious liberty as set out in section 116 of the Constitution.³²

Section 116 does not confer a constitutional right to the free expression of religion. Rather, the section places a limit on the legislative power of the federal Parliament and forbids it from imposing a religious qualification for certain kinds of positions. Similarly, an individual has no constitutional right under section 116 to assert freedom of religion against the actions of other individuals or organisations. Indeed, as Evans notes, section 116 does not even create a positive obligation on Parliament to protect religious freedom. 'Section 116 simply prohibits the Commonwealth from enacting certain laws.'³³ It secures freedom for the citizen by constraining the power of Parliament rather than by creating a new, enforceable right. Furthermore, remarks made in *Kruger vs Commonwealth* suggest that even if the High Court were to hold that legislation found to be in breach of section 116 was invalid, no right to compensation or other civil remedies would thereby arise as a consequence.³⁴

In 2009, the National Human Rights Consultation Committee recommended Australia adopt a statutory bill of rights. Many religious groups had been clear in their opposition to the committee's recommendation, and the federal Labor government declined to act on it. Victoria and the ACT are the only two jurisdictions that have introduced statutory protections of human rights, including the right to religious freedom.³⁵ Both the Victorian Charter and the ACT *Human Rights Act 2004* require courts to interpret legislation in ways that are consistent with the provisions of the Acts. Both Acts contain very similar provisions that prohibit discrimination on the grounds of religion and establish a right to religious freedom.³⁶ Whereas under the ICCPR, only manifestations of religion can be limited or restricted, section 7 of the Victorian Charter provides for a 'reasonable limit' to be set on any human right if the need for restriction can be justifiably demonstrated. However, Evans considers it 'highly unlikely that any direct infringement of the freedom to have a religion would be held to be a reasonable limitation under s 7 of the Victorian Charter.'³⁷

Legislation is one way of protecting religious freedom. Another, easier way of doing so is for the state to leave unregulated issues of religious life and practice. This approach gives individuals and communities the freedom to decide for themselves how best to organise matters of life and practice. However, the issue of religious freedom will still arise sharply in the event that the secular law commands

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certain forms of conduct that religious believers find unconscionable. The clash between the dictates of conscience and the requirements of the law of the land can provoke great controversy because it raises two linked issues: first, the extent to which religious believers should be free to manifest their religion, and second, the extent to which religious freedom should be reconciled with the requirements of anti-discrimination laws.

The Australian Greens' assault on religion

The idea of marriage only being between a man and a woman is not just outdated but extremely defamatory.³⁸

— Senator Sarah Hanson-Young

In an adjournment speech to the Australian Senate on the night of 4 March 2014, just days before going to the polls in his own state, WA Senator Scott Ludlam taunted Prime Minister Tony Abbott with a provocative invitation to visit Western Australia. Ludlam qualified his invitation by presuming to tell the prime minister which attitudes and beliefs he should and should not bring with him on his visit:

Western Australians are a generous and welcoming lot, but if you arrive and start talking proudly about your attempts to bankrupt the renewable energy sector, cripple the independence of the ABC and privatise SBS, if you show up waving your homophobia in people's faces and start boasting about your ever-more insidious attacks on the trade union movement and all working people, you can expect a very different kind of welcome.³⁹

Perhaps Ludlam really does think the prime minister is frightened of homosexuals and that he expresses this fear in hatred. Abbott's principled opposition to the introduction of legislation to introduce same-sex marriage, as well as his decision not to permit a conscience vote for MPs and senators if a bill were to come before the federal Parliament, is enough to attract vociferous condemnation and even denunciation from some who actively campaign on the issue.⁴⁰ No evidence has ever been presented to suggest the prime minister hates homosexuals. Abbott's sister, who is a lesbian, has defended her brother, which gives a strong indication that the prime minister has no fear of homosexuals. However, Abbott is a practising Roman Catholic and his critics like to assume that it is his Christian convictions that have led him to defend a traditional model of marriage and oppose 'marriage equality.'

