

2018

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This article was originally published as:

Benson, I. T. (2018). Religious liberty in Australia: Some suggestions and proposals for reframing traditional categorisations. *Zadok Perspectives*, 139, 10-17.

Original article available here:

<https://search.informit.com.au/documentSummary;dn=841942196842826;res=IELHSS>

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Benson, I.T. (2018) Religious liberty in Australia: Some suggestions and proposals for reframing traditional categorisations. *Zadok Perspectives*, 139, 10-17. Retrieved from <https://search.informit.com.au/documentSummary;dn=841942196842826;res=IELHSS>

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# RELIGIOUS LIBERTY IN AUSTRALIA:

## SOME SUGGESTIONS AND PROPOSALS FOR REFRAMING TRADITIONAL CATEGORISATIONS

Iain T. Benson

### INTRODUCTION

The Religious Freedom Review (Ruddock Review), established by the Government of Australia, provided an opportunity to make some suggestions and proposals for ways to understand religious liberty in this country. The purpose of the author's Submission to the Review, and of this article, is to show more accurately what is at stake and how certain traditional categorisations stand in the way of more useful and fair ways of viewing religion and the public sphere. Some of the suggestions relate to human rights legislation, where many questions of religious liberty are or should be addressed, but other aspects go well beyond that to the question of how we think of religion in relation to the contemporary state itself. These considerations are framed within an evaluation of how some challenges to religious liberty have emerged and been dealt with in other countries, particularly Canada and South Africa.

This article is focused on important principles. It discusses religious liberty, human rights and human communities, as well as the language often employed to describe the relationship between them. For it is in understanding the role and nature of communities in relation to some aspects of scholarly and practical concern regarding religious liberty, human rights and religious communities themselves, as these are developing in practice, that we can understand the role and nature of religious liberty today: context is key to understanding what should be avoided or adopted.

This article raises concerns about the context of religious liberty and human rights today, particularly where bi-furcative or dualistic uses are employed in relation to the interpretation of the de-contextualised terminology usually used in a human rights context - terms such as 'equality' and 'non-discrimination'. These terms are bi-furcative or dualistic when they are used expressly or implicitly to bracket religious belief outside shared public dimensions. Such uses (believer/unbeliever, 'communities of faith', 'people of faith' etc.) fail to describe accurately the nature of the realm of competing belief systems that is the reality of the contemporary public sphere. Simply put, this is because everyone has 'faith' and 'belief', often without knowing that they do or without acknowledging their commitments to whatever they believe in (and it is not possible to believe nothing): not all 'beliefs' or 'faith' are religious, meaning that not all are oriented to a Divinity. Atheists and agnostics are, therefore, also believers of a certain kind and, if we wish a fair sharing of the public sphere, their commitments should have no dominant position there.

Worse, ideas that the public sphere is 'secular' or 'neutral', when this is neither true nor possible, further obfuscate descriptions of the reality that are so important for understanding what is actually at issue when religious liberty is being discussed or analysed in relation to the state.

This article does not develop the arguments for or against particular legislative language, except in relation

to the important terms 'discrimination' (as discussed in the submission of 'Freedom for Faith'<sup>1</sup>) and 'hatred', when what is really at issue is mere disagreement. This article focuses on principles that should apply whatever frameworks are adopted in future. The author has been privileged to have read the submissions of Freedom for Faith and of the Catholic Bishops and agrees with the recommendations in both of these submissions, so does not repeat them here.

As will be seen, this article raises serious concerns about how religious liberty and human rights are being developed in other countries and, in particular, how diversity is being threatened by those who have agendas to push and who see human rights legislation or particular de-contextualised approaches to 'equality' or 'discrimination' as a ready means of doing so. This is the result of the abstraction of principles from communities. This article pushes back on such abstraction and calls into question the legitimacy of avoiding the lived context of communities. In several instances this article identifies direct challenges to human rights that are themselves posed *in the name of human rights*.

There is much to be said for protecting the role of legislative bodies rather than transferring policymaking to judicial or quasi-judicial bodies such as human rights tribunals. Often such transfers are justified under the guise of human rights 'discrimination' protection or 'advancing equality', where both concepts are detached from the context that is essential to a diverse and plural society. This article outlines some of these concerns, drawing particularly on the experiences around human rights discourse and policy in Canada and South Africa. No comment is made on the outworking of human rights in Australia; but it is assumed, with good reason, that the tendencies identified elsewhere, particularly in regard to lack of respect for individual and community difference, will be evident as well in Australia - though it will be for those more expert in this jurisdiction to make that assessment alongside what is seen in other countries.

It may be asserted that 'things are fine' in both Canada and South Africa, but having acted as an academic and legal advisor to a wide variety of groups in both countries, this author can confirm that things are anything but fine. There is considerable concern in these countries that the vague language of 'human rights', as with the vague language of 'equality', is being used as a blank slate upon which those with transformational aims can attempt to force their versions of culture on society in general, using the power of law to do so through human rights cases.<sup>2</sup> For this reason, great care must be taken in any approach to 'human rights' today. This article raises some of these foundational concerns for the consideration of the Review and, perhaps, beyond it. Professor Parkinson, in his Freedom for Faith submission, suggests that debates around the nature of marriage, and the fall-out from what the redefinitions lead to, are 'resolved'; with respect, I suggest otherwise.<sup>3</sup> Litigation in Canada and the United States, to name but two countries, shows that, following re-definition, a host of challenges, some of them highly aggressive, can be anticipated. It is to be hoped that the

Review, by delineating some of the potential pitfalls where religious liberty is not adequately protected, will apply lessons from other countries so as to avoid anticipated similar challenges in Australia in the years ahead.

