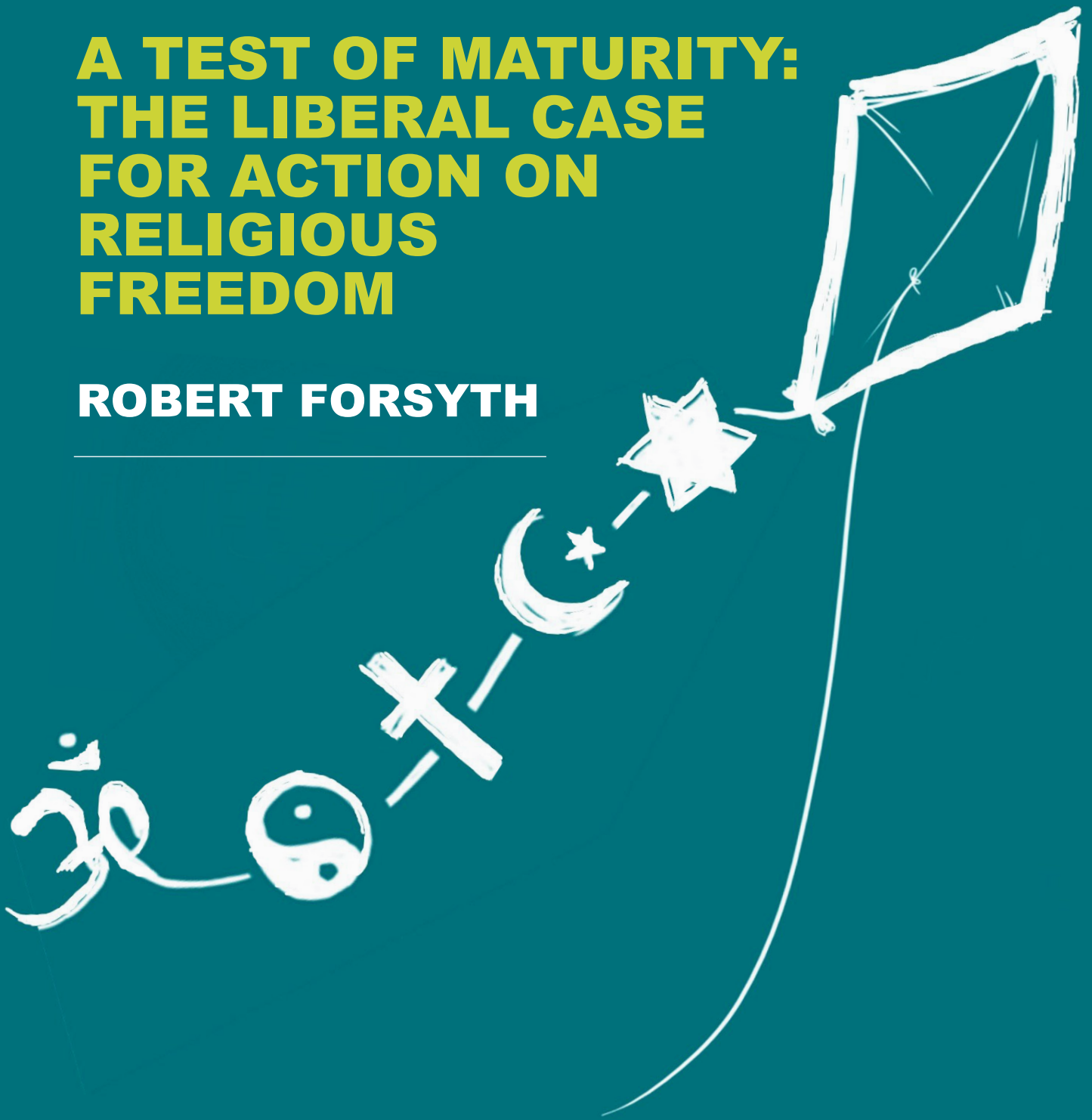


A TEST OF MATURITY: THE LIBERAL CASE FOR ACTION ON RELIGIOUS FREEDOM

ROBERT FORSYTH





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on religious freedom**

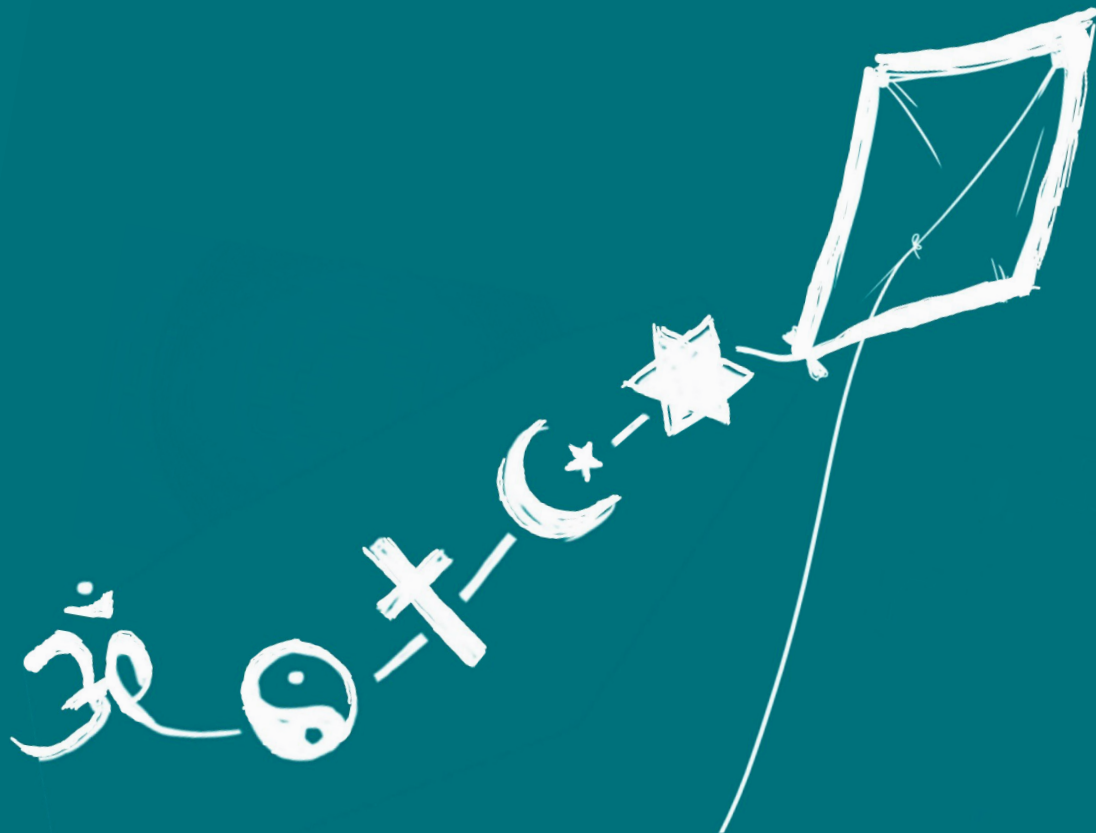
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POLICY Paper 8

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Introduction: Background and Context

One of the tests of Australia as a harmonious civil society is how we handle diversity among our fellow citizens. A genuine concern about persecution of racial minorities has led Australia to pass far-reaching anti-discrimination legislation; but race, gender and sexual orientation are not the only aspects of diversity. Nor are these protections of interest only to minorities — they concern our whole society.

Arguably the most turbulent and important aspect of diversity historically has been diversity of faith. Protections for believers of all kinds have been hard won in the evolution of Western society. Protection of religious freedom and diversity remains important — and important for all, not merely the preserve of religious adherents alone.

The right to religious freedom is not the only fundamental human right. It cannot therefore be absolute, but exists alongside other rights. How different rights and freedom coexist is one of the big questions facing our nation today.

Australia has long enjoyed religious freedom in practice without robust legal protections. However this was largely a function of common law tradition and the fact that a healthy majority of the population were attached to a religious institution. Changes in Australian law and society over the past 20 years or

so has meant that more formalised protections for religious freedom are now needed.

