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AUSTRALIA

DEFENCE
OF THE FAITH
INFORMATION PAPER

DEFENDING RELIGIOUS FREEDOM

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UNDERSTANDING THE ISSUE

What is religious freedom?

The *International Covenant on Civil and Political Rights* (ICCPR) provides that “everyone shall have the right to freedom of thought, conscience and religion.”¹ It includes the freedom to manifest religious belief in worship, observance, practice and teaching, alone or in community, in public and in private.

The UN Human Rights Committee tells us that religious freedom encompasses a broad range of acts which include liturgies, the observance of dietary regulations, wearing of distinctive clothing, and the freedom to choose religious leaders and teachers, establish seminaries or religious schools, and prepare and distribute religious publications and texts.

These aspects of religious freedom – freedom *for* the exercise of religious belief – are often referred to as ‘positive’ religious freedom. Negative religious freedom is freedom from discrimination based on religious belief. ‘Negative’ aspects, the freedom *from* religion, is better understood as the freedom from religious *coercion* than from any incidental effects of religious practices. Religious belief includes the right not just to hold a religious belief but the right to manifest religious practices and disseminate their teachings in private as well as public. Similarly, the best way to understand the jurisdictional nature of Australian law is “the co-operation of Church and State” in which the two jurisdictions are separate in key ways but may co-operate where justice and the common-good are served by such co-operation.²

The ideology of secularism seeks to remove religion from the public sphere.³

Under the ICCPR, religious freedom may only be limited where it is “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

THE CURRENT SITUATION IN AUSTRALIA

Religious freedom in Australian law

Despite Australia being a signatory to the ICCPR, and the strong protections for religious freedom in this and other international law documents, Australian law holds very few positive protections for the protection of conscience and religion. The oft-cited protections for religion in the Australian Constitution are, in reality, very limited. This is because they only apply to federal laws that have the *intention* of restricting, not securing, religious freedom. Whether the law in practice restricts religious freedom is not relevant, the reality is that the widely assumed freedoms under the law simply do not exist.

One of the key difficulties for religious citizens and their communities or those who wish to exercise their consciences in relation to government policies in Australia is that religious and related freedoms are often not recognised as rights in and of themselves, but only as exemptions to anti-



discrimination laws. For example, the reason Catholics are allowed to have a male-only priesthood is because there is an exemption in the *Sex Discrimination Act* that says religions are allowed to discriminate on the basis of sex when it comes to choosing people for ministry⁴. Framing religious freedom by way of ‘exemptions’ provides the impression that religious groups are given a license to discriminate, and forces religious citizens and their communities to defend the seemingly special treatment provided to them at law. This is why religious freedom can be difficult to defend when it comes under attack: it is inherently framed as an exemption in order to discriminate. A straight religious rights affirmation approach would provide superior protections as long as the limitation provisions in relation to those rights recognise properly the principles of diversity and association in an open society.

Religious freedom has come under increasing pressure in recent years

While religious freedom has always been important, the current social and political climate has made its protection all the more urgent. Despite promises that no change to the marriage law would be made without simultaneous protection for religious freedoms, the law changed without any meaningful protections for religious citizens and their communities. Instead, the Expert Panel into Religious Freedom (Ruddock Review) was appointed to “examine whether Australian law adequately protects the human right to freedom of religion.”⁵

Despite the purpose of the Ruddock Review being the protection of religious freedom, the October 2018 leaking of its recommendations which indicated that religious schools would be allowed to retain existing exemptions under anti-discrimination law had the effect of turning public opinion against religious freedom. A campaign began to strip religious schools of the already limited freedoms they currently enjoy reversing, rather than furthering, protections for religious and related liberties.

Two further Senate inquiries were held, and it is the stated intention of Labor and the Greens to remove the existing religious freedom protections for religious schools in terms of both staff and students.

Despite the focus on schools, the Recommendations of the Ruddock Review extended far beyond this issue and proposed that new legislation should be introduced at a federal level to provide real and comprehensive protections for religious citizens and associations. Whether or not this recommendation is carried out depends greatly on the outcome of the upcoming federal election.