Many religious believers are concerned that a campaign is underway to ensure issues of equality and sexual orientation prevail when they come into conflict with freedom of religion. Proponents of same-sex marriage frequently dismiss the religious reservations of believers who argue that state-sanctioned marriage should not confer upon gay unions the status conferred upon conventional marriage. Thus, Cate Faehrmann, a Greens MP in NSW, insists that religious freedom must never be permitted to trump discrimination on the basis of sexual orientation. In a speech in the state's lower house in May 2011, Faehrmann proposed the introduction of a bill that would remove exemptions (or 'loopholes,' as she described them) based on religious liberty in the name of social justice and equality:

There is a false dichotomy at play here: freedom of religion, association and speech need not play out against the need to conform to standards of fairness and equality as determined by our democratically elected Parliament ... As a Parliament in a secular society we must rightly

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determine that no student in an educational institution, no employee in the workplace and no patient accessing any kind of health care should ever be disadvantaged or discriminated against because of his or her sexual orientation, sex and/or gender identity.⁴¹

If the policy objective is there should never be any acceptable religious reason for exempting an action that would otherwise be unlawful discrimination, it is highly probable that religious reasons for refusing to recognise same-sex marriage will, in time, also be struck down. So with what success can religious believers claim the right of religious freedom in this campaigning environment? The issue of same-sex marriage highlights how religious beliefs are increasingly coming into conflict with the prevailing anti-discrimination *zeitgeist*, and how those who hold those beliefs are attacked and their liberty compromised in the name of tolerance.

Tyranny of tolerance

The very idea of deconstruction seems to suggest that the idea of God ought to be eliminated from Western culture as a power play on the part of churches and others with vested interests in its survival.⁴²

— Alister McGrath

Contemporary debate about religious freedom usually concerns the extent to which the liberal state should permit the free expression of religious ideas in the public square. It is significant, if not always obvious, that this permission for free expression is closely associated with three other key freedoms: freedom of speech, freedom of conscience, and freedom of association. As Blackford has correctly observed, 'Religious freedom is essentially a freedom from state persecution, not a guarantee of a religion's ongoing credibility or its success in the contest of rival ideas.'⁴³

What the liberal state can and should do is secure the freedom of religious believers to live their lives in accordance with their beliefs as long as they do so in ways that do not undermine social cohesion. In any discussion of the right to freedom of religion, it is important always to be mindful of the place that right occupies in a larger quartet of freedoms. Blackford is quite correct to call for the protection of speech that is critical of religious belief; such discussion is, indeed, part of the fabric of the liberal state. Even when the beliefs of the religious come into conflict with others over an issue such as same-sex marriage, Blackford remains inclined to extend to them the same protection of speech:

Widespread freedom to discuss these matters should be seen as healthy. If it is constrained, this will silence not only artists, and others who may be seen as privileged, but also the weaker voices within the traditional communities.⁴⁴

This, most surely, is not a call for state-backed guarantees of the 'credibility or success' of a religious creed; it is simply to accept the right to believe what you want and to act on that belief in any way that does not threaten the peaceful social order. After all, it's not only religious believers who can behave in ways that cause offence and distress. Yet it is religious liberty that is now under threat, and liberal tolerance of religion that is on the wane in Western societies.

The vulnerability of religious freedom to anti-discrimination laws, notwithstanding the ostensible protections those laws contain, is demonstrated by the cases of Lillian Ladele, Brendan Eich, and Andrew Moffat. It is also demonstrated by the

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manner in which opposition to same-sex marriage informed by religious, specifically Christian, conviction, has generated significant political and legal difficulties in the United Kingdom and the United States.

When Lillian Ladele, a registrar working in Islington, North London, refused to conduct civil partnership ceremonies on the grounds of her orthodox Christian beliefs, she lost her job.⁴⁵ The European Court of Human Rights (ECHR) upheld the earlier decision of the UK Court of Appeal. The judges weighed theological as well as legal arguments and ruled that her objections were based on a view of marriage that was not a core part of her religion. Yet her employer, the local council, had implemented a new policy named, without any apparent irony, ‘Diversity for All’ that confronted Ladele with the need to make a decision.

An unanticipated and unilateral change in a fundamental term of her employment gave her a stark choice: to act against her religious convictions (which the court accepted were conscientiously and sincerely held) or to leave her employment.⁴⁶

In remarking upon the case before it had reached the ECHR, Ahdar and Leigh observed: ‘It is hard to avoid the conclusion that the higher courts allowed an employer in effect to prioritize one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance.’⁴⁷

The case was also a good example of how easy it is for a tribunal or court to get itself tangled in matters of theology and ecclesiology (disciplines in which judges seldom have much training) as it attempts to define a faith’s core beliefs. Judicial attempts to draw a workable distinction between *manifesting* belief (deemed worthy of protection) and behaving in ways *motivated* by belief (not deemed worthy of protection) are likely to yield further entanglements because actions that are motivated by religious belief tend to be regarded as inherently private whereas actions that manifest belief are not.