Although the debate over same-sex marriage is well and truly over in this country, it has served to push the issue of religious freedom in Australia into the foreground. In November 2017, this led Prime Minister Malcolm Turnbull to appoint an Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion. A similar inquiry is being conducted by the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (DFAT).¹

While the passage of same-sex marriage may have sparked heightened interest in religious freedom matters, religious freedom is not about revisiting that law. Nor should continuing debate on the issue be treated as a shadow continuation of the conflict over same-sex marriage that took place in 2017. Rather, it is about the future of Australia as a genuine liberal democracy; and the maintenance of genuine diversity in a changing world.

This Policy Paper argues that there are developing threats to religious freedom, which require a new modest approach to defending it in Australia— by means of a federal Religious Freedom Act — and will set out the liberal case for doing so.

What is Religious Freedom?

In order to appreciate exactly what is at stake in the current debate in relation to the role of religion as a vibrant part of Australian society, it is crucial that the right to religious freedom be properly defined and understood — and especially that it not be understood to simply mean creating the right to discriminate or be a bigot. The standard, internationally agreed definitions of religious freedom, in particular two United Nations declarations, Article 18 of the *Universal Declaration of Human Rights* of 1948 and Article 18 of the *International Covenant on Civil and Political Rights* of 1966, reflect the way that liberal democratic nations — given the premium they placed on maximising individual freedom and a flourishing civil society — have sought to eliminate religious persecution by the state and/or its agents by protecting the religious rights and liberties of all citizens, of all denominations, on a basis of civil equality.

Two important aspects of religious freedom are clear in such definitions. First, religious freedom is not just a freedom to hold, or not to hold, certain religious beliefs. Importantly it is also the freedom to manifest such beliefs in behaviour and actions. Nor does religious freedom only involve freedom to worship or attend services in church, synagogue, mosque or temple. It involves freedom to live out the religion in daily life.

This reality can be overlooked if religion is, for example, too narrowly conceived in terms of protestant Christianity with its emphasis on belief. As the distinguished economist and social commentator Henry Ergas has pointed out,² the common historic defenders of religious tolerance in the West were steeped in such a view. But, says Ergas, this is too narrow to do religion justice.

This narrow portrayal of religion as a matter of private choice, separable from economic, social and political life, facilitated the rise of toleration; but it deprived faith of its flesh and blood. In effect, far from being exhausted by the private act of knowing and holding to one's truth, the religious life involves reflecting that truth in every facet of existence. The commitments that entails are not solely or even primarily creedal; rather, from ritual observance to dietary habits, they consist of social practices that give tangible form to the fact of living according to faith.

In contemporary multicultural Australia, this is more and more evident in the religious life of Hindus, Sheiks, Buddhists, Muslims and Jews — just to name a few religions that emphasise social practices as much as creedal beliefs.

Secondly, religious freedom is expressed in, and empowered by, community. This implies that religious freedom is not just individual freedom, but involves the freedom of communities and institutions to survive and be effective. The maintenance of religious community identity will involve the freedom of association within that community. The freedom of such religious institutions and communities to select and — where necessary — dismiss employees or members, is essential to the existence of such bodies. Otherwise they lose control of their identity and integrity.

This is why current anti-discrimination law exemptions matter — and why any effective removal of these exemptions would pose such a threat to religious freedom in Australia. Further, the maintenance of religious community will involve the ability to educate children and adults in the teachings, practices and moral values of the religion.

The Inadequacy and Vulnerability of Existing Protections

Because of Australia's inheritance of the English tradition of unwritten rights and freedoms that are protected by custom and the common law, there has been little formal legal protection of the freedom of religion in Australia in the past. Arguably, given that the vast majority of Australian society was connected to a religious institution — or closely associated with someone who was — there was also little practical need for formal protection for expression of religious belief. Indeed, for much of Australia's early history, religious freedom was better understood as religious tolerance: which in practice meant freedom from

discrimination for being Roman Catholic.