Religious freedoms potentially at risk

If religious freedom is not appropriately protected at law, there are a number of potential risks to the individual and collective freedoms enjoyed by Catholics (and other religions *mutatis mutandis*). For example:

- Catholic schools may no longer be able to:
 - preference Catholic staff for employment and promotion⁶
 - insist on a commitment to the Catholic ethos as a condition of employment, and the ability to discipline a teacher who publicly lives a life that contradicts those standards⁷
 - preference Catholic students for enrolment⁸
 - insist that an all-girls school only enrolls biological girls⁹



- enforce uniform policies, team sports, camping accommodation and toilet facilities based on a child’s biology¹⁰
- teach a religious perspective on life, marriage, family, gender and sexuality¹¹
- resist attempts to force them to teach LGBTI sex and gender education¹²
- education funding may be used as a threat to have schools conform to new anti-discrimination rules¹³
- Special Religious Education (SRE) may be removed from public schools¹⁴
- Catholic parents may:
 - lose the right to exempt their children from classes that present moral teachings that conflict with their beliefs¹⁵
 - face a situation where simply raising their children with a Catholic view on life, marriage, family, gender or sexuality is deemed to be a risk to children, and provides the impetus for children to be removed from their care, or for applications for foster or adoptive care to be denied¹⁶
- Catholic organisations, charities and agencies may:
 - no longer able to preference Catholic staff for employment and promotion¹⁷
 - be denied government contracts based on their religious beliefs¹⁸
 - not be able to decline the use of their facilities to groups and events that promote ideas that are contrary to Catholic teachings¹⁹ may find their accreditations or status at risk if they hold to traditional Catholic teaching about the person, marriage and the family
- Catholic charities may be denied charitable or tax-deductibility status if they don’t conform to mainstream beliefs about life, marriage, family, gender and sexuality²⁰
- Catholic pre- and post-marriage courses and counselling may be required to accept same-sex couples²¹
- Ministries such as Courage that support those experiencing same-sex attraction who want to live a life of chastity may be banned²²
- Individuals may find that expressing a Catholic view on life, marriage, family, gender or sexuality may fall foul of anti-discrimination/hate speech laws or risk of being disciplined or dismissed in their employment²³
- Professional memberships and accreditations may be denied to those who hold to a Catholic view on life, marriage, family, gender and sexuality²⁴
- University chaplaincies and Catholic student societies may lose their ability to be registered on campuses²⁵,
- Catholic medical professionals may be forced to participate in procedures to which they conscientiously object²⁶
- The confessional seal has already been abolished in some states and territories, and is under threat in the remainder

WHAT CAN I DO TO ASSIST?

It is important that religious freedom is a key issue for the upcoming 2019 federal election, by the election after that it might be too late. If all parties are not required to make commitments on



religious freedom before the election, the next term of parliament may see some or all of the above threats to religious freedom realised.

It is critical that members appraise themselves of the positions of major and minor parties when considering their voting intentions at the upcoming Federal election. There are a number of organisations that will provide carefully considered reviews of party positions on these matters ahead of the next election including the Australian Christian Lobby, the National Civic Council, the Sydney and other Catholic Archdioceses.

April 2019

This Information Paper has been prepared by the Australian National Defence of the Faith Panel under the authority of the President, Ian Marshal. The purpose of these Information Papers is to inform members of current important issues relating to the defence of the faith matters and to provide advice on how to practically respond.

