THE CENTRE FOR
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A Quartet of Freedoms:
FREEDOM OF RELIGION, SPEECH, ASSOCIATION & CONSCIENCE

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OCCASIONAL PAPER 135

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Introduction

Peter Kurti

The issue of religious freedom seldom seems to generate much excitement in contemporary Australia. Controversy surrounding institutional responses to the sexual abuse of children, as well as a marked lack of sympathy for some points of view propounded by religious leaders on issues such as human sexuality and voluntary euthanasia, has helped push religion to the margins of public life. No longer is it widely considered appropriate for religion to be practised in the glare of the social and cultural realm where expressions of religious conviction and belief might jar with one another and conflict. Far better for religion to be confined to the private realm of the mind where it can be considered almost a hobby or taste preference with as little capacity to cause offence as an enthusiasm for astrology.

One factor lying behind this marginalisation of religion is a sincere desire to eliminate discrimination on the grounds of race or ethnicity. Enthusiasm for securing equality in relationships and social interactions has given rise over the years to a series of anti-discrimination laws in all states and territories. This development began with the *Racial Discrimination Act 1975*, brought onto the statute book by the Whitlam government. Although the Act was intended as a means of eradicating racism, its values have set the tone for subsequent debates about equality and social inclusion. Even so, anti-discrimination legislation does confer upon Australian religious communities the right to order their own beliefs,

traditions and practices. These protections of religious liberty do not simply exist to justify what would otherwise be unlawful discrimination; rather, they are there to protect the fundamental right to the free expression of religion and to ensure that that right is balanced against other rights.

Religion and the concomitant requirements of anti-discrimination legislation present Australia with competing and conflicting demands. Formal participation in religious institutions is declining in this country but the contribution they make to Australian society remains strong. In addition to some 12,000 religious organisations that comprise the largest single group of not-for-profit organisations, a substantial number of religious charities provide services in education, health, disability and aged care. Clearly, religion continues to occupy a significant place in the Australian public square, and yet believers are under increasing pressure to demonstrate that religious faith is a positive rather than a negative feature of a liberal society.

The ethicist Oliver O'Donovan has observed: 'Civil societies are necessarily tolerant to a degree, and intolerant to a degree; they punish what they cannot afford to tolerate [and] tolerate what they cannot afford to punish.'* Efforts in Australia to redefine the boundary between the necessary power of the State to coerce and the right of religious freedom are frequently in the news. When the High Court recently struck down the National School Chaplaincy and Student Welfare program as unconstitutional, it did so because the program was not authorised by a specific head of power under the Constitution. However, it was not a concern to protect states' rights that motivated the challenge to the program's validities but rather secular objections to the open involvement of religious groups in public schools. These objections were articulated by those who brought the action, and when the High Court handed down its decision it was widely celebrated as a victory for secularism.

At one time, the mark of a good citizen in the liberal state used to be the unselfconscious display of personal conviction about

* Oliver O'Donovan, *Church in Crisis: They Gay Controversy and the Anglican Communion* (Eugene, Oregon: Cascade Books, 2008), 36.

ideas and beliefs. The open manifestation of conviction has, however, given way to what can best be described as an ostentatious display of open-mindedness that attempts to appeal to the culturally acceptable values of tolerance and diversity. Too often, this tolerance is intolerant of traditional religious beliefs that are often ruled to be incompatible with the values of the secular state. Instead of allowing greater freedom to express religious belief in the public sphere, the effect of this 'tyranny of tolerance' has been to confine religious faith to the realm of subjective opinion.

But religious belief is not something that can simply be confined to the realm of the mind as though it were some kind of hobby or recreation. Belief and practice are inseparable; freedom to believe must surely be accompanied by the freedom to speak. Those whose ways of life are guided by the search for ultimate meaning and a solemn obligation to live dutifully are likely to clash with the values of the secular state. It is not difficult to see that if this dutiful living is met with the coercive force of the State, not just the right to freedom of religion but also the broader rights of freedom of association and freedom of expression are bound to be put at risk.

Both the papers delivered at a seminar of the Religion and the Free Society program at The Centre for Independent Studies on 19 June 2014, and now published here, examine the context of the current debate about religious liberty and attempt to take stock of some the most significant challenges posed to religious liberty in Australia. The Religion and the Free Society program examines broad questions of religious freedom and value as they arise in the cultural and religious diversity of contemporary Australian society, although it does not concern itself with matters of discipline, dogma or organisation, all of which are internal issues with which all religious communities wrestle from time to time.

In his paper, Bishop Robert Forsyth argues that religious liberty needs to be seen not as a grudging exception granted by the liberal state but rather as a positive right enjoyed by very varied groups that combine to confer a public good upon society. Religion, he argues, needs to be tolerated not for the truth claims it may make—indeed, these claims need never be accepted by secular

society—but because of its capacity to pose important questions about meaning, value and the nature of obligation in society.

Then CIS Research Fellow Dr Jeremy Sammut examines the foundations for religious liberty as established in the Australian Constitution. He questions the militant secularist reading of section 116 of the Constitution, which holds that religion is never a legitimate social and moral force, and argues instead that the real purpose of the section is to prevent the State from restricting the open practice of religious belief. The Federal Fathers sought not to remove religion from the public sphere but to ensure that no group or community was privileged above any other.