The recent decision of the Supreme Court of Canada denying accreditation to a Law School on the basis of its Evangelical Protestant 'Community Covenant' looks to have wide-spread and perhaps international implications. That Covenant at Trinity Western University, a private university in British Columbia, included a limitation of marriage to only married heterosexuals, and excluded same-sex relationships as well as non-married heterosexual ones. Since the community view was that the only valid marriage should be between one man and one woman - a standard view for most traditional religions - the extension of 'public interest' to rule against accreditation of the private law school shows how notions of 'public' and 'diversity' must be carefully understood in relation to access to public goods. Such matters as tax exempt status, charitable status and other types of licencing and accreditation are now at risk for religious groups and projects if they do not toe the Supreme Court of Canada's majority reasoning. The decision is attracting a firestorm of controversy.<sup>4</sup>

One point referred to bears repeating here. Despite express legislative statements indicating that various viewpoints on the nature of marriage were part of the Canadian scene, and clear indications in the legislation that religious officials would not be subjected to pressures to conform to the broader definition, Canada has experienced an unrelenting wave of legal and social challenges to those who continue to affirm 'traditional marriage'. This is not a good outcome. *If Australia is to head off some of the more aggressive and unjust campaigns against advocates of traditional marriage, the Review should address expressly the need for unambiguous protections in the areas that have been hot spots for litigation in other countries (charitable status, accreditation, curriculum, parental rights, marriage counselling, marriage commissioners, definitions of 'hate speech' etc.).*

## RECOMMENDATIONS IN BRIEF

### 1. Getting the language of 'faith', 'belief' and the nature of the public sphere correct

Ensure that the language used to describe the nature of the state accurately reflects its philosophical (and theological) realities and is, as much as possible, descriptive of the nature of citizens as 'believers', the state as 'inclusive' of all citizens (religious and non-religious) and all communities as, in some sense, 'communities of faith'. These terms may be employed in ways that suggest that 'faith' and 'belief' are the properties of religious individuals and their communities only. This is an error that fails to deal adequately with the realities. Everyone is a 'believer': the question is not whether one is, but rather what one believes *in*. To place, therefore, religious beliefs at any sort of 'public disadvantage' is to act secularistically, furthering the strategy of exclusion set out by the man who coined the term 'secularism' - George Jacob Holyoake.<sup>5</sup> The public sphere, rightly understood, is *the realm of competing belief systems* - some religious, some not, but all are belief-based and everyone acts on the basis of faith, since not all faith is religious faith. Faith and belief are

essential for everyone, whether they realise it or not.

### 2. Freedom from and freedom for religion

Ensure that the formula 'freedom from religion' is not employed when what is usually meant is 'freedom from religious coercion'. A 'strict separationist' mindset can creep in alongside flawed suggestions that citizens have a 'right' (which they do not) to be freed from any incidents of the public manifestation of religious belief. To take one example, the presence of religious ceremonies held in public ought not to trigger claims that citizens should be free from seeing or hearing any public manifestation. Article 18 of the *Universal Declaration of Human Rights* protects the right '...alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'. The limits to such manifestations are significant and weighty: 'subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.<sup>6</sup>

### 3. Focus on unjust discrimination, not just 'discrimination'

Create the category of 'unjust discrimination', not simply 'discrimination', so as to distinguish between just and unjust discriminations in any legislation.

### 4. Recognise a general 'Presumption in Favour of Diversity'

Any legal developments should include a presumption in favour of diversity.<sup>7</sup>

### 5. Where a religious ethos is shared, recognise not only the 'core religious functions'

Respect the organic approach to religious exemptions so that all employees in a given religious organisation have their beliefs respected, not just those in 'leadership' roles. Do not make any employment-related exemptions depend on the functions of the job in an organisation that has a shared ethos. An 'organic approach' recognises that, for some sorts of religious projects, everyone is involved in the religious mission irrespective of their actual job-functions. Where, for example, a janitor or gardener is involved in prayers, leading sacred text studies or playing religious music, it would be wrong to say that the nature of their 'job duties' qua gardener, janitor etc. are not part of the shared religious ethos or organic mission of the project. The error of 'core function' analysis is that it simply looks at the leadership team of a religious project as the only positions sheltered by religious exemptions, thereby ignoring or showing scant regard for the associational dimension of religious belief and projects.

### 6. Accommodate the exercise of conscience

Ensure that the duty of the accommodation of conscience is spelled out as both a public and private necessity. In relation to medical (and pharmaceutical) services, the right to conscientious objection and non-referral should be recognised explicitly and protected.

### 7. Limit 'hate speech' to the incitement of violence, not merely 'hurt feelings'

Limit offensive speech restrictions to 'incitement to commit violence or physical harm'.

### 8. Establish a Religious Liberty Commission and

### Religious Liberty Council to encourage the involvement of civil society

Consider establishing a Religious Liberty Commission, consisting, in part, of representatives put forward by the major religions themselves. The Head of this Commission shall be elected from among the Members for a rotating period of no longer than two terms (of three years each). In addition, consider establishing a Religious Council as an adjunct to the Commission, made up of appointees from the religions, other concerned citizens and representative members of the Commission itself.<sup>8</sup>

#### 9. Ensure that the public sphere is fully accessible to religious and non-religious citizens (and their projects) alike

Make clear that the 'public sphere' is one fully accessible to all citizens, religious and non-religious. The privatising of religion was and is one of the goals of secularism which, properly understood, is an anti-religious ideology.

#### 10. Co-operation not 'Separation' of 'Church and State'

Australia, in common with Canada and South Africa, enjoys the 'co-operation' of religion and the state, not its separation. In so far as there is jurisdictional separation, this does not undermine the essential co-operation (but not merger) of 'church and state', and this relationship should be expressed as a co-operation not separation.

## A. BACKGROUND: IMPORTANCE OF RELIGIOUS LIBERTY AND HUMAN RIGHTS

### The importance of understanding the proper scope of human rights: it should not be 'The New Secular Religion of Our Time'

Writing as an academic new to Australia, but one experienced with law as a theorist and practitioner in Canada, South Africa and Europe, this author believes it is important to see the development and extension of human rights as part of a Western movement to protect human rights but one that, paradoxically, often threatens the very diversity it purports to respect.