Ladele is not the only person to lose her job for holding fast to her religious convictions. In April 2014, Brendan Eich, the CEO of software company Mozilla, was forced to step down from his position because of his opposition to same-sex marriage. While defending Eich’s right to express his opinions, many journalists, such as *The Guardian*’s Mary Hamilton, condemned him for holding them:

All Eich is having to do here is face the consequences of his speech—and no one is attempting to restrict it, least of all the government. He can say what he likes and believe what he wants. But he doesn’t have a right to respect, or freedom from responses, or to a CEO job. No one does.

Eich clearly could not lead Mozilla in the way Mozilla needs and wants to be led.⁴⁸

Meanwhile, *The Economist* noted the care that business leaders must now take in expressing their own religious beliefs, while increasingly having to accommodate those of their employees:

The dividing line, it seems, is between indicating one’s faith and spelling out what it means in practice: devout Jews or Muslims, say, may wear kippahs or hijabs at work, but any manifestation of traditionalist religious views on morality would still be unacceptable—such as shunning colleagues of the opposite sex, or expressing disapproval of homosexuality.⁴⁹

‘It is hard to avoid the conclusion that the higher courts allowed an employer in effect to prioritize one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance.’

Oppressing encumbered selves

The moral justification for a right to religious liberty ... cannot wholly be detached from a substantive judgment about the moral worth of the practice it protects.⁵⁰

— Michael Sandel

In a celebrated essay, the philosopher Michael Sandel argued that any consideration of the nature of religious freedom required making an important distinction between freedom of conscience and freedom of choice, arguing that whereas conscience dictates, choice decides:

Religious liberty [addresses] the problem of encumbered selves, claimed by duties they cannot renounce, even in the face of civil obligations that may conflict.⁵¹

One of the significant marks of the liberal state has been a readiness to recognise this burden borne by the encumbered. This recognition has been both in terms of the moral worthiness of a life lived according to a higher authority and of the importance of allowing all citizens the freedom to act according to the demands of conscience. Questions about the scope of the religious freedom enjoyed by encumbered selves can arise in various ways. For instance, it may arise in the event that religious believers argue that compliance with their religious and moral code violates the secular law, or that the moral code articulated by their faith should be enforced by the secular law and imposed upon non-adherents. Other questions will arise if religious groups demand exemption from taxation or from building codes or from specific legal protections prohibiting criticism of beliefs, or if they claim entitlement to refuse employment to members of minority groups.

Needless to say, the claim by one group to religious freedom may just as readily be viewed by another as a claim to religious privilege. As Blackford notes, these are the kinds of issue that can give rise to conflict between religious believers and non-adherents as well as with the state. Since rival claims about the manifestation of a supernatural realm in the natural realm are not easily verified or falsified, such conflicts defy resolution.⁵² 'If religious teachings encounter severe criticism, or religious leaders receive scorn or mockery from their opponents, is that an *exercise* or a *violation* of religious freedom?'⁵³ [emphasis in original] Religious freedom can't be all things to all people, says Blackford, yet wholly opposing policies are often pursued in its name.⁵⁴

Protections long afforded by the liberal state to those claimed by Sandel's unrenounceable duties are now being threatened by the contemporary corrective tendency to minimise cultural differences as a way of managing diversity.⁵⁵ This tendency, powered by the legislative fuel of the anti-discrimination laws, promotes the expression of minority identity to the status of an end in itself. The emergence of what legal scholar Augusto Zimmermann has described as 'a radical anti-Western ideological project' suggests that the resulting outlook for religious liberty is not encouraging.

Instead of promoting the globalisation of liberal democracy and human rights, [advocates of diversity] regard these values as ethnocentric products of Western history. In their place they propose a form of cultural pluralism that ... stands as a form of moral relativism which refuses to admit that culture, at the extremes, may produce either a democratic society or social oppression, for example, against women and minority groups.⁵⁶

Religious freedom can't be all things to all people, yet wholly opposing policies are often pursued in its name.