The right to freedom of religion is a fundamental right that confers upon the citizen of the liberal state the freedom to pursue their conception of the good life. If one accepts that religion is about the human pursuit of ultimate meaning and value, it is reasonable then 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. Of course, this pursuit is not necessarily consensual; wrangling about questions of ultimate meaning among adherents of different religions is certainly bound to cause offense in any diverse, modern Western society. However, if these questions about value and fulfilment are important, the liberal state needs to enshrine and uphold the right to religious liberty as a fundamental human right.

Religious Freedom Under Challenge?

Robert Forsyth

I want to address the question of some real challenges to religious freedom in Australia. But first we must put this issue into perspective.

This is not the Sudan where a woman is facing flogging and then hanging for the Christian faith—once her newborn is weaned, that is. This is not North Korea where a tourist is in jail for leaving a Bible in a hotel room. This is not the Pakistani city of Peshawar, where last year 170 Sunday morning attendees at All Saints Church where killed and 170 injured in a bomb attack. Neither is this Saudi Arabia, the northern parts of Nigeria, or so many other places in this world where religious freedom, despite what constitutions may or not say, is denied, and often with violence. Religious freedom is under attack in the world these days, and I wonder whether, for all kinds of its own reasons, the West underplays the problem.

However, tonight I want to talk about what you might rightly designate a 'First World problem,' that is, about a more subtle and quieter threat to religious freedom in countries like Australia, which arises in particular from a combination of rapid social change in norms regarding sexual matters on the one hand and the unprecedented extension of anti-discrimination laws on the other, in a culture that is frankly not that interested in freedom of religion anyway.

What are we talking about when we talk about religious freedom? The International Covenant on Civil and Political Rights (ICCPR), which Australia has adopted by treaty, provides a comprehensive

framework for understanding religious freedom as it incorporates other fundamental freedoms. Article 18 states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject 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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Notice two features in particular.

First, this is a freedom that goes far beyond the freedom of an individual to believe certain things in private. It involves freedom to manifest religion in public and in association with others 'in worship, observance, practice and teaching,' like the running of religious schools, hospitals and the like. This means that freedom of religion cannot exist in a vacuum, but, as the title of this event suggests, needs also three other freedoms—of speech, of association, and of conscience—to accompany it, that is, it is through speech that religious notions are communicated and contested. It is by being able to associate with fellow adherents that religious community is possible. And because a person has the right to manifest their religion in public, there needs to be the right to freedom of conscience, that is, an individual should not be

compelled to act against their sincere, conscientiously held belief. This is the quartet of freedoms.

And second, while freedom of religion is not absolute and can be restricted for good reason, the use of the word 'necessary' means a restriction cannot be imposed beyond what is strictly necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others—and not beyond what is necessary. In other words, any restriction must be clearly justified by real evidence and not assertion.[1] In my view, this is not adequately grasped in contemporary debate.

However, there is a general lack of interest in matters of freedom in our society and even less in freedom of religion. There is much more concern, even anxiety, about protecting people from perceived threats to dignity and equality. In many ways, this has become one of the overriding preoccupations in discussions of public policy. I noticed a revealing, if trivial, example of this just the other day in a report in the *Sydney Morning Herald*[2] concerning the NSW government's delay in its response to some recommendations to make criminal convictions easier under racial vilification laws. Apparently, then Premier O'Farrell had set up an inquiry as there has been no successful criminal prosecutions in the history of the laws. Current Premier Baird is less interested. I have no view on the matter, except to say there may be more than one reason for the lack of criminal convictions under such laws than that the legislation doesn't make it easy enough. But what really did catch my attention was the last paragraph of the article.

> NSW Council for Civil Liberties president Stephen Blanks said the government's response was 'terribly unsatisfactory and sends a signal that it is not prepared to take appropriate action against racism.'

Is anyone here old enough to remember when the Council for Civil Liberties actually was concerned about threats to civil *liberties*? The worst of it is that I don't think Mr Blanks or the *SMH* reporter

even had the slightest inkling of the irony of the president of a body presumably set up to safeguard the rights of individuals to freedom of speech and action *against* the encroachment of the State—that is, civil liberties—complaining that the government was not making it easier to achieve criminal convictions for certain kinds of bad speech. It is a sad sign of our times.

Not only is there at present a general lack of interest in matters of freedom but the standing of religion itself has also suffered a decline. Partly, this is due to the aggressive secularism of the last decade but also the rise of religious violence to which it was reacting. It is not as easy to make the case for religion being a public good in the face of some of the terrible Islamist violence of the last decade, even if it is irresponsible to lump the diverse and very different faiths and practices of the world under the one category which, according to the late Christopher Hitchens, 'poisons everything.'[3] For their part, the Christian churches have also damaged their standing here and overseas through the terrible revelations about sex abuse and the failure of institutions to adequately respond at the time. In this context, concerns for freedom of religion will not gain much traction and well-meaning attempts to diminish it will not cause much alarm.