Who can object to 'protecting human rights'? In this day and age it has become a mantra, but one must be careful that what is established contains genuine safeguards for diversity; many of those who argue for the extension of human rights have, as an implied goal, forced changes to the beliefs of others with which they disagree. Compelling others to agree by force of law with moral propositions or actions that ought to be open for dissent in a free society is the very definition of an authoritarian state. History shows all too clearly that it is in the protection of and respect for difference on those subjects that matter most to many of us that an 'open society' remains free. Shutting down dissent and failing to grant accommodation is the preferred tactic of those who wish to use law, rather than popular debate and changeable legislative frameworks, to obtain cultural dominance.

This article argues that for many people religious liberty and human rights are viewed as threatening; this need not be the case. If the goal is to create a culture in which religious liberty and human rights are respected, then the culture produced must be one that recognises respect. In particular, the structure of any human rights instruments must be framed in part in relation to the experiences in other countries and must do what it can to put into place

protections to show respect for diversity, against those who often will try to use human rights itself to *attack* diversity or *coerce* people to change how they think.<sup>9</sup>

Legislation can be changed within the rough and ready flexibility of democratic politics; constitutions are less flexible, and the vague application of balancing and proportionality tests transfers vast areas of social control to unelected judicial bodies and tribunals. Over the door of every human rights tribunal should be the phrase: 'tread carefully here, for the right to disagree is essential to freedom'.

Considering how and whether to adopt Bills of Rights or Human Rights Protections can be a useful exercise, provided that such extension maintains respect for diversity and understands the danger of human rights themselves becoming ideological and, in fact, coercive. Case law from other countries, particularly Canada, has shown just such unwarranted extensions of human rights. In Canada it is routine for religious believers and their communities to feel threatened by human rights complaints, in which the goal of the complaint often seems to be the forcing of new conceptions of morality on communities that ought to be protected to develop and maintain their own belief systems as free as possible from coercion by the state (understood as law and politics).

American political theorists Stephen Macedo and William Galston<sup>10</sup> and English philosopher John Gray<sup>11</sup> have all warned of the dangers of illiberal 'convergence', or the tendencies towards 'civic totalitarianism' that lurk within many legal or political approaches that use the rhetoric of 'liberalism' or 'human rights' today. These writers and others have rightly identified the danger of attempts to force other citizens to 'toe the line' in relation to matters that should properly remain open. Abortion, euthanasia and the nature of marriage are three contemporary issues that show the capacity or incapacity of democratic regimes to properly respect the morally different viewpoints of citizens. In each case the historical record ought to give us considerable cause for concern, as the principles of accommodation discussed in this article are often lacking or not present at all in relation to these issues.

William Galston, for example, has warned that:

*...an account of liberal democracy built on a foundation of political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity.<sup>12</sup>*

With respect to the relationship between an abstraction such as 'equality' and the lived communal reality of diversity, South Africa's former Constitutional Court Justice, Albie Sachs, had this to say about diversity in a decision dealing with the rights of gays and lesbians:

*[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.<sup>13</sup>*

One may believe, even vehemently, that everyone should accept his or her view of same-sex conduct, or (to take another deeply held belief based on an equality right)



that the priesthood within Roman Catholicism should be female as well as male, or that issues such as abortion and euthanasia should not allow for dissent; one may argue for that viewpoint in public and private spheres. One is not, however, entitled to force those who disagree to have their views and presumably organisations 'purged' from society, coerced to change or forced to co-operate with the beliefs of others by force of law. At least, so Gray and Galston counsel in their approaches to liberalism.

### **Human rights ought not to be an 'Unofficial State Religion' or become an ideology that seeks to force convergence or cultural 'Transformation'**

Former Canadian Justice Minister and a noted human rights and religious liberty expert, Irwin Cotler, once referred, without irony or criticism, to human rights as 'the new secular religion of our time'.<sup>14</sup> This ought to raise concerns for those who believe in the appropriate jurisdictional division between 'church and state'. Yet another leading Canadian authority on human rights, Michael Ignatieff, in what could be seen as a rejection of Cotler's un-nuanced statement, has warned of the significant danger of viewing human rights as 'idolatry' or as some kind of replacement religion.<sup>15</sup> He writes:

*Human rights is misunderstood, I shall argue, if it is seen as a "secular religion". It is not a creed; it is not metaphysics. To make it so is to turn it into a species of idolatry: humanism worshipping itself. Elevating the moral and metaphysical claims made on behalf of human rights may be intended to increase its universal appeal. In fact, it has the opposite effect, raising doubts among religious and non-Western groups who do not happen to be in need of Western secular creeds.<sup>16</sup>*

There is a reason that human rights ought not to be perceived or treated as 'a new secular religion': it does not have the competence to do what religions do. For another thing, human rights cannot be a religion as it is for everyone and is generalised across a national- or state-based jurisdiction. As such it must be for the benefit of all citizens, whether they are religious or not. It is in the nature, therefore, of a common denominator, and ought not to have either implicitly or explicitly a 'transformational' (religious) mandate. It must work with civic associations (including religions) as it finds them, not start out with an implicit or explicit idea that it has a mandate to 'change society'.

For reasons in part articulated by Ignatieff, human rights can properly have no such mandate in a pluralistic and diverse society. To make it 'transformative' in any way can only result in an insufficient respect for differing contexts - contexts that, in themselves, do have a right to the metaphysical traditions that speak of personal and group 'transformation' but through, typically, the languages of religious commitments and in some cases Divine revelation. For human rights to take on this mantle would mean that it will inevitably become not only 'idolatrous', as Ignatieff understands it, but, given its legal mandate, dangerously *theocratic* in practice - threatening religions as it does so and, paradoxically, undercutting the very enlightenment project of de-coupling the state from religions.