Australia does have a limited protection for religious freedom in Section 116 of the Commonwealth Constitution, which constrains the Commonwealth Parliament from restricting the open practice of religion as well as from making religion part of the law of the land. All other formal protection for freedom of religion is found in anti-discrimination laws. Some laws prevent discrimination of individuals on the basis of religion; however most protections for religious liberty are expressed as mere exemptions and exceptions to anti-discrimination laws.³

However the language of 'exemptions' presupposes there is an accepted norm from which some are permitted to diverge and engage in what would otherwise be unlawful behaviour. It is better to see these as 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

Regardless of any protections enshrined in legislation, freedom of religion remains vulnerable to accusations of prejudice, bigotry and discrimination when the views and practices of religious believers conflict with secular norms.

Indeed, one main problem with the current exemptions regime for protecting religious freedom is that, in reality, antidiscrimination laws themselves present a significant challenge to religious freedom. As the DFAT interim report noted

The desire of religious individuals to express and act on their religious beliefs, and the desire of religious organisations to maintain autonomy over their affairs, can compete with the desires of people not to be treated differently or unequally. Striking the right balance between these competing rights is a challenging and delicate task.⁵

In particular, as the scope of operation of anti-discrimination law has extended in recent years to cover more areas of society — especially in areas of sexual behaviour and identity in which broad societal norms have undergone rapid change in the past 50 years — the differences between many religious bodies and many aspects of mainstream culture have become more acute.

Another of the reasons for an increased threat to the freedom of religion is due to a significant shift in the rationale of anti-discrimination law away from provisions that sought to ensure equality of access to those that seek to ensure the advancement of dignity. As Patrick Parkinson and Joel Harrison have recently pointed out:

Rather than supporting the presence of multiple groups in what may broadly be termed "public life", certain recent requirements 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.⁶

When 'dignity' is conceived as a person's worth in their chosen self-identity, and non-discrimination is aimed at avoiding status or dignity harm, then the mere existence of an apparent discrimination

is problematic in itself — irrespective of whether or not there are many other opportunities to obtain the relevant service or employment. This shift from one form of anti-discrimination practice to another represents a significant, potential threat to religious freedom.

This is taking place at a time when there is a tendency, particularly among political and media elites, to not take religion seriously. Because of this, they do not think other people take it seriously; leading them to suspect that people are using religion as a cover for mere bigotry, and to regard the loss of religious freedom as not important, even though it may involve people's fundamental beliefs and acts of conscience.

It may be worse than that. Paul Kelly warns there is a new anti-religious prejudice arising, many of whose adherents aspire to drive religion from the public square into the exclusively private realm — constituting a direct assault upon the secular state.

In this concept [of the secular state], the state became neutral between believers and non-believers and neutral among different types of believers. The reason for such neutrality was to allow all types of faith to flourish without war. Any proposal to move the state from being neutral to being actively anti-religious would constitute a betrayal of this mission and guarantee new and bitter divisions throughout the community.⁷

Indeed, there is a constituency arguing actively for the elimination of religious exemptions in anti-discrimination laws with little understanding of the rights of religious groups to maintain their identity. The Australian Greens have long argued for the removal of all religious exemptions from anti-discrimination law, both federally during the 2016 election campaign⁸ and in the states of NSW⁹ and Western Australia.¹⁰ There is no reason to think this pressure will not continue at the state and territory level.

This also appears to be the agenda of some LGBTBI activists in the wake of the legalisation of same-sex marriage. Hence the submission to the Ruddock inquiry by the peak same-sex marriage lobby group, Australian Marriage Equality, calls for repeal of religious exemptions in state and federal anti-discrimination law.¹¹

However, if discrimination laws are used to limit religious freedom in a significant way, not only will human rights be curtailed. The civil compact — the equal protection of religious liberty for all — that has enabled liberal democracies to minimise religious conflict will also be broken in a manner that could well result in religious groups having no recourse other than to politically mobilise around these issues; a result that will ultimately leave us as a more divided community.