Those well-meaning attempts to diminish religious freedom particularly involve the matter of anti-discrimination law. In Australia, over the last decades the scope and range of anti-discrimination law has expanded to cover an increasing range of attributes and areas of society. Traditionally, there have been limits in the application of anti-discrimination law in certain religious contexts, among others. It is not as if religious bodies and organisations are exempt as such from anti-discrimination law, but that the law makes exceptions on certain terms. For example, the NSW *Anti-discrimination Act 1977* (section 56: 'Religious bodies') reads:

> 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.

These exceptions are not a means of justifying what would otherwise be unlawful discrimination, and they are not granted as the result of some political compromise. Rather, they are a mechanism that balances the right to non-discrimination with other fundamental human rights, such as freedom of religion and freedom of association. Such religious exceptions do not exist for the pejorative purpose of 'excluding' people, but rather to enable religious communities to exist and operate in accordance with their unique cultures and beliefs.[4]

What religious organisations really need by way of accommodation in anti-discrimination law is three things:

1. Accommodation that allows religious organisations to employ staff using criteria that derive from the mission and identity of the organisation. This enables the organisation to maintain its ethos and character.
2. The right to give preference in some kinds of service provision to those for whom the service was established.
3. Freedom to uphold moral standards within faith communities. For example, a faith community may well discipline a member or employee for actions that are lawful and normally subject to anti-discrimination law. In Tasmania, one of the grounds on which some can sue for discrimination is 'lawful sexual conduct,' which includes much that many religious groups would consider immorality.

However, it could be argued that there exists an active constituency arguing to reduce or eliminate 'religious exceptions' which exist to safeguard legitimate expressions of religious freedom. This constituency seemingly has little understanding of, or respect for, the rights of religious communities to maintain their identity.

Most significantly, as Dr Joel Harrison and Professor Patrick Parkinson point out in a forthcoming article in the *Monash University Law Review*,[5] there has been an important shift in the rationale of anti-discrimination law and the equality it seeks to ensure. The rationale has shifted from equality of access and participation to equality of dignity or identity. They argue that anti-discrimination law originally served distributional justice of making sure that different groups, who may otherwise experience economic or social disadvantage, are able to participate in public or shared goods. We might call this 'participation anti-discrimination.' Now the justification for anti-discrimination law is shifting to a new basis: the advancement of human dignity and equality. We might call this 'dignity anti-discrimination.' Harrison and Parkinson write of the significant change this brings to the reach of anti-discrimination law:

> Rather than supporting the presence of multiple groups in what may broadly be termed 'public life,' certain recent arguments in anti-discrimination discourse point to the following claim: that the dignity of individuals requires the universal, or near-universal application of an undifferentiated non-discrimination requirement against all groups, including the religious.

Although it can be argued that the concept of the universal human dignity owes a great deal indeed to the revolution the Christian faith brought to the world of antiquity,[6] in this capacity, 'dignity' is conceived as a person's worth in their chosen self-identity, and because it requires undifferentiated non-discrimination to avoid status or dignity harm, it cannot but pose risks to other rights like the freedom, either individually or in community with others and in public or private, to manifest one's religion or belief

in worship, observance, practice and teaching. The shift from participation anti-discrimination to dignity anti-discrimination creates a serious threat to religious freedom.

Two examples of the impact this shift can have for freedom of religion are in order. In the United Kingdom, the Charity Tribunal considered that permitting a Catholic adoption agency to maintain its policy of only serving married couples would be 'particularly demeaning' to same-sex couples, and so was unlawful as religious agencies were not exempt from the duty not to discriminate on the ground of sexual orientation. As Harrison and Parkinson note:

> On this approach, the existence of religiously-motivated discrimination is seen as diminishing dignity, even when alternatives readily exist or no victim of discrimination is directly engaged. No space was permitted for those who held the conscientious view that it was best for children to be placed with adoptive parents of different genders.

In other words, the problem wasn't that non-married couples could not access adoption services somewhere. It was that there was one place they couldn't that threatens their dignity.

On a slightly different note, here in Australia the Victorian Court of Appeal[7] found that, in effect, a refusal to support an activity providing support for homosexual *activity* is the same as discrimination against homosexual *persons*.[8] Religious groups, especially Christian, make a crucial distinction between the person 'the sinner' and the behaviour 'the sin.' But this was explicitly denied in the judgment that sexual orientation is part of a person's identity and that:

> To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.

This ruling, if it is allowed to stand, has profound implications over the freedom of religious bodies to proscribe norms of behaviour and regulate their affairs. This case, C*hristian Youth Camps Limited vs Cobaw Community Health Service Limited*, had a number of other complications as well. I am pleased that the Youth Camp has launched a High Court appeal, although as Derrick Koh of the Victorian Christian Legal Society points out that while the appeal 'could restore our balance of religious freedoms in our society, it has the potential to leave a dangerous precedent against it.'[9]

It is noteworthy that both my examples concern issues of sexual behaviour and identity, as this area is one where societal norms have undergone rapid change in the last 50 years—and where the differences between religious bodies and many aspects of mainstream culture are most acute. It is also an area where it seems intemperate debate often is found.

And it is changes in the law in this area that most concern me as having potential to diminish religious freedom. Certainly I find a deep anxiety among my fellow religious adherents about the possible deleterious effects the introduction of so-called gay marriage would have in this area.