Human rights should not occupy expressly or by default the roles of religions. For all the above reasons and others, great care must be taken, therefore, to ensure that wide latitude is given to alternative belief systems

(religious and otherwise) so as to ensure their ability to operate without fear of hindrance or reprisal. Human rights discourse and policy (and legislation) need to focus on developing new approaches that assist diversity in reality, not only in name while hosting homogenising conceptions of culture under a guise of respecting diversity. Sadly, such nuanced care is no longer the standard template in Canada, where it is now routine for religious believers and their communities to face unrelenting challenges to their open and free operation, or even to the existence of their projects - such as, most recently, founding a Christian-based law school.<sup>17</sup> Australia could easily be taken down the same road and must think carefully and differently lest such errors be repeated here.<sup>18</sup>

This is not the place to embark on a detailed analysis of how this happened, but something like the expansion of law in attempts to replace, *by law*, concepts that were developed within the metaphysical richness of religions plays a large part in this shift: one need only consider how contemporaries ground the notion of 'respect for the person' or 'dignity of the person' when religious grounds provided the cornerstone of human rights in the past. The 'liberal consensus' that many felt comfortable with has now been widely regarded as having broken down. Thus, Paul Horwitz has written, somewhat boldly, that:

*...we are now in the twilight of the liberal consensus as we have known it. It may survive, with important revisions. Or it may collapse all together, and new prophets will arise to predict what will come after it. One thing, however, seems certain: the liberal consensus that emerged after the enlightenment, gelled in the nineteenth century, and reached a more or less stable form in the twentieth century, cannot last much longer as a basic, unquestioned assumption about the way we live. From within and beyond its borders, the liberal consensus is under attack. On all sides we are hearing calls, sometimes measured and sometimes shrill, for a revision or an outright rejection of the terms of the liberal treaty.<sup>19</sup>*

The traditions that gave us 'civic virtues' are no longer understood and even within these traditions the language of 'virtue' has been replaced, almost entirely, by the vague and amorphous language of 'values', with few recognising the tremendous catastrophe this poses to our understanding of shared meaning. Professor Edward Andrew of the University of Toronto has noted that '... there has been only partial awareness [in the Western academy] that the language of values entails that nothing is intrinsically good and nobody is intrinsically worthy'.<sup>20</sup> Such a diagnosis ought to concern anyone who believes that human beings are intrinsically worthy but who is trying to articulate this in the 'language of values'.

Identifying the general problems of 'convergence' and 'civic totalism', referred to above, and recognising the authoritarian dimensions of notions such as 'deep equality' (as discussed in Canada) give us some tools to analyse these moves when they arise in politics, law, religious studies and sociology, to name a few disciplines now interested in human rights. Here, an observation by David Novak appropriately sums up what has been discussed:

*A society dedicated to the protection and enhancements of its participatory cultures surely commands more respect and devotion than does a society established*

merely to protect and enhance property. When, however, a civil society no longer respects that communal priority, it inevitably attempts to replace that sacred realm by becoming a sacred realm itself. As such, it attempts to become the highest realm in the lives of its citizens. In becoming what some have called a 'civil religion,' civil society usurps the role of historic traditions of faith. It becomes what it was never intended to be, for the hallmark of a democratic social order is the continuing limitation of its governing range. Without such limitation, any society tends to expand its government indefinitely. But such limitation cannot come from within; it can only come from what is both outside it and above it. Today that external and transcendent limitation can be found in the freedom of citizens in a democracy to find their primal identity by being and remaining a part of their traditional communities. This is what has come to be known in democracies as religious liberty.<sup>21</sup>

To Novak's insight that civil society as civil religion becomes a 'sacred realm' itself, we need to add that law becomes the divinity in such a metastasised vision. The antidote to the drug of civic or legal inflation, and the corresponding deflation of respect for associations and difference, is a re-understanding of what is actually taking place where law, religion and society meet. Human rights is now at the cutting edge of attempts to remake society by law and, for the reasons this article sets out, we should be highly suspicious of these developments and try to ensure that the utopian dimensions of the projects are avoided where possible and blocked where necessary.

## B. SPECIFIC ANALYSIS OF RECOMMENDED PROVISIONS

### 1. Not all discrimination is bad: the need for specificity in relation to the term 'Discrimination'

Not all discrimination is bad or should be the subject of legal penalties. This is widely misunderstood. People must make discriminations and distinctions all the time, such as in routine matters related to job hiring, the granting of licences, the making of any legislative category that touches on age or disability or, in appropriate settings, relevant and important decisions and distinctions based on sex or even religion.

A diverse and open society is one that can manage the many forms of accommodation necessary to ensure appropriate freedoms and their exercise. Restrictive societies, on the other hand, fail to provide for such accommodation. Grand-sounding language using the rhetoric of 'non-discrimination' or 'equality', both vague terms, may often be used to reduce the very things they claim to expand. Thus, George Orwell's use of the term 'equality' in his justly famous short novel *Animal Farm*, in which 'all animals are equal and some are more equal than others', alerts or ought to alert us to the risks of this sort of rhetorical take-over of freedom by languages of pseudo-egalitarianism.<sup>22</sup>

### 2. The need to respect diversity and difference in clear and express language and recognise that they are prior to equality; the creation of a legal presumption in favour of diversity

Terms such as 'equality' must be understood as *following upon context*, not as somehow *prior* to context. Just as

there should be a presumption in favour of diversity in any proposed law, there should also be express recognition of differences in relation to beliefs of religion and conscience and, therefore, ample protection where conscience is under threat from 'one size fits all' application. This means that, in areas such as controversies in the medical field (euthanasia and abortion) or related to aspects of culture (such as the nature of marriage or gender roles within religions), safeguards need to be provided for in relation to exemptions and allowances for difference. It can be anticipated, as has been seen in other jurisdictions, that human rights will become little more than a tool used to beat diversity into submission, if our legal mechanisms do not set out that diversity as the recognised prior condition: deep diversity is the goal here.