Passed with the intention of inhibiting intolerance, anti-discrimination laws have effectively pursued equality by removing from the public sphere all that distinguishes one group of citizens from another. Whether these distinguishing factors are religious forms of address or the performance of public roles and rituals, their removal serves only to undermine the very diversity and tolerance the legislation effects to promote, thereby inhibiting the freedom of all citizens. As Patrick Parkinson has noted, if it is to contribute to the health of our society, anti-discrimination legislation, in particular, must be framed so as to improve the capacity of minority communities who share a particular faith or ethnicity to strengthen the bonds that join them together and thereby flourish.⁵⁷ ‘The issue is what freedom minority communities need at the margin in order to build the cohesiveness of their own groups according to the values that bind them together.’⁵⁸ Why the concern with the margins of religious freedom? Parkinson says the margin defines the minimum scope of freedom required by religious groups ‘to build cohesiveness ... according to the values that bind them together.’⁵⁹

The secularising effect: Gay marriage and the hollowing out of religious life?

While many members of religious groups, including Christian, Jewish and Muslim groups, condemn unjust discrimination against gay and lesbian people, some have nonetheless affirmed their belief that the values and principles of their respective faith traditions do not permit the practice of same-sex marriage. For instance, the Australian Catholic Bishops Conference has criticised proposals to change the meaning of marriage as defined by the *Marriage Act 1961*.

It is not unjust to point out the special nature of marriage, that same sex marriages would be quite different and to argue that given the two relationships are quite different, they therefore should not be called the same thing.⁶⁰

While acknowledging that the state has the legislative authority to make provision for secular forms of marriage, Australian religious leaders have nonetheless expressed concern about the Parliament’s moral authority to do so. If such a change were to occur, there is also concern that once the state has provided for gay marriage, a legal requirement that religious groups make similar provision might not be far behind.

Tim Wilson, Australia’s Human Rights commissioner, does not particularly care to indulge these concerns. In an article written before his appointment to the AHRC, Wilson argued:

At its most basic level, much of the marriage reform debate is an elaborate trademark dispute over the divergence between government and private religious certification terms for conferring a contract between two people as well as the state, their God, or all four.⁶¹

Wilson advocates the creation of what he calls ‘a competitive marriage market’ where religious and secular ‘providers’ can offer marriage contracts according to their own rules and traditions. This would ensure ‘all couples would be treated equally for public purposes, but not for private religious ones.’⁶²

There are two problems with this proposal. The first is that it empties the concept of marriage of all meaning since it could mean whatever one (or a couple) wanted it to mean. The second problem arises when the traditional meaning of marriage, as being between one man and one woman, no longer prevails in society. When this happens, the minority religious view, holding as it does to the traditional

The issue is what freedom minority communities need at the margin in order to build the cohesiveness of their own groups according to the values that bind them together.

Would the refusal of a minister of religion to perform a same-sex marriage ceremony amount to an imposition of religious beliefs?

meaning, is likely to come under considerable pressure to change. Although the *Marriage Act* does not require any minister of religion to perform a marriage ceremony contrary to the tenets of his or her religion, the Act itself could be amended to require ministers of religion to conform to the new, culturally appropriate standard. How easy would it be for a minister of religion to withstand for long pressure to conform to the view that ‘the fundamental human rights principle of equality means that civil marriage should be available, without discrimination, to all couples, regardless of ... sexual orientation or gender identity’?⁶³ The Heritage Foundation’s Ryan Anderson has warned of the dangers of a broader, more sustained form of coercion faced by religious groups in the United States:

As experience has already shown, the redefinition of marriage and related state policies on sexual orientation have led to intolerance, intimidation, and even government coercion and discrimination against citizens who believe that marriage unites a man and a woman and that sexual relations are properly reserved for marriage.⁶⁴

Nevertheless, the AHRC insists that the ‘right’ to marriage equality does not conflict with the right to religious freedom:

The proposed amendments to the Marriage Act would provide same-sex couples with access to civil marriage only and would not affect the position of religious ministers under the Marriage Act.⁶⁵

This breezy confidence may prove to be misplaced if remarks in a recent decision handed down by the Victorian Court of Appeal are anything to go by. The judgment was on appeal from a decision fining a Christian youth camp organisation and one of its officers for declining a booking from a homosexual support group.⁶⁶ The court split in different ways on the different issues, making it difficult to distinguish the key elements of the decision.⁶⁷ However, one of the most important components of the decision was that all three members of the court declined to uphold a distinction between discrimination on the basis of homosexual orientation and that of homosexual activity. In other words, the justices held that there was no distinction to be made between sexual orientation and sexual behaviour. On the basis of this, legal scholar Neil Foster argues:

It will still be of some concern that a policy based on upholding traditional Christian views about human sexuality, based on *behaviour*, is being interpreted as amounting to discrimination against the *persons* involved.⁶⁸ [emphasis in original]