Without being alarmist, I can say pressures are coming in a number of areas in which there is a trend to let discrimination law trump religious freedom.

One is in the whole area of government funding. While it is perfectly proper for the State to insist that the services it purchases to be delivered by a religiously based agency should be on the State's terms as the agency is acting for the State, the mere fact that a body receives some State funding is not a good enough reason to impose a blanket non-discrimination obligation. For example, to insist that a school that identifies as religious should not 'discriminate' at all in employing staff or enrolling students is to misunderstand the very reason for its existence. So far, pressure on schools has been resisted, though the matter has not gone away at the state level.

Second, there is pressure to narrow the meaning of 'religious purposes,' which will have the effect of reducing freedom of religious bodies to act in the public sphere according to their beliefs.

And third, there is the pressure to wind back the exemptions completely or put them up to regular review. This is due to the dignity harm model of anti-discrimination.

Let me make clear this is not about one's attitude to sex or one's religious convictions, if any. It is about the question of a basic freedom in our society. While it is naturally a concern for religious organisations and officials like myself, it should not be restricted to us. One reason why I value the work of The Centre for Independent Studies, and particularly its Religion and the Free Society program, is that it is an explicitly secular body (in the sense of not making any religious commitments, not in the sense of being anti-religious) taking a interest in these issues. In fact, I would welcome atheists and others without religious commitments to take this issue seriously. To be frank, it looks a little less self serving than when someone like me speaks up.

For this reason, I was delighted to hear Human Rights Commissioner Tim Wilson on *Lateline* earlier this year[10] when this exchange occurred.

> EMMA ALBERICI: Now you recently told a Senate committee that your own partner, who's a school teacher, resigned from the Catholic education system because as a gay man he didn't see any opportunity for career advancement. Now you've defended the rights of the Catholic education system to discriminate against someone on the basis of their sexual orientation.
>
> TIM WILSON: Well, I—both my partner and I—have defended the right of the Catholic Church to have an education system where they decide that they think only people who can work for them want to uphold their version of moral values. I disagree with their approach. I think they end up selling out the future of their children as well as making sure they don't get the most talented staff. But if you believe in human rights and you understand the principles of why they're important and preserving the integrity of the individual and their rights to go out living their lives,

> including when they operate collectively as religious faiths do, you have to be consistent. You can't just pick and choose when suddenly things decide to work for your interests or otherwise. But I know that my partner's very hopeful that the Catholic Church will change its views particularly in relation to teachers and that that will give him an opportunity to go and work in the system in the future.
>
> There is an honest defence of religious freedom.

What is needed? To be frank, wherever the right to religious freedom is presented basically as a minority exception from 'normal' society and its norms, there is a problem. What is needed is something much more positive. There needs to be a way to conceive religious freedom among others as a positive right, as a positive good, and not a begrudging exception, or worse still, as a 'right to discriminate' not otherwise allowed. What is needed is an appreciation that society is not simply the State and the individual. There are other what may be called locations of authority in civil society. Rather than a single rule from the sovereign centre as representing the rights of individuals—in this case, a universal principle of non-discrimination—society considers how different groups could be accepted as contributing to shared goods in different and not incompatible ways, in a society in which there are still areas of official authority or commercial enterprise where straightforward non-discrimination would apply.

If I could go further, religious freedom is to be valued not simply for the undoubted social and even financial benefits to society that religious activities provide. (Nonetheless, you may be interested to know that there is an *ad hoc* interfaith group, of which I am chair, organising a serious professional study of the economic impact of religious activities in Australia.) No, religious freedom is to be valued because religious communities and their members do represent positions of authority and meaning beyond that of mainstream society. It is not that one has to accept the truth claims of any religion to appreciate the presence of such communities and institutions.

It is enough that there exists in our society that which raises possibilities and challenges, even the questions of meaning and obligation, beyond the mundane everyday. In short, one of the values of religious freedom is that it allows a society in which the State is humble.

That alone justifies this topic in this place.

Endnotes

1 As pointed out in 'In Defence of the "Four Freedoms": Freedom of Religion, Conscience, Association and Speech"' (Freedom 4 Faith, 2013).
2 Nicole Hasham, 'Mike Baird's response to hate speech inquiry delayed,' *The Sydney Morning Herald* (5 June 2014), www.com.au/nsw/mike-bairds-response-to-hate-speech-inquiry-delayed-20140604-39jhb.html#ixzz3At1alQ6L.
3 Christopher Hitchens, *God is not Great: How Religion Poisons Everything* (Twelve, 2009).
4 'From Freedom for Faith,' Submission to the Review of the *Discrimination Act 1991* (June 2014).
5 Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society,' *Monash University Law Review*, forthcoming (2014).
6 See David Bentley Hart, *Atheist Delusions: The Christian Revolution and its Fashionable Enemies* (2009), 213.
7 C*hristian Youth Camps Limited & Ors vs Cobaw Community Health Service Limited & Ors* [2014] VSCA 75 (16 April 2014).
8 Neil Foster, 'Christian Youth Camp liable for declining booking from homosexual support group,' http://works.bepress.com/neil_foster/78, 3.
9 'Religious freedom claim for High Court,' *Eternity* (June 2014), 3.
10 ABC *Lateline* (17 February 2014), www.abc.net.au/lateline/content/2013/s3946783.htm.