In other words diversity, respected as difference, is the *setting within which* equality is understood, *not the other way around*. It should be remembered that, in fact, in all constitutions and human rights frameworks, 'religion' is an 'equality right', so the placing of these in opposition, as if they are in conflict, misunderstands the correct relationship between them. Again, it should be the associational context that provides the framework within which equality is assessed, not some abstract conception of 'equality' dropped like a mist on culture, including associations.

Mere difference of opinion may, for example, be stigmatised in clever rhetoric to avoid the nuanced moral distinctions that some believe to be important and that define the different moral approaches of different belief-communities. Thus, in relation to the morality of sexual acts, it is a frequent thing to hear one side of the debate - that with the longest moral tradition and greatest number of associations gathered around these conceptions - typecast as 'homophobic' by those who have a different view. Yet the term 'homophobia', when unpacked, discloses a failure to respect any allowable position from which to disagree with the morality of homosexual acts. Similarly, poor philosophy conflates desire with the right to exercise a desire in relation to 'sexual orientation', yet allows such exercise only in relation to some desires (not polygamy or polyamory or pedophilia, for example) - so moral distinctions are still present but, due to the nature of the debates, largely incoherent. These are worrying realities about which legislators should be aware in such difficult and contested areas.

Freedom depends upon lived diversity and laws that protect that diversity in significant ways, not in the erection of frameworks that claim to respect diversity in theory but fail to do so in practice. The Canadian dilemma is the gradual domination of pseudo-diversity in court and human rights decisions. This lack of respect is also, unfortunately, visible in Australia, as the section below on the lack of proper conscience protection in health care demonstrates.

### 3. The need to respect the overall ethos or organic nature in employer exemption cases rather than the less respectful 'Core Functions' approach

It has been recognised that a 'job-parsing' or 'integral role' test narrows religious liberty unduly, and fails to respect the differences between the kinds of religious organisations that exist. In many, the religious 'mission' and 'ethos' is not limited to only a few 'leaders' but is an integral part of the whole organisation and its function. Therefore, to focus only on 'key roles' misses this proper respect for religious diversity. A better approach,

recommended by Canadian scholar Alvin Esau and the author of this article, is the 'organic' or 'shared ethos' approach set out in the latter's PhD thesis.<sup>23</sup>

In this approach, the question that should be asked of religious organisations is: 'what kind of an organisation is it?' If the religious ethos is shared by everyone through manifestation, teaching and practice (such as teaching, prayer, sacred-text study, retreats etc.), then it is inappropriate to limit religious employment exemptions to only 'key positions', since everyone in the organisations is practicing religion 'organically'. This being the case, limiting the tests, as many tribunals have done, to 'key personnel' is a significant reduction in the respect for religious liberty and the respect that should be shown to religious organisations that function in this 'organic' way.

#### **4. The 'duty of accommodation' in health care is badly handled in Australia: the need for conscience protection and laws that explicitly ensure that there is no 'duty of referral' and that the proper placement of the onus for the 'service' is on the state**

Respect for diversity in a medical context requires careful handling of difference and dissent, and it requires attention, often missing, to where the onus lies for obtaining 'access to services'. Too frequently, it is just assumed that the primary medical or health care specialist bears that onus where other means could be implemented with a bit of ingenuity.

In relation to medical ethics, the practices of both abortion and euthanasia (the former now legal in some countries or, as in Australia, officially illegal but with very wide exceptions) can fail to respect the capacity of citizens to dissent. It is all too common to see, as one does in Australia, a failure to recognise that requiring referrals for abortion (as it would be for euthanasia) is to treat the autonomous moral views of the health care worker as irrelevant – it is to accord no respect for the dignity of the dissenting professional and to load all the 'autonomy value' on to the patient, yet this cannot be correct when two autonomies are in conflict. This error is all too common and ought to provide serious concern about how moral issues are weighed at the moment in Australia.<sup>24</sup> The current failure to respect diversity in relation to accommodation in medicine may be seen as reflecting an attitude of 'non-accommodation', and this observation might well extend to other areas. Such errors can only be countered or protected against by clear language spelling out the need to provide respect for dissent and the duty of accommodation in all areas of public and private employment.

#### **5. Another language aspect: offensive speech and the need to define this tightly so that 'Hurt Feelings' do not become equated with 'Hatred'**

Some human rights approaches wish to protect people from being exposed to offensive speech. For example, the Canadian decision overturning certain language in a Provincial Human Rights Statute nevertheless failed to completely overturn its vague and chilling language. Here, the Saskatchewan Court of Appeal decision overturned a trial decision which had upheld the ruling of a Human Rights Tribunal. The Supreme Court of Canada chose to disregard the arguments of many groups and academics and left in place a very heavily criticised approach to 'hate speech'.<sup>25</sup>

The Supreme Court of Canada upheld but narrowed the legislation by striking out the words 'ridicules, belittles or otherwise affronts the dignity of'. The court ruled that this language was unconstitutional, creating too low a threshold and thus not aligned with the purposes of the *Saskatchewan Human Rights Act*. The result is that 'hatred' in Canada is defined as 'extreme manifestations of the words "detestation" and "vilification", a threshold that would not include merely repugnant or offensive expression'. Moreover, tribunals were directed to consider 'the effects of the expression not its inherent offensiveness'.<sup>26</sup> This was not the approach that free speech and religious groups called for, namely, to confine the definition of 'hate speech' to 'that which incites violence', as it continues to suppress speech that falls short of incitement.