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- 1 Signed by Australia and entered into force November 13, 1980. Note that under the principles of International Law, the provisions of a treaty do not become law in Australia until domesticated. This has occurred only for certain provisions of the ICCPR - Commonwealth Acts exist for Discrimination in relation to Age, Sex, Disability and Race but none has been passed in relation to "religion" or related rights. This shortfall has been commented upon and the subject of criticism from, amongst others, Paul Babie, "Australia" in Sir James Dingemans et al. (eds) *The Protections for Religious Rights: Law and Practice* (Oxford: Oxford University Press, 2013) 140-159. Professor Babie refers to Australia's approach to the protection of religious liberty (and related rights) as "piecemeal" and in need of evolution. More recently the Ruddock Commission Report in 2018 called for the creation of, amongst other things, a Commonwealth Act to protect religious liberty: see: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf> ("Ruddock Commission"). Recommendation #15: "The Commonwealth should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities." Failure to have Commonwealth legislation regarding "thought, conscience and religion" in Article 18(1) and (4) "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" are therefore notable gaps in Australian treaty obligations and domestic law.

All of Article 18 is non-derogable according to Article 4 (2) of the ICCPR (allowing for restriction only in states of emergency) but, more importantly, Article 18(4) cannot be limited according to General Comment #22 Article 18 (Freedom of Thought, Conscience or Religion) 30 July 1993, CCPR/C/21/Rev.1/Add.4. This Comment notes that the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In this important but often overlooked Comment, "The best interests of the child" are said to be "a primary consideration" not *the* primary consideration in relation to Article 3(1) of the *International Convention on the Rights of the Child*. That article stipulates that: 3(1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The Preamble to the *Convention on the Rights of the Child*, however, sets out that:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,



Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

- In General Comment #22, the Human Rights Committee (the Supervisory Committee for the ICCPR) stipulates that Article 24 of the ICCPR does not make the rights of the child absolute so that they do not trump the parental rights of, for example, access or recovery. One could argue that the Conventions in so far as they respect the family and religion derive from an understanding of the family and religion and human dignity that are *recognized by* but not the mere *creations of* positive law. See, generally, on the freedom of religion and the extent to which Article 18 may be restricted (though he does not deal with the later theological and jurisprudential argument), Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: CUP, 2005).
- 2 As such, Australia, despite the seeming similarities between Section 116 of its *Constitution* and the First Amendment of the US *Constitution* (“free exercise” and “non-establishment”) does not have a strict “separation of Church and State” doctrine of the sort that has caused such debates in the United States.
 - 3 See, on the definition and history of “secularism” and how much confusion has been occasioned by failure to evaluate the history of its origin as a movement to drive religion out of the public sphere: Iain T. Benson “Considering Secularism” in Douglas Farrow (ed), *Considering Religion in a Secular Society* (Montreal: McGill-Queens, 2004) 83-98.
 - 4 *Sex Discrimination Act 1984* (Cth), section 37(1).
 - 5 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Freedom-of-Religion.aspx>
 - 6 It is the position of the Australian Labor Party that exemptions pertaining to employment matters for religious schools be removed from the *Sex Discrimination Act 1984* (Cth.) See, for example, the Labor Senators Dissenting Report to the final report of the Senate Standing Committee on Legal and Constitutional Affairs relating to the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Dissenting Report)*, paragraph 1.35. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Sexdiscrimination/Report/d01
 - 7 The Dissenting Report states that religious schools should not need to rely on exemptions to discipline a teacher who does not uphold its ethos, and instead should seek relief under contract law. However, the Victorian Court of Appeal refused to allow a Christian youth camp to make a distinction between ‘an aspect of a person’s identity, and conduct which accepts that aspect of identity...’ (*Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75).
 - 8 The Northern Territory has already proposed making such a change. See NT Department of the Attorney-General and Justice. *Modernisation of Anti-Discrimination Act*. September 2017. [online]. Available at: https://justice.nt.gov.au/data/assets/pdf_file/0006/445281/anti-discrimination-act-discussion-paper-september-2017.pdf.
 - 9 If anti-discrimination legislation is amended such that discrimination is prohibited on the basis of gender identity, the ability of a single-sex school to refuse enrolment from a child who identifies as the relevant sex could be challenged.
 - 10 If anti-discrimination legislation is amended such that discrimination is prohibited on the basis of gender identity, requiring a transgender student to comply with policies according to their biological sex could be seen as direct discrimination. Two recent decisions, one from Canada and the other from South Africa (both of which countries had laws that originally stated that religious liberties would be protected from the new sexual identity categories) show how quickly and aggressively legal decisions can challenge religious liberty for citizens, families and churches themselves. In British Columbia Canada (where there are protections under Human Rights for religious liberties in addition to the Federal *Charter of Rights and Freedoms*), a recent decision, *A.B. v. C.D. and E.F.*, 2019 BCSC 254 (BCSC) per Bowden J. (February 27, 2019), a trial court judge upheld the decision of school and hospital counsellors that testosterone injections should be administered to a 13 year old gender dysphoric (and suicidal) daughter “to help the “son” adapt to “his” future life” and that failure by the family or others connected to it to use male pronouns in relation to the “son” in future would constitute “domestic violence” under the *Family Relations Act* in that province. Scarcely a week later, a decision in South Africa (where there are Constitutional protections for religious liberty) from a three justice division of the Gauteng High Court, *Gaum et al. v. General Synod of the Dutch Reformed Church* (7 March, 2019) held that the Dutch Reformed Church must change its policies regarding marriage and ordination - in both instances to allow for same-sex marriage and those in homosexual relationships to be ordained since the doctrine of the Church was said to constitute unjustifiable discrimination on the basis of sexual orientation. This shows the direction laws can go even in the presence of supposed entrenched protections for religious liberty. Both decisions are expected to be appealed.
 - 11 During the same-sex marriage postal vote, ACT Education Minister Yvette Berry warned that staff and parents were permitted to hold their own views on marriage, but could not communicate these in a way that “damages the welfare of young LGBTQ+ people.” See: <https://www.canberratimes.com.au/national/act/act-education-minister-yvette-berry-cautions-schools-on-samesex-marriage-20170920-gyl17m.html>