An Equal Opportunity Destroyer of Freedoms: The Politics of Anti-Discrimination Law and the Threat to the Four Freedoms in Australia†

Jeremy Sammut

The so-called 'freedom wars,' which have raged over the Abbott government's pledge to repeal section 18c of the *Racial Discrimination Act 1975*, need to be understood as a battle over the future of citizenship and democracy in Australia.

To understand why citizenship and democracy are at stake over section 18c, the relevant issues need to be put into historical perspective. An initial way of doing this is to review how the relationship between Church and State is altered by the operation of anti-discrimination laws.

The starting point therefore is that the forces threatening religious freedom in Australia are a straw in the wind regarding threats to the civil freedoms of the non-religious alike. This is because the political objectives that lie behind anti-discrimination laws are an equal opportunity destroyer of the freedoms that traditionally have been taken for granted in a democratic country like Australia.

The meaning and purpose of section 116

Much of the debate in Australia about religion and the separation of Church and State is usually based on a misunderstanding or misrepresentation of the Constitution.

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† Sections of this paper have appeared in *Quadrant* (July/August 2014).

Section 116 of the Commonwealth 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.

Militant secularists assert that the meaning of this section is that religion is to have no place in the public square—in the political life of the nation—because of the threat religious values are believed to pose to civil freedoms in a democratic society.

The militant secularist reading of the intent of the Constitution goes too far, and misinterprets the liberal principles of religious freedom that underpinned the making of the Constitution. Rather than illegitimatising religion as a social and moral force, the real purpose of section 116 was to prevent the State from restricting freedom to worship and practise one's religion.

The Federal Fathers knew their history. They had learned the lessons of the long history of religious persecution in Europe, which had occurred when one official faith held a monopoly over the power of the State and thus over religious belief.

To make it clear that the new Australian nation was to be a 'new world' society free from the 'old world' divisions of class, creed and bigotry, section 116 was designed to ensure there could be no Established Religion here. There would be no State monopoly that would invite religious persecution, and which would create social and political divisions that would undermine the liberal ideal of a common Australian citizenship, with equal rights and responsibilities for all.

This formulation sought to suppress religious difference while extending the maximum of religious liberty. Drawing this line between Church and State involved a tricky balancing act. It is important to point out that these liberal principles of citizenship were not entirely to the liking of either the Protestant or Catholic

churches, because religion was hereby granted a somewhat ambiguous status.

The pursuit of a common citizenship and the achievement of religious pluralism

The liberal formulation of the relationship between Church and State not only relegated religion into something of a private matter, but also classified religion as a sectional interest that needed to be sublimated to what were thought the true obligations of citizenship—the pursuit of the public good (aka the national interest) through the fulfilment of the civic duties of a good citizen in a democracy.

The concern here was to prevent sectarian political conflict, and to ensure that no special privileges or disability under the law was attached to any sect or section of the community that would detract from the common democratic rights of all citizens.

The best manifestation of the liberal ideals of citizenship that once animated the civic life of Australians is provided by the Australian Natives Association (ANA)—which was a Victoria-based organisation devoted to the mutual improvement of its members through educational and other activities. The Natives, as members of the ANA were referred to, practised the ideal of a common citizenship devoted to a higher public good by leading the campaign for Federation. Religious motives and motifs—self-sacrifice, service and devotion to a higher calling—hereby found temporal expression and a civic outlet. However, in fulfilment of their civic ideal, the Natives banned all discussion of religious doctrine and theology, being all too aware of the divisive potential of these subjects and their potential to divert citizens from their civic duty.

How difficult the liberal formulation of citizenship was for the status of the churches was best demonstrated by the extended controversy over school education that began in the second half of the nineteenth century. The withdrawal of State aid from religious schools was meant to definitely define the relationship between Church and State in a Disestablishment direction by elevating the ideal of a transcendent citizenship above private matters of faith.

The higher purpose here was to transform the 'free, secular and compulsory' public schools, by dint of moral instruction and rote learning of the 3Rs, into makers of good citizens.

The withdrawal of State aid for denominational schools and the pursuit of a common citizenship through public education was the singular event that by the time of Federation had given religion its ambiguous, resolutely Disestablished position in Australian public life. Nevertheless, there were some obvious benefits for the churches, compared to what came before in Europe, due to the liberal determination to protect religious freedom.

The constitutional provision forbidding the Commonwealth from making laws 'prohibiting the free exercise of religion' left the churches free to practise their faiths and govern their communions as they wished. It also enabled the churches to participate in the public square but only on the strictly Disestablishment terms of the liberal democratic State.

Marriage equality: The implications of identity politics and anti-discrimination law for freedom of religion

The constitutional guarantee of freedom of religion—and thus two more of the four freedoms, namely freedom of conscience and freedom of association—was a virtue of the liberal state that was not to be taken for granted. The Constitution's enlightened attitude towards religious liberty was, and remains, a national achievement, given the long history of intolerance elsewhere.