The Respondent on the appeal was a man who manifested his religious faith by placing certain leaflets in places such as apartment buildings, pointing out that in local gay newspapers older men were soliciting young men for sex. His pamphlets were deemed offensive but the debate was whether they constituted 'hatred'. Despite striking down a portion of the legislation, the Supreme Court of Canada found against the man for calling some gays 'sodomites' and saying that some of them were 'out to get your children', thus upholding the law that many thought overboard and leaving in place the fine against him. Many thought that these expressions, while clearly not polite, ought not to have been construed as 'hatred'. *Whitcott* had argued that he was trying to protect young men from his own fate at the hands of older men he believed were predatory. There is widespread dissatisfaction with the result in Canada.

Meanwhile, a Report prepared for the Canadian Federal Government by academic Richard Moon recommended repeal of Section 13, the 'hate speech' Section of the *Canada Human Rights Act*. Professor Moon argued that, if complete repeal was not to occur, such speech should be limited to 'advocating violence'. He further argued that the more appropriate approach and place for such restrictions was under the *Criminal Code* and in the Criminal courts, not before Tribunals, which he found on his review to have, inter alia, insufficient safeguards to protect fundamental rights.<sup>27</sup> The Section was repealed in June 2013. Clearly the area of 'offensive speech' is far from settled in Canada. The current public rhetoric over same-sex marriage in Australia suggests that such allegations of 'hatred' for what is merely the advocacy of traditional marriage will occur here, too, unless legal protections are set up in advance.

In addition, the *South African Charter of Religious Rights and Freedoms*, a civil society Charter under Section 234 of the *South African Constitution*, signed by all the Religions of that country in 2010, also recommends that the freedom of expression be limited only according to hatred defined as constituting 'incitement to violence or [that causes] physical harm'.<sup>28</sup> The full provision reads:

*6.4 Every person has the right to religious dignity, which includes not to be victimised, ridiculed or slandered on the ground of their faith, religion, convictions or religious activities. No person may advocate hatred that is based on religion, and that constitutes incitement to violence or to cause physical harm. (emphasis added)*

The developed and developing view, therefore, based on the Canadian Federal approach and that recommended



by the religions in South Africa, is that the best approach is to limit 'hate speech' to incitement of violence or physical harm and to subject it to Criminal proceedings, rather than to administrative Tribunals under vague categories such as 'hurt feelings' or 'offended dignity'. When these are allowed, such uses are likely to chill (i.e. inhibit or discourage) valid free speech or may be deployed in relation to contemporary notions such as 'homophobia', which has been discussed above.

## SUMMARY OF RECOMMENDATIONS

1. Since human rights expansion fails to respect diversity, diversity must be recognised expressly as a good to be maintained, and *any developments should include a presumption in favour of diversity*.
2. Since not all 'discriminations' can be said to be legally wrong, *create the category of 'unjust discrimination' to distinguish it from 'discrimination'*.
3. Human rights tests in relation to exemptions usually fail to respect the ethos of organisations as they tend to have a bias towards individual rather than group rights - in particular, a specific 'job-parsing' approach to employment exemptions that focuses on so-called 'core functions' fails to respect properly the nature of certain kinds of religious organisations. Therefore, *do not make any employment-related exemptions dependant upon the functions of the job in the case of an organisation where there is a shared ethos; instead, respect the organic approach to religious exemptions so that all employees in such an organisation, not just those in 'leadership' roles, have their beliefs respected*.
4. The duty of accommodation is essential in all areas of public or private function, and existing practice in Australia (particularly in relation to medical issues) shows a marked failure to provide accommodation and respect for conscience. Therefore, *the duty of the accommodation of conscience should be spelled out as both a public and private necessity and, in relation to medical (and pharmaceutical) services, the right to conscientious objection and non-referral should be recognised and protected*.
5. Since 'hate speech' chills expression and there has been wide criticism of 'feelings'-based tests for insult or injury, it is important *to limit offensive speech restrictions to 'incitement to violence or physical harm'*.

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This article is based on a Submission to the Religious Freedom Review on 14<sup>th</sup> February 2018. The author acknowledges the assistance of Anna Walsh (PhD candidate) in her helpful review of the Submission. Part of that Submission (and this article) is based on an earlier submission in a different but related area: Iain T. Benson, *Understanding Human Rights in Context*, A Submission to the Human Rights Inquiry of the Queensland Government, Australia, 17<sup>th</sup> April 2017.