The court also adopted a very narrow interpretation of religious belief, applying it only to religious services or conduct in the observance of religious rules, and held that an exemption under the legislation, in this case the *Equal Opportunity Act 1995* (Vic), could only apply in those situations. However, Neave JA went on to hold that:

The appropriate balance between religious freedom and freedom from discrimination would be struck by holding that the exemption does not apply in situations where it is not necessary for a person to impose their own religious beliefs upon others, in order to maintain their religious freedom.⁶⁹

Would the refusal of a minister of religion to perform a same-sex marriage ceremony amount to such an imposition of religious beliefs? If so, the religious sphere within which behaviour that would otherwise be considered discriminatory is permitted will have shrunk markedly. A footnote in Neave JA’s judgment makes a glancing reference to a Canadian decision:

An advisory opinion of the Saskatchewan Court of Appeal suggests that provisions permitting persons who celebrate civil marriages to refuse to do so for same sex couples on religious grounds may breach constitutional guarantees of equality in the Canadian Charter of Rights and Freedoms.⁷⁰

Judges charged with identifying the appropriate balance between exempt and discriminatory behaviour may well move in the direction of developing a narrowing conception of religious liberty as they accord priority to issues of sexual identity over those of religious belief and practice. The campaign to promote same-sex marriage, which actively pursues the diminution of the religious sphere in liberal society, would thereby form part of the same wider social trend that pursues its goal of equality both by attempting to secure the removal of all differences between people, and by reducing the range and scope of exempted conduct.

Obliterating difference

If your agenda is liberation, then the vision of same-sex marriage, in which gays become domesticated and live happily ever after, is a kind of nightmare. It is, at best, the squandering of a revolutionary potential.⁷¹

— Jay Michaelson

All kinds of differences between people exist, and they matter. When the state attempts to manipulate these differences by imposing laws that enforce a particular conception of thought and action, it turns difference, whether cultural, social, intellectual or economic, into a moral entity to which an obligation of fairness in the pursuit of equality is then owed. Brian Barry invokes the Dodo's dictum, proclaimed after the Caucus Race in Lewis Carroll's *Alice in Wonderland*, to criticise the state's attempts to turn human beings into ciphers to pursue what he call 'the transcendent goal of equality': 'Everybody has won, and *all* must have prizes.'⁷² [emphasis in original] Yet the prizes to be won will always have a different value for different people. Barry's criticism is important because he identifies the folly of pursuing equality as a matter of public policy. It is impossible for a diverse society to be one in which everyone is trying equally hard to achieve the same goals.⁷³ As Roger Scruton and Philip Blond have correctly argued, 'A free society is made of those who differ and who can express that difference and distinction both by themselves and in association with each other.'⁷⁴

To argue that democracy should seek the obliteration of difference is to adopt a statist form of liberalism that has only an attenuated view of the freedom enjoyed by the open-minded liberal citizen to express his or her own interests and beliefs. Indeed, it conflicts with the very ideal of religious belief where the search for truth requires open-minded enquiry. As Ahdar and Leigh observe:

To the extent that the state pursues this new vision of the liberal citizen and enforces its vision by force, religious freedom is gravely endangered ... [Liberalism has become] a narrow sectarian program enforcing its dogmas by force.⁷⁵

The political and cultural framework of the liberal state needs to allow believers and non-believers alike, with differing and even conflicting points of view, to live together peacefully. In other words, citizens of the state need to enjoy equal standing before the law without expecting identical treatment.

Different people and different organisations can in certain situations be treated differently without infringing their equality. We can legitimately 'discriminate'—using the term neutrally to mean discern and evaluate

All kinds of differences between people exist, and they matter.

on relevant grounds rather than pejoratively to mean decide according to prejudice.⁷⁶

The liberal state, therefore, does not coerce its citizens to adopt one worldview or set of beliefs, for to do so would be to impose a tyranny of tolerance. Rather, it must allow differing outlooks to coexist unless the safety and wellbeing of those citizens is put in jeopardy.

Citizens may influence the social environment through their speech and expression, but they forgo the power to suppress the speech and expression of others—even others who reject a social consensus.⁷⁷

The crucial point is that when the liberal state does act to restrict freedom of speech, it ought not to do so to protect religious sensibilities or to defend religious traditions of belief and conduct, but simply to protect the secular, or worldly, interests of the state itself, and the liberty of all its citizens.