However, the old formulations of the relationship between Church and State, and between citizenship and religion, are breaking down as a new form secular intolerance and zealotry has arisen which is rendering the churches no longer free to be left alone by the State.

Since the 1970s, the idea of a common citizenship has given way before the principle of diversity and the rise of identity politics.

Where we used to talk about the collective rights and responsibilities of citizens, civic and political life has become dominated by discussion of the rights of women, the rights of ethnic minorities, and the rights of gays and lesbians—a conversation that

is usually started and sustained by taxpayer-funded advocates embedded in various departments of the human rights industry.

The legal means of enforcing these rights are the federal and state anti-discrimination laws. The concern is that anti-discrimination laws, combined with the push for marriage equality, is in the process of revolutionising the relationship between Church and State.

Any bill to legalise gay marriage is certain, in the first instance, to contain faith-based exemptions allowing churches to refuse to perform same-sex marriages. But I wonder how long this tactical concession will last once the marriage equality law is on the books, and until the campaign is renewed to remove the exemption consistent with the logic of anti-discrimination laws.

Advocates of gay marriage *per se* are not waging war on religion. The concerns relate to certain groups, most importantly the Australian Greens, which are already campaigning to remove faith-based exemptions from anti-discrimination laws for religious schools regarding employment of gay and lesbian staff. The strong suspicion is that the gay marriage issue will be used to advance the militant secularist agenda articulated by the Greens against traditional Christian religions, especially the Catholic Church, and also the increasingly popular Pentecostal and Evangelical churches.

Note as well that the coupling of marriage equality to anti-discrimination law has the potential to advance the militant secularist cause far beyond keeping religion out of the public square. What is looming is a new form of State monopoly over matters of religious belief and faith, since eradicating the Church's 'secular sins' of discrimination on the basis of sexual orientation would represent an extraordinary interference in the internal affairs of religious organisations.

The forgotten freedom: The liberal case for religious liberty and a tolerant and plural Australia

To dramatise the issue without exaggeration, forcing the successors of Archbishop George Pell to marry a gay couple in front of the altar at St Mary's Cathedral at the barrel end of anti-discrimination law would amount to an unprecedented form of religious persecution,

as the State forces non-conformists and dissenters from the theology of State to act against their conscience.

If this comes to pass, then the end product of what is claimed to be the great pluralist cause of marriage equality would render meaningless the principles of freedom of religion, freedom of association, and freedom of conscience in Australia.

You don't need to be religious to be concerned about this. For the record, I am a lapsed Catholic, with no personal, professional or institutional stake in these issues. Those who should be concerned about the threat to religious freedom are all who are committed to the principle of liberty, and to ensuring the proper boundaries between Church and State and civil society are observed by the law.

Again for the record, I believe that marriage equality is a matter for the Australian people to determine according the processes of parliamentary democracy, and I truly have no strong opinions either way on the subject.

But I do feel strongly about the broader cultural issue of militant secularists imposing their left-progressive values on the churches. This form of creeping totalitarianism ought to be opposed, and the maintenance of the traditional liberal relationship between Church and State that respected the freedoms of religion, association and conscience ought to be supported, even if upholding these principles contravene contemporary anti-discrimination pieties. If religious Australians are not free to follow the dictates of their faith inside their own churches on the question of marriage, Australia will no longer be able to consider itself a pluralistic society capable of tolerating civil disagreements on moral issues.

Now is not a good time to be defending the rights of the churches, particularly the Catholic Church, to independently govern themselves free of State interference, given the Royal Commission into Institutional Responses to Child Abuse. But it remains that some fundamental principles are worth defending.

We are all Catholics now: Shared strategic interests

Those who are interested in liberty, particularly those on the centre-right, need to recognise their shared strategic interests

with the churches. In a sense, 'we are all Catholics now' when it comes to the politics of anti-discrimination law. The same ideas, the same constellation of political forces (identity politics plus left-progressivism plus administrative overreach by the State) that threaten freedom of religion, association and conscience also threaten the fourth and most important freedom of all in a democratic society—freedom of speech.

This is why it is important, as a starting point, to appreciate the way a political objective—the militant secularist agenda of de-legitimising traditional Christianity—is being advanced under the rubric of anti-discrimination to the detriment of religious liberty. Political objectives also lie behind the origins and operation of anti-discrimination laws in general, and these political objectives are advanced under the rubric of eradicating so-called offensive speech to the detriment of the democratic rights of all Australians.

The debate about section 18c, initiated by the infamous *Andrew Bolt* case, is not just about the right to free speech. This has understandably been the main theme of the debate, and of course in a democratic society people should be free to say what they wish because it is a dangerous business for the authorities to get involved in regulating speech. However, the arguments for repealing section 18c need to be broadened.

It needs to be made clear to the Australian people that at stake over section 18c is our democratic right to collectively determine how we are governed through the free discussion of competing ideas. The issue is whether Australians are free to discuss controversial issues and express dissenting views on subjects such as Aboriginal identity and multiculturalism without facing legal action under the *Racial Discrimination Act*.

The missing context for the section 18c debate can be fleshed out by considering a couple of examples of how political discussion could be compromised by anti-discrimination law, with parlous results for the health of Australian democracy and society in general.