## Endnotes

1. Patrick Parkinson, *Protecting Diversity: Towards a Better Legal Framework for Religious Freedom in Australia* (Freedom for Faith, January 2018), 58ff.
2. Claims for 'equality' that turn out to rank at least second behind quests for 'reform' are not new. See C.B. Macpherson, *The Real World of Democracy* (Toronto: Canadian Broadcasting Corporation, 1965), 59, in which he observes that Marxian and Rousseauian concepts have 'one thing in common.... [b]elieving as they do that the most important thing is the reformation of society, and realizing that this requires political power, they are not prepared to encourage or even allow such political freedoms as might hinder their power to reform the society. Thus political freedoms come a poor second to the drive for the new kind of society they believe to be necessary for the realization of equal human rights. Freedom is sacrificed to equality; or, more accurately, present freedoms are sacrificed to a vision of fuller and more equal freedom in the future. Freedom, in this view, contradicts itself...' (emphasis added). It is useful to recall Rousseau's formulation of and commitment to 'civil religion' with the corresponding demand that religions other than, of course, civil religion '...must withdraw from civic life'. See Douglas Farrow, 'Of Secularity and Civil Religion', in *Recognizing Religion in a Secular Society*, ed. Douglas Farrow (Montreal: McGill-Queens, 2004), 140-182 at 157-158.
3. Parkinson, *Protecting Diversity*, 79.
4. *Trinity Western University v. The Law Society of British Columbia* (SCC), 15 June 2018. The dissenting judgement of Justices Brown and Cote is highly critical of the majority judgement which, amongst other things, largely ignored the unanimous five-judge decision of the BC Court of Appeal in favour of the University and strongly affirming a meaning of diversity that allowed the public square to have different views of marriage - as the Civil Marriage Legislation itself mandated. The sleight of hand employed by the Supreme Court of Canada majority judges is a very worrying sign.
5. See Iain T. Benson, 'Considering Secularism', in *Recognizing Religion*, ed. Farrow, at 83-98.
6. Article 29(2), *Universal Declaration of Human Rights*. On Article 18 see 'Article 18: an orphaned right', A report to the All Party Parliamentary Group on International Religious Freedom (London: House of Lords, undated) [2013].
7. See Iain T. Benson, 'Should There be a Legal Presumption in Favour of Diversity? Some Preliminary Reflections', in *Religion, Liberty and the Jurisdictional Limits of Law*, eds Iain T. Benson and Barry W. Bussey (Toronto: Lexis Nexis, 2017), 3-27.
8. This goes further than the submission of Professor Patrick Parkinson, *Protecting Diversity*, 100. The rationale for this extension is to involve civil society more intentionally in the outworking of law and politics, for the improvement of the common good through co-operative initiatives that include civil society but extend beyond it to co-operation with the state itself. A Constitutional gesture in this direction is Section 234 of the *Constitution of the Republic of South Africa* (1996), which provides for the creation of additional Charters so as to 'enhance the culture of Democracy'. The first use of this provision was the 2010 signing of the *South African Charter of Religious Rights and Freedoms*, an innovative and important document assembled over some years with the input of all the major (and many of the minor) religions of South Africa. The author was one of the principal drafters of the Charter. (See strasbourgconsortium.org.) See also Iain T. Benson, 'Religious interfaith work in Canada and South Africa with particular focus on the drafting of a South African Charter of Religious Rights and Freedoms', *HTS Teologiese Studies / Theological Studies* 69, No. 1 | a1319 (2013). Governments should consider ways in which initiatives might encourage civil society involvements in relation to religious liberty and the development of richer conceptions of citizenship. See Iain T. Benson, 'Civic Virtues and the Politics of Full Drift Ahead', 2017 Acton Lecture (Sydney: Centre for Independent Studies, 2017), cis.org.au.
9. The terms 'attack' and 'coerce' are chosen carefully and reflect, unfortunately, the sort of approach some academics have argued for in other countries. Consider the following passages from leading South African Constitutional scholars Pierre de Vos and David Bilchitz. De Vos calls for attacks against those who hold different views on 'same-sex marriage' and writes: '[I]f everyone has the right to be different and if we must move away from the idea that heterosexuality forms the normative basis for policy formulation, then the very institutions which valorise a certain manifestation of heterosexuality... in our society *must be under attack*. A prime candidate for re-invention or reconstruction must surely be the institutions of "marriage" and the "family", the very institutions which have been deployed to regulate and police intimate relations in our society'. See Pierre de Vos, 'Same-Sex Sexual Desire and the Re-Imagining of the South African Family', *South African Journal of Human Rights* 20, No. 2 (2004), 179-206 at 187 (emphasis added). David Bilchitz, for his part, seeks to use law to 'coerce change in