Although it's a word that can mean many things, 'secular' is an appropriate term to describe a political philosophy or outlook that is neutral to the existence or relevance of a religious dimension in public affairs. In particular, 'procedural secularism' recognises the importance of religion to its citizens and permits equal participation in the public sphere while refraining from imposing any religious beliefs. In a lecture delivered at the Pontifical Academy of Social Sciences in Rome in 2006, Rowan Williams, a former archbishop of Canterbury, argued that procedural secularism is:

... the acceptance by state authority of something prior to it and irreducibly other to it; it remains secular, because as soon as it systematically privileged one group it would ally its legitimacy with the sacred and so destroy its otherness; but it can move into and out of alliance with the perspectives of faith, depending on the varying and unpredictable outcomes of honest social argument, and can collaborate without anxiety with communities of faith in the provision, for example, of education or social regeneration.⁷⁸

However, another version of secularism argues that the state should no longer refrain from imposing belief but rather should actively establish unbelief as the norm. By contrast with procedural secularism, 'programmatic secularism' holds that there can be no place at all in the public sphere for any non-material or supernatural account of human life. According to Williams, programmatic secularism assumes:

... that any religious system demanding a hearing in the public sphere is aiming to seize control of the public realm and to override and nullify opposing convictions ... It assumes that the public expression of specific convictions is automatically offensive to people of other (or no) conviction. Thus public support of subsidy directed towards any particular group is collusion with elements that subvert that harmony of society as a whole.⁷⁹

The emergence of programmatic secularism has been accompanied by a willingness by the state to use its legislative powers to diminish and even exclude the influence of religion in shaping public policy. It's part of the process that the British legal philosopher Raymond Plant describes as the transition of liberal democracy from *ethos* (a matter of practice and habit) to rules and explicit principles. Whereas *ethos* allows for fudging and compromises between different points of view, 'making liberal principles explicit in law ... means greatly reducing the scope for easy fudging and compromise.'⁸⁰ As religious voices count for less in public policy debates, so religious groups are denied the exemptions that embody religious freedom.

Programmatic secularism' holds that there can be no place at all in the public sphere for any non-material or supernatural account of human life.

Of course, to say that secularism is neutral to the existence of religion in society is not to say it is impartial to the impact or effect it has on that society. Burdens have been added to the free practice of religious belief by the elision of procedural secularism into programmatic secularism. At its worst, this imposition has created a climate that has been actively hostile to the liberty enjoyed by religious believers. ‘Equality of form [of government policy] can be accompanied by inequality of effect [of state action] ... Such a religion-blind approach imposes heavy costs upon believers [whenever] their faith requires some conduct that a general law proscribes.’⁸¹ Nonetheless, advocates of burdensome legislation argue that it is intended to uphold the virtue of civic equality as a basic value of liberal democracy.

Conclusion

Offensiveness by itself is not a good reason for legal regulation.⁸²

— Jeremy Waldron

Secular virtues such as equality are being imposed with aggressive assertiveness by the state in the name of tolerance and dignity. However, this pursuit of inoffensiveness effectively imposes nothing less than a tyranny of tolerance upon the individual citizen. This tyranny, in turn, threatens the freedoms the citizen has long enjoyed under the liberal state to pursue his or her conception of the good life. The right to religious liberty is especially imperilled by this new tyranny. Since religion is essentially about the human pursuit of ultimate meaning and value, it is not far-fetched to argue that the erosion of religious liberty impedes the pursuit of a higher purpose that can contribute significantly to deep human fulfilment and satisfaction.

However, this pursuit is not necessarily consensual. Wrangling about questions of ultimate meaning among adherents of different religions is almost certainly bound to cause offense in diverse, modern Western societies. Political scientist Jeremy Waldron sees no realistic way to defang religion of this potential for offence since each group’s creed will seem like an outrage to every other group.

People have to be free to address the deep questions raised by religion the best way they can. For either these questions are important or they are not. If they are, we know that they strain our resources of psyche and intellect.⁸³

Conduct that manifests a creed is also likely to offend, but if, as Waldron argues, the questions are important, the state needs to enshrine and uphold the right to religious freedom as a fundamental liberal right. A person may come to a religiously informed and sincerely held conviction that policy positions advocated by other people—such as same-sex marriage, human euthanasia, or abortion—are morally repugnant. Once a religious believer acts upon that conviction, whether in speech or in print or by peaceful protest, offence is bound to be caused to those who disagree. Protections under the rule of law must be extended, nonetheless, to those who cause offense:

Religious freedom means nothing if it does not mean that those who offend others are to be recognised as fellow citizens and secured in that status, if need be, by laws that prohibit the mobilization of social forces to exclude them.⁸⁴