Freedom of Belief and Liberal Democracy

Supporting freedom of religion in a liberal democratic society does not require — or amount to — agreeing with religious truth. Even those who think all religions are false should still agree with them having appropriate freedom; just as liberal democracy respects and protects a plurality of political beliefs. The question is whether it is good to live in a society that values religious freedom irrespective of the truth of any particular religious claims.

Liberal democracies both value, and are built on, the right to freedom of thought, conscience and religion. Such freedom of belief, together with other freedoms of association, speech and the right to own property, is crucial to the health of our society and the flourishing of its people. There are benefits in allowing the freedom of such religious pluralism. It brings freedom of choice, the competition of different visions of the meaning and purpose of existence, and contributes to realisation of a truly civil society. Interestingly, this freedom is relatively new in human history. It is only in the past few hundred years that states or societies no longer enforce a limited range of religious options for its people. In many parts of the world today, such freedom to religious pluralism still effectively doesn't exist.

There are three arguments for the protection of religious freedom. The first involves the freedom of the individual.

The right to freedom of religion is a fundamental right that confers upon the individual citizen the freedom to pursue their conception of a 'good' life. Since religion is about the human pursuit of ultimate meaning and value, it is reasonable to argue that any erosion of religious liberty impedes that pursuit and so diminishes opportunities for human fulfilment.

Wrangling about questions of ultimate meaning is likely to cause offense to some group at some point in any diverse, modern society. However, if these questions are important, the liberal state needs to uphold the right to religious liberty as a fundamental human right.

The second argument is that, irrespective of the truth of any religious claims, the freedom of religions to exist is in general beneficial for society as a whole.

This is not to say that every religion or religious practice is an unalloyed good, but there is evidence of the general good that religion adds to society.¹² Denis Dragovic draws attention even to the economic growth impact of religious freedom when he writes that "Research has found that religious freedom positively contributes to prosperity above and beyond its contribution to buttressing other freedoms."¹³ More importantly, religious freedom and pluralism enables religious communities to be other locations of authority in civil society other than the sovereign state and the needs or preferences of the individual.¹⁴ This deepens and enriches society.

The third reason is the harmony and peacefulness of society in general.

Liberal democracy's accommodation of maximum religious pluralism — achieved through the state's neutrality on matters spiritual — was designed to eliminate political conflict over religion by creating freedom for all belief; and special favour and privileges for none. By achieving civil equality for all individuals and religions, the aim of liberal democracy was to enable the community to live together peacefully despite their doctrinal and theological differences that, historically, had caused bitter social division and strife.¹⁵

Never an Absolute Right, But...

However, because the right to religious freedom is not the only human right, the question of the relationship between different rights arises. This means that freedom of religion is not an absolute right. The Australian Law Reform Commission has noted that the right to 'manifest' belief does not always guarantee the right to behave in a manner governed by that belief. "Once a belief is 'manifested' in action, it leaves the sphere of absolute protection, because the manifestation of a religious belief may have an impact on others."¹⁶

A useful guide to what limits freedom of religion should be subject is Article 18 of the *International Covenant on Civil and Political Rights* 1966 which specifies "only 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." Issues of national security and child protection are two clear examples of where religious freedom can justifiably be so limited.

The matter is a little different when the government is paying or subsidising a religious organisation

to perform some service to the community. Here, some further limitations may be justified. However there are two quite different scenarios and limits. If the government is paying a religious organisation in effect to provide a government service on behalf of the government, it is justifiable for the religious organisation to be required to provide the service on the government terms without discrimination. Even here, the government should not impose limitations on those whom the faith-based charity can employ if those limitations threaten the very character of the faith-based charity which make it so effective in the first place. In this case, what looks like discrimination may only be a faith-based organisation maintaining its identity and ethos through the selection of or giving preference to staff appropriate to the mission of the organisation.

On the other hand, if the government is supporting religious organisations providing services because it wishes to have a diversity of such providers and products available, then limitations need to be less stringent. Here, the whole point is that the religious organisation provides a relevantly different service to

others, so there be genuine diversity and choice. The ethos and mission of the religious organisation and its particular service should not be threatened by a one-size-fits-all policy that simply holds that tax-payers money should not be given to organisations that discriminate. Not all selection is unjustified discrimination. Some is essential to the very purpose of the funding.