- hearts and minds'. See 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply', *South African Journal of Human Rights* 28, No. 2 (2012), 296–315 at 314 (emphasis added). Both, with respect, misunderstand the proper role of law in a diverse and free society, but their approach is one that should be noted as there are many proponents of legal coercion. For this reason, any laws need to be drafted anticipating inappropriate uses and should go out of their way to build in maximal protection for diversity and associational difference.
10. William A. Galston, 'Religion and the Limits of Liberal Democracy', in *Recognizing Religion in a Secular Society*, ed. Farrow (Montreal: McGill-Queens University Press, 2004), 41–50 at 43–44, 49. The term 'civic totalism' Galston acknowledges he has taken from another American theorist, Stephen Macedo.
  11. John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000).
  12. Galston, 'Religion and the Limits', 49 (emphasis added).
  13. *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 1517, 1574–1575 (Sachs J) (emphasis added).
  14. Irwin Cotler, 'Jewish Nongovernmental Organizations', in *Religious Conscience, the State and the Law*, eds John McLaren and Harold Coward (New York: SUNY Press, 1999), 77–96 at 77.
  15. Michael Ignatieff, 'Human Rights as Politics and Idolatry', in *Human Rights as Politics and Idolatry*, ed. Amy Gutman (Princeton: Princeton University Press, 2001), 3–98.
  16. Ignatieff, 'Human Rights', 53.
  17. Despite litigating its right to graduate education students from its University over a decade and a half ago - see *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772. Trinity Western University ('TWU', a private evangelical protestant university in Western Canada) had to litigate all over again for the right to have a Christian-based law school, despite having its accreditation already approved by those with statutory authority to do so. Prejudice against the religious views about acceptable sexual morality are being dressed up as 'discrimination' and the nature of legal accreditation as 'public', interpreted so as to shut down the properly public aspect of religious involvement in Canadian society. This case alone ought to provide Australians with a case-study of how human rights conceptions (anti-discrimination) can be widely used to shut down diversity and attack those with now unpopular views related to sexuality. The case was argued before the Canadian courts in three provinces.  
Though not a human rights case per se, the problem of an over-extension of law so as to oppress religious diversity can happen, as shown in Canada, in both human rights and Charter of Rights frameworks. For a review of some of the issues and an argument against this domination of dissenting associations by elites, see Iain T. Benson, 'Law Deans, Legal Coercion and the Freedoms of Association and Religion in Canada', *The Advocate* 71, Part 5 (September 2013), 671–675, at papers.ssrn.com. The 7-2 decision of the Supreme Court of Canada on 15 June 2018, overturning a unanimous decision of a five-justice division of the British Columbia Court of Appeal, falsely suggests that dis-allowing accreditation advances diversity. The British Columbia Court of Appeal (and the dissenting judges Cote and Brown of the Supreme Court of Canada) understood diversity in practice – in contrast, the majority judges of the Supreme Court advance a civic totalist conception that, while giving lip-service to 'diversity', undercut it completely in practice.
  18. A recent volume published in Canada actually suggests that something known as 'deep equality' should be embraced. According to the rather vague arguments in the book, '[deep equality] requires an abandonment of language that establishes hierarchies of difference, such as "tolerance" and "accommodation"'. See Lori G. Beaman (ed.), *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: University of British Columbia Press, 2012), 213. Part of this quest for 'deep equality' involves the suggestion that '...the content of religions should be opened to fair and public assessment' and that this is 'an admission that this is already taking place in the courts', 218–219. This article calls for 'deep diversity' as, in part, a response to the frankly totalitarian dimensions of 'deep equality' which emerge from the pages of this Canadian volume. This book and some of its more startling claims are discussed in considerable detail in the author's PhD thesis: Iain T. Benson, 'An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion' (Unpublished PhD thesis, Witwatersrand, 2013), 120–125.
  19. Paul Horwitz, *The Agnostic Age: Law Religion and the Constitution* (Oxford: Oxford University Press, 2011), 22 (emphasis added).
  20. Edward Andrews, *The Genealogy of Values* (Lanham: Rowman and Littlefield, 1995), 170.
  21. David Novak, 'Human Dignity and the Social Contract', in *Recognizing Religion*, ed. Farrow (Montreal: McGill-Queens Press, 2004), 51–68 at 56–57 (emphasis added). On the tensions between liberalism, pluralism, religions and 'transformative constitutionalism', see the insightful chapter 'Liberalism, Pluralism and Religion' in Ronald Beiner, *Philosophy in a Time of Lost Spirit: Essays on Contemporary Theory* (Toronto: Toronto University Press, 1997), 44–50.
  22. Seen graphically in the recent majority decision of the Supreme Court of Canada in the *Trinity Western University* decision referred to above at footnotes 4 and 17.
  23. Iain T. Benson, 'An Associational Framework', Chapter 5 at 126–152, citing Canadian scholar Alvin Esau and South African scholar Shaun de Freitas. Esau has consistently argued for an 'organic' approach to understanding religious associations. Alvin Esau, "'Islands of Exclusivity": Religious Organizations and Employment Discrimination', *UBC Law Review* 33 (2000), 719–827 at 726, where the author places himself in the shoes of a sensitive commentator not imposing his own views on the religion but asking, as it were, from the perspective of the association: '[w]hat if the religious employer expects that the workplace itself should be a community of faith, where people work and witness together?' In South Africa, Shaun de Freitas has endorsed Esau's approach - see 'Freedom of Association as a Foundational Right: Religious Associations and *Strydom v. Nederduitse Gereformeerde Gemeente, Moreleta Park*', (2012) 28 SAJHR, 258–272, wiredspace.wits.ac.za.
  24. Forced referrals in relation to abortion are stipulated in the NSW policy regarding abortion. And recommendations in Canada from the recent (November 2015) 'Experts' Report' on euthanasia, following the Supreme Court of Canada's decision in *Carter v. Canada* (Attorney General) [2015] 1 SCR 331, somewhat shockingly show no respect for dissent from providing euthanasia on the part of individual physicians or denominational facilities themselves; the Supreme Court was less draconian. Many Canadians have expressed serious concerns about the scant regard being given to dissent and difference in this controversial area.  
Australia will sooner or later face the same issues and the same pressures to coerce dissenting citizens by law. Already in NSW the *Policy Directive Doc Number PD 2005\_587 'Pregnancy – Framework for Terminations in New South Wales Public Health Organisations'* (25 May 2005), Section 4.2 dealing with 'Conscientious objection', states as follows: 'In the circumstances where staff have a conscientious objection to participate in terminations of pregnancy or administer any abortifacient agents there is an obligation to transfer the care of the patient to another medical specialist (or health professional) on site or at another AHD facility'. Thus there is a complete failure to respect the conscientious objections of medical specialists - they are required to be in the chain of causation for the very procedure they find conscientiously unacceptable. This is unfair and unacceptable. Should health authorities have any concerns about a particular patient obtaining legal (but controversial) services the onus is on them, not on the practitioner, to provide alternatives. There is no reason, for example, why simple provision of a phone number by NSW Health, and the keeping of a list of non-objecting professionals at the other end of the phone and on the internet, cannot 'join the dots' in these circumstances. The provision on 'conscientious objection' is coercive and provides no respect for dissent - it is just this sort of coercion that any approaches to law needs to guard against.  
That NSW is out of step with the practice in other countries may be seen by comparison with the Canadian Medical Association 'Policy on Induced Abortion' (1988), which contains no duty to provide 'effective referrals' in such situations. The Policy provides that: 'A physician whose moral or religious beliefs prevent him or her from recommending or performing an abortion should inform the patient of this so that she may consult another physician. No discrimination should be directed against doctors who do not perform or assist at induced abortions. Respect for the right of personal decision in this area must be stressed, particularly for doctors training in obstetrics and gynecology, and anesthesia' (Canadian Medical Association, *CMA Policy: Induced Abortion*, policybase.cma.ca, 2). Recent developments in both Australia and Ireland (in the wake of that country's change to the abortion law) show that the Canadian Medical Association's policy of not requiring referrals is not being followed elsewhere; a most worrying development for those favouring respect for dissent and diversity. The Review should suggest the need for the onus to be on the state rather than on physicians in such circumstances.
  25. See: *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 SCR 467. The author declares an interest as he was counsel for the Respondent (Whatcott) on the appeal to the Supreme Court of Canada.
  26. Per J. Rothstein for the unanimous Supreme Court of Canada at paras 56–59.
  27. See R. Moon, *Submission to the Canadian Human Rights Commission concerning section 13 of the Canadian Human Rights Act and the regulation of hate speech on the internet prepared by Richard Moon*, October 2008 (January 2009), ohrc.on.ca.
  28. *South African Charter of Religious Rights and Freedoms*, 2010.