Yet as proponents of same-sex marriage continue to advance their cause, the social forces of exclusion have been mobilised against religious believers. For advocates of militant secularism such as the Australian Greens, this is unexceptional and is to be

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considered part of the price worth paying in the pursuit of marriage equality. But it is a dangerous development that falls into the error of hard secularism—setting non-religious and religious discourse in direct opposition to one another. The public arena should not be seen as the polar opposite to that of religious institutions.⁸⁵

No fair-minded and free-thinking citizen should advocate hatred of, or discrimination against, another person on the basis of ethnicity, gender or belief. Yet hard secularism is now developing in Australia in such a way as to deny what Waldron calls ‘the compossibility of rights.’⁸⁶ Rights and freedoms recognised in a liberal society must be capable of coexisting and being recognised together. However, the drive to eradicate discrimination on the basis of sexual orientation is gathering such momentum, shaped as it is by identity politics, that it threatens to eradicate the right to religious liberty into the bargain.

The decision of the Victorian Court of Appeal in the *Christian Youth Camps* case that to discriminate on the grounds of behaviour is to discriminate on the grounds of identity will do little to cheer defenders of religious liberty. Once claims about discriminatory behaviour or beliefs are presented as assaults upon the person, they become non-negotiable and the compossible administration of rights virtually impossible. Developments such as this will only make it harder in the long run for Australian society to be tolerant of difference and disagreement.

Endnotes

- 1 Samuel Gregg, ‘Religious Freedom and Economic Liberty: Truly Indivisible,’ *The American Spectator* (5 August 2014).
- 2 Article 2(1) of the ICCPR states: ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ I am grateful to Dr Augusto Zimmermann for drawing to my attention the significant role of the former USSR in the drafting of the ICCPR. The USSR brought pressure to bear to secure restriction of speech as a matter of human rights law. In proposing the extension of restraint, the USSR introduced the notion of ‘incitement to hatred’ and thereby helped secure international commitment to the elimination of intolerance. A full account of this can be found in Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Melbourne: Institute of Public Affairs, 2012), 171–176.
- 3 Even though multiculturalism had yet to emerge as a specific policy objective in 1974 when the bill was before Parliament, debate was conducted in terms of its implications for the notion of a multicultural society. For more on this see Mark Lopez, *The Origins of Multiculturalism in Australian Politics, 1945–1975* (Melbourne: Melbourne University Press, 2000), 410–417.
- 4 According to a Galaxy poll conducted for Australian Marriage Equality in August 2012, almost 64% of the 865 respondents believed that same-sex couples should be allowed to marry (32% of whom strongly supported same-sex marriage). It is reasonable to assume that 36% of respondents did not support same-sex marriage, although neither this figure nor any reasons for dissent were stated in the findings. Australian Marriage Equality, ‘Public Opinion: Nationally,’ website.
- 5 Gerard Calilhanna, ‘Gay Marriage and the Growth of State Intervention,’ *Quadrant Online* (23 August 2012).
- 6 There are already moves in Canada to ban what are considered ‘discriminatory practices’ from many spheres of professional life. See, for example, Lea Singh, ‘Canada on verge of banning Christians from professional life,’ *FrontPage Magazine* (30 May 2014).
- 7 Section 56 of the *Anti-Discrimination Act 1977* (NSW) states: ‘Nothing in this Act affects: (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 appointment of any other person in any capacity by a body established to propagate religion; or (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.’