The political origins of hate speech laws

To appreciate how democracy is at risk, we first need to review the

origins of and understand the intellectual and political circumstances surrounding the creation of Australia's 'hate speech' laws.

Australia's *Racial Discrimination Act* was based on the British *Race Relations Act 1965*. In Britain, by the late 1970s, the *Race Relations Act* was felt not to be working properly because the controversial Tory politician, Enoch Powell, was not able to be prosecuted for making speeches questioning the rationale for mass migration from the former colonies of the British Empire and for warning about the social problems and racial tension that mass, uncontrolled immigration had engendered in British society. Powell was unable to be prosecuted for allegedly stoking racist prejudices against 'coloured' migrants because under the *Race Relations Act*, it was necessary to prove intent to incite racial hatred. Intent was therefore removed as a requirement for prosecution for use of 'threatening, abusive or insulting' language—a precedent and precursor to what would become section 18c in Australia.

One of the arguments cited in favour of repealing section 18c is that language which incites racial violence will remain a crime in Australia under state and territory criminal statutes. This is dismissed by supporters of section 18c because their objective, and the objective of hate speech laws, in general is not to preserve the peace so much but to use the law (or 'lawfare' as it has come to be called) to achieve a political objective: to suppress dissent and reinforce the left-progressive consensus about controversial, race-related political and social issues that prevails in academia, the media, and in much of the political class.

The British experience bears this out: the aim of amending the *Race Relations Act* was to shut down the discussion of the problems associated with immigration sparked by Powell by establishing a statutory mechanism that would brand as racists those who raised the subject. Note that the threat of potential legal action can be sufficient to deter discussion, and that this is the means by which hate speech laws become a political muzzle and enforce the progressive consensus that certain subjects should not be open for discussion. Not only is this legal manoeuvre inherently opposed to free speech, but it is also deeply anti-democratic as it is based on the

idea that some topics are unfit for public discussion and deliberation by the citizenry.

The progressive consensus that immigration and the closely related subject of multiculturalism should not be discussed extends to Australia and is also predicated on the belief that discussion will foster racism.

I disagree. We should be wary of how the cause of anti-racism is exploited to shut down legitimate debate, given the need to discuss the topics of immigration and multiculturalism as openly as possible. Despite the overwhelming success of Australian's immigration program in the last 60 years, mass-migration and multiracial societies remain a grand experiment—a virtually unprecedented experiment until the second half of the twentieth century. It is important to periodically assess how the experiment is going so as to detect and address potential problems.

Free discussion of these issues is also important to instil public confidence and create support for immigration. If responsible people and politicians do not talk about these subjects, the danger is that irresponsible people will exploit community concerns. There are many examples in European countries that can be cited to prove these points—for example, the success of the National Front in France.

But we don't need to look overseas. During the period of the Keating government in the 1990s, attempts to discuss immigration, multiculturalism and Indigenous policy ran up hard against the progressive consensus: the reply by media, academic and political elites to those who dared to raise these subjects, in the worst anti-free speech tradition, was to say 'you can't talk about that because that's racist,' and the legislating of section 18c by the Keating government in 1995 was the institutional expression of that sentiment. There was indeed a community backlash against the shutting down of debate in the form of the rise to political prominence of Pauline Hanson after the 1996 federal election.

The persecution of Andrew Bolt: Hanson redux?

The Hanson phenomenon shows it is politically self-defeating and, in fact, dangerous to try to suppress free discussion. Nevertheless,

this has happened again with respect to the *Andrew Bolt* case, and the same concerns apply to the potential political consequence of suppressing discussion of Indigenous identity.

Andrew Bolt's offence was to question whether people who identified as Aboriginal, but who may not have experienced any discernible disadvantage, should be entitled to race-based assistance such as government educational support, preferment in public sector employment, and other usually arts-based scholarships. The basic question Bolt was asking was whether race or need should be the criterion for special assistance.

Bolt was sued under section 18c by the people he named in his articles who felt offended, insulted and humiliated on the basis of their race.

Was there more to this than the hurt feelings of these people? Was there a political agenda, designed to shut down debate about this subject, behind the decision to target Bolt for prosecution?

The reason I believe there was a political agenda is the role Bolt played in the evolution of Indigenous policy more than a decade ago. Lowitja O'Donoghue was the former head of the Aboriginal and Torres Strait Islander Commission (ATISC)—the then peak Indigenous organisation in Australia—and had claimed to be a member of the Stolen Generation. Bolt was the journalist who wrote the story that uncovered and forced O'Donoghue to admit she had not been stolen by the authorities in the Northern Territory but had been placed in a Mission school by her father.

This was a pivotal moment in the history of Indigenous affairs. The discrediting of the most prominent and respected Indigenous leaders in the country helped set in train the series of events that eventually lead the Howard government to abolish ATSIC. This marked a shift away from the Separatist policies that had dominated Indigenous affairs since the 1970s and towards the policies of mainstreaming Aboriginal communities, with a view towards full engagement with educational and employment opportunities—a policy shift most definitely signalled by the Howard government's Northern Territory Emergency Intervention (NTI) in 2007.