As important as the right to religious liberty is, it is crucial to add that protecting it should not entail any laws that remove others' rights to criticise, deny or even ridicule any particular religious belief or practice — as long as it does not involve incitement to discrimination, hostility or violence. Therefore, it is essential to rule out any notion that blasphemy should be either reintroduced or reinvigorated as an offence. Nor can religious freedom protection guarantee that religious points of view will necessarily be listened to, or religious leaders respected in public debate. These are matters properly outside the reach of law in liberal democracies.

A Religious Freedom Act

Given that religious freedom is clearly important and integral to liberal democracy, and that existing framework of protections are inadequate due to the changing political and social environment, there is a case for a new approach to protecting religious freedom. This is why the proposal for a federal religious freedom act is worth consideration. In one of the more substantial submissions to the Ruddock Expert Panel, *Freedom for Faith* — a Christian legal think tank with a particular interest in religious freedom — has proposed such an act.¹⁷ The proposal is based on the principle that any improvements to the framework for protecting religious freedom in Australia should address the threats that anti-discrimination law poses to religious freedom, without shifting the present balance of rights nor compromising public safety. It is an essentially modest proposal to secure the freedoms that exist without changing them in any real way.

A proposal worth considering is that the federal parliament enact a religious freedom act that, in effect, seeks to clarify and codify common law concepts of religious freedom, as well as existing statutory anti-discrimination protections, into Australian statute law. Such legislation would have an impact on state and territory antidiscrimination laws because of section 109 of the Commonwealth Constitution which says that “when a law of a State

is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency be invalid.”

This would mean that while the states and territories would keep their legislative powers, the federal law would place certain constraints upon the scope of, and application of, any laws they make; but only to the extent that their application in any given situation would be in breach of long-held protections for freedom of religion.

While there are good reasons to restrict the expansion of Federal powers over the States, the protection of religious freedom — to the extent any legislation is necessary — is legitimately a national matter warranting central government action.

Though some have called for the direct incorporation of provisions of the *International Covenant on Civil and Political Rights* in Australian law as a means of ensuring religious freedom, it should be noted that these rights and freedoms do not exist because of international covenants. Instead, they come from Australia's inheritance of the English tradition of unwritten rights and freedoms that are protected by custom and the common law. Any support found in the enunciation of the principle of freedom of religion in international law is in addition to — not the source of — such rights.

Consideration therefore should be given to bringing in such a federal religious freedom act that would not increase freedoms; but guarantee such as exist and clarify their genuine limitations. It would not therefore be a 'mini bill of rights' but a modest action on strengthening religious freedom. Given the present state of Australian society, there is a need for a federal act that will guarantee religious freedom into the future by legislating proper protections of existing rights to religious liberty, as opposed to creating specifically any new right or rights.

Rather than permit anti-discrimination law to be used to eradicate differences between Australians by mandating uniformity of belief, thought, speech, and action, the federal parliament must establish a new law to protect religious freedom that will allow Australians to live together harmoniously *despite* their differences of belief, thought, speech, and action. For the act to be effective, it needs to have the support of both sides of politics to prevent the very unsatisfactory situation arising when religious freedom in this country becomes further politicised and unstable.

Conclusion: Preserving Pluralism in Australia Society

The issue of religious freedom, together with other freedoms of association, speech and the right to own property, are crucial to the health and status of our liberal-democratic society in Australia. The principle of religious liberty must be upheld as a positive good and not as an exception granted grudgingly by the government — as if the conferring of a right to discriminate that would not otherwise be allowed. There are other 'locations of authority' in civil society that transcend the needs or preferences of the individual. 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 share goods in different, and compatible ways.

We are at a crucial moment in Australia's history on this issue. The Expert Panel process has opened the door for genuine and bipartisan action to secure the nation's existing religious freedom for the future. If this could be done in a way that neither increases nor diminishes existing common law freedoms, and is supported by a wide section of the community, the matter would in effect be settled for decades. The achievement of such an outcome will require leadership from both the government and the opposition, as well as a spirit of trust and compromise from the various sections in society that have a stake of one kind or another in the issue. It would be a tragedy if the issue was unduly politicised, or if — after so much work — nothing is finally done. How the securing of a better platform for religious freedom is dealt with in the coming months will be a test of the maturity of this county.