- 8 This figure is from the Productivity Commission's 2010 research report, 'Contribution of the Not-for-Profit Sector,' cited in Stephen Judd, Anne Robinson, and Felicity Errington, *Driven by Purpose: Charities that Make the Difference* (Greenwich, NSW: Hammond Press, 2012), 43.
- 9 John Micklethwait and Adrian Wooldridge, *God is Back: How the Global Revival of Faith is Changing the World* (New York: Penguin, 2009), 367.
- 10 Jürgen Habermas, 'Religion in the Public Sphere,' *14 European Journal of Philosophy* 1:15 (2006), www.signandsight.com/features/1714.html.
- 11 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2012), 17.
- 12 Michael McConnell, 'Why is Religious Liberty the "First Freedom"?' quoted in Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, as above, 17.
- 13 The term *homophobia* was popularised in the 1970s by US psychotherapist George Weinberg and is now widely used to mean a fear of homosexuals, usually linked to hatred of them. www.macquariedictionary.com.au/features/word/search/?word=homophobia&search_word_type=Dictionary.
- 14 Oliver O'Donovan, *Church in Crisis: The Gay Controversy and the Anglican Communion*. (Eugene, Oregon: Cascade Books, 2008), 36
- 15 AHRC (Australian Human Rights Commission), *Freedom of Religion and Belief in 21st Century Australia* (2011), 4.
- 16 Data from the 2011 Census on Population and Housing is available at www.abs.gov.au/census.
- 17 Tracey Joynson, 'Christians set to become a minority in Australia,' *The Satellite* (17 April 2014).
- 18 AHRC (Australian Human Rights Commission), *Freedom of Religion and Belief in 21st Century Australia*, as above, 7.
- 19 *Torcaso vs Watkins*, 367 U.S. 488 (1961).
- 20 I am grateful to Dr Augusto Zimmermann for drawing this important point to my attention.
- 21 Russell Blackford, *Freedom of Religion and the Secular State* (Chichester: Wiley-Blackwell, 2012), 6.
- 22 *Church of the New Faith vs Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120.
- 23 *R vs Big M Drug Mart Ltd* [1985] 1 SCR 295, 336 per Dickson J, 94–95.
- 24 As above, 95.
- 25 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, as above, 46.
- 26 Nick Spencer, *How to Think About Religious Freedom* (Theos: London, 2014), 55.
- 27 Article 18(1) of the Universal Declaration of Human Rights 1948 states: '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.'
- 28 These provisions are set out in Article 18(2) of the International Covenant on Civil and Political Rights (ICCPR) 1966: 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.' Article 18(3): 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.' Article 18(3) was adopted from Article 9(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950.
- 29 Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Leichhardt, NSW: Federation Press, 2012), 39.
- 30 As above, 42.
- 31 As above, 44.
- 32 Section 116 of the Australian Constitution states: '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.'

- 33 Carolyn Evans, *Legal Protection of Religious Freedom in Australia*, as above, 73.
- 34 *Kruger vs Commonwealth* (1997) 190 CLR, 1, 125 per Gaudron J.
- 35 *Charter of Human Rights and Responsibilities Act 2006* (Vic) (hereafter 'Victorian Charter') and *Human Rights Act 2004* (ACT) (hereafter 'ACT HRA').
- 36 Section 14 of the Victorian Charter states: (1) Every person has the right to freedom of thought, conscience, religion and belief, including (a) the freedom to have or to adopt a religion or belief of his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.
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- 42 Alister McGrath, *The Twilight of Atheism* (New York, NY: Doubleday, 2004), 227.
- 43 Russell Blackford, *Freedom of Religion and the Secular State*, as above, 191.
- 44 As above, 194.
- 45 *Case of Eweida and Others vs The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10).
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- 47 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, as above, 356.
- 48 Mary Hamilton, 'Brendan Eich has the right to fight gay rights, but not to be Mozilla's CEO,' *The Guardian* (7 April 2014).
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- 51 Michael J. Sandel, 'Religious Liberty—Freedom of Conscience or Freedom of Choice?' *Utah Law Review* 597 (1989), 611.
- 52 Russell Blackford, *Freedom of Religion and the Secular State*, as above, 11.
- 53 As above, 1.
- 54 As above, 2.
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- 56 Augusto Zimmermann, 'The Intolerance of Religious Tolerance Laws,' *Quadrant* (July–August 2013), 52, 56.
- 57 Patrick Parkinson, 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to Be Different,' *Australian Law Journal* 81:12 (2007), 954–966.
- 58 As above, 965.
- 59 As above.
- 60 Australian Catholic Bishops Conference, 'Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012' (March 2012), 7.
- 61 Tim Wilson, 'Equality for all couples won't destroy society,' *The Australian* (23 July 2011).
- 62 As above.

- 63 AHRC (Australian Human Rights Commission), 'Marriage equality in a changing world,' Position Paper on Marriage Equality.
- 64 Ryan T. Anderson, 'The Church and Civil Marriage,' *First Things* (April 2014), 34.
- 65 AHRC (Australian Human Rights Commission), 'Marriage equality in a changing world,' as above.
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- 67 See Neil J. Foster's commentary for a detailed evaluation of the Court of Appeals' decision at http://works.bepress.com/neil_foster/78.
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- 69 *Christian Youth Camps Ltd*, as above [290].
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- 83 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012), 127.
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- 85 Nick Spencer, *How to Think About Religious Freedom*, as above, 57.
- 86 Jeremy Waldron, *The Harm in Hate Speech*, as above, 135.

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