Bolt played an important part in setting the stage for the Howard government's Indigenous policy revolution, which overturned the progressive consensus in place since the 1970s. It was not a coincidence, therefore, that a successful lawfare campaign was waged to silence Bolt and shut down discussion of Aboriginal identity and entitlement before it could get off the ground.

This is a dangerous strategy. According to the Australian Census, increasing numbers of Australians are identifying as Indigenous. I have been surprised in the last couple of months by people, who can by no means be considered political animals, who have raised in conversation the topic of (to use their words) 'white' people claiming Aboriginal identity to qualify for the associated benefits. Shutting down discussion of Aboriginal identity and entitlements (and, by extension of the *Bolt* case, labelling those who raise the subject as racists) has the potential to build community resentment. Suppressing debate could set the stage for the issue flaming into prominence in inevitably nasty and divisive ways—and in a similar fashion to the Hanson phenomenon. We should fear that the issue may explode if the proposal to hold a referendum to amend the Commonwealth Constitution to recognise Aboriginal Australians in the Preamble is proceeded with, because the referendum campaign will concentrate the public mind on the question of who is an Aborigine and what benefits that ought to entitle people to receive and why.

Islamism and Australia: Three concerns about multiculturalism

The same concerns apply with respect to the interaction between hate speech laws and discussion of multiculturalism.

The major concerns about multiculturalism tend to fall under three major headings. Multiculturalism is potentially divisive because it risks (1) importing foreign conflicts into Australia; (2) sectional interests subverting national policy; and (3) exemptions from the rule of law. There is a need to fully discuss these concerns about the course of multiculturalism in Australia right now.

In 2012, the nation witnessed the Sydney protest-cum-riot in Hyde Park, which was led by Islamic organisations and sparked by an anti-Islamic film in the United States that had (allegedly) led to the sacking of the American consulate in Benghazi and the murder of the US ambassador. This fulfils concern number one.

In his diaries released earlier this year, former Foreign Minister Bob Carr explained that former Prime Minister Julia Gillard was rolled in Cabinet in 2012, and Australia abstained on the vote in the UN General Assembly on the recognition of Palestine's observer status at the United Nations based on electoral concerns that the Labor Party would otherwise lose support among Muslim voters in key Labor seats in Southwestern Sydney. The Cabinet decision overturned decades of bipartisan support for Israel. This fulfils concern number two.

In May this year, the ABC reported that Muslim community leaders had held a closed meeting with Deputy Police Commissioner Nick Kaldas, and had asked him not to enforce laws that prohibit Australian nationals from fighting in foreign conflicts, and not prosecute Muslims leaving Australia to fight in the civil war in Syria. Kaldas is slated to become the next NSW police commissioner. This fulfils concern number three.

But is it permissible to discuss these issues under the *Racial Discrimination Act*? In 1998, Tom Switzer, former opinion page editor at *The Australian* newspaper and current editor of *Spectator Australia* magazine, was sued under the NSW *Anti-Discrimination Act* for racial vilification. His offence was to pen a newspaper column on the Israel-Palestine peace process critical of the Palestinians. The complaint was initially upheld but overturned on appeal. But the need to spend years in court and thousands of dollars on lawyers to exercise your right to free speech has a 'demonstration effect' on others. Rather than court controversy, risk being labelled racist, and face legal action, maybe it's easier (and cheaper) to be silent.

The *Switzer* case deserves to be better known as the 'Australian Mark Steyn case,' given the identical travails experienced by that journalist under Canada's now repealed hate speech laws. What these cases have illustrated is the chief problem with section 18c

and why it should be abolished: the process is the punishment and politically motivated lawfare makes the price of free speech way too high.

Conclusion: The democratic deficit of lawfare

All Australians need to understand that hate speech laws give rise to a democratic deficit—'no go' topics unfit for adults to debate in public. This is why the freedom wars are ultimately about democracy. The so-called right of others not to be offended restricts our democratic right to fully and freely discuss subjects of national importance.

Hate speech laws are inherently bad for democracy because the only way democratic institutions acquire legitimacy is by channelling the mind of the public. The way the public mind is formed is by free discussion of issues, as different interests compete to shape and define their collective meaning through the political process. Laws restricting free speech are therefore the antithesis of democracy, and they represent the end of politics in a free society.

Far from religion in the public square being the major threat to civic freedom in Australia, the real threat to all of the four freedoms is posed by those who would use the law for political purposes to enforce the secular pieties of anti-discrimination. The creation of special legal privileges for certain sectional interests undermines the collective democratic rights of our common Australian citizenship, and is a state of affairs that would have appalled the Federal Fathers.

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A Quartet of Freedoms: Freedom of Religion, Speech, Association & Conscience

The International Covenant on Civil and Political Rights, to which Australia is a signatory, gives high prominence to freedom of religion. But religious freedom is under threat in Australia. An aggressive secular culture, combined with the diminished standing of religious organisations, is putting religious believers under pressure to be silent in the public square. It is necessary now to defend the place of religious liberty in our society and to re-affirm its place alongside the freedoms of speech, association and conscience. The Australian Constitution has in place protections for religion against interference by the State. These protections are now being read as provisions that deny religion any place in public debate. Robert Forsyth and Jeremy Sammut argue that religion is to be conceived not as an entirely private matter but as a public good that enhances both the individual and civil society.



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