Endnotes

- 1 The Centre for Independent Studies has made submissions to both inquiries and appeared before a hearing of the DFAT Human Rights Sub-Committee. This Policy Paper is based on and expands those submissions.
- 2 *The Australian* 25 May 2018 <https://www.theaustralian.com.au/opinion/columnists/henry-ergas/freedom-of-religion-plays-out-in-every-facet-of-life/news-story/2af44c485e7eefea48f0e96b7c708ff1>
- 3 For example the *Anti-Discrimination Act 1977 NSW* Section 56 'Religious Bodies', 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.
- 4 Forsyth, R., "Religious Freedom Under Challenge", in Kurti, P., Forsyth, R., and Sammut, J., *A Quartet of Freedoms: Freedom of Religion, Speech, Association and Conscience* (The Centre for Independent Studies: St Leonards, NSW, 2014)
- 5 Interim Report Legal Foundations of Religious Freedom in Australia (November 2017) 7.53 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report
- 6 Harrison, J., and Parkinson, P., "Freedom beyond the Commons" 413, 420-422
- 7 *The Australian* 19 September 2012 <https://www.theaustralian.com.au/opinion/columnists/islam-should-accept-a-secular-state/news-story/60148875901a3f0602599704fa8da5fa?sv=8599333941b3fa3a5f94435666caa5d0>
- 8 <https://www.theguardian.com/australia-news/2016/may/17/greens-promise-to-end-religious-exemptions-to-sex-discrimination-act> and <https://www.theaustralian.com.au/national-affairs/federal-election-2016-greens-under-pressure-on-religion-reforms/news-story/70ac95faeb7e301a1c507fa8f90eda01>
- 9 <https://nsw.greens.org.au/policies/nsw/sex-sexuality-and-gender-identity-policy>
- 10 <https://www.outinperth.com/wa-greens-introduce-bill-end-discrimination-religious-schools/>
- 11 Marriage Equality Submission to the Expert Panel recommendation 8. <https://www.pmc.gov.au/sites/default/files/religious-freedom-submissions/14948.pdf>
- 12 For example, see Chapter 11 'Religion is a Team Sport' in Jonathan Haight *The Righteous Mind* (2012) and more recently in Australia the Deloitte's report for the Study of the Economic Impact of Religion on Society <https://www2.deloitte.com/au/en/pages/economics/articles/donating-volunteering-behaviour-associated-with-religiosity.html> and Angela Shanahan "What do religious people do for Australia? Ask the charities" *The Australian* 9 June 2018 <https://www.theaustralian.com.au/news/inquirer/what-do-religious-people-do-for-australia-ask-the-charities/news-story/843f2404d3ee29551598f83b4c1008ed>
- 13 <https://www.theaustralian.com.au/opinion/freedom-of-religion-serves-us-all-so-lets-protect-it/news-story/d38a6b38963a80079b4e063cd495be43> and also <https://theconversation.com/why-australians-religious-freedom-is-worth-protecting>
- 14 See Harrison, J., and Parkinson, P., "Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society" (*Monash University Law Review* 19)
- 15 For the roots of Australian religious pluralism in the nineteenth century, see John Hirst, *Australia's Democracy: A Short History*, p.233-43.
- 16 *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2015), 5.54
- 17 *Protecting Diversity* https://freedomforfaith.org.au/images/uploads/FFF_submission_Ruddock_Jan_15th.pdf

About the Author



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THE CENTRE FOR
INDEPENDENT
STUDIES

POLICY Paper 8 (PP8) • ISSN: 2209-2447 • ISBN: 978-1-925744-25-5

Published August 2018 by The Centre for Independent Studies Limited. Views expressed are those of the authors and do not necessarily reflect the views of the Centre's staff, advisors, directors or officers.

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