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- 12 For example, a December 2018 from the Irish education authority recommended that LGBT sexual health issues be taught to students in primary and secondary schools, and that LGBT relationships be presented without distinction from their heterosexual counterparts. It went further to recommend a change in law to require Catholic schools to teach these programs, regardless of the school's ethos. See: <https://universityobserver.ie/consent-and-lgbt-relationships-considered-in-oireachtas-education-report/>. In New South Wales, pressure is being exerted to delete the conscience protections in the NSW *Education Act* that exist to allow non-government schools to have a course of study that accords with their "educational philosophy or religious outlook" for both primary and secondary schools (Sections 8(3) and 10(3)).
 - 13 Those seeking to remove the existing religious freedom protections for religious schools often argue that schools in receipt of government funding should not be afforded exemptions to anti-discrimination law. In Canada, the removal of government funding was used as a threat to force schools to comply with the LGBT sex education program. See, for example: <https://qnews.com.au/call-to-link-religious-school-funding-with-removal-of-lgbtig-discrimination/>. The existence of a "community covenant" stipulating a traditional view of marriage and sexuality at a private evangelical protestant University was seen as sufficient justification to allow the Law Societies of British Columbia and Ontario to refuse to accredit the University School of Law despite the fact that all other aspects had been regarded as sufficient: *Trinity Western University v. Law Societies of BC and Ontario* (SCC) 2018 SCC 32 (Supreme Court of Canada). The University has since amended its covenant to remove the restriction on same-sex relationships. It is not clear whether it will be successful in obtaining accreditation in future.
 - 14 The NSW Teachers Federation has begun a campaign to see SRE removed from public schools. See: https://www.nswtf.org.au/files/council_decisions_3_november_2018.pdf
 - 15 For example, a Canadian father was denied the right to remove his children from objectionable classes on the basis that the value of 'inclusivity' was paramount: *E.T. v. Hamilton-Wentworth District School Board*, 2016 ONSC 7313
 - 16 The Human Rights Law Alliance told the Ruddock Review that a Christian couple from Western Australia were refused the ability to foster children on the basis that their Christian beliefs on sexual morality made it "unsafe" for children to be placed in their care. In Ontario, Canada, the law was changed to require the child's "gender identity and gender expression" to be included in considering the best interests of the child. The Minister of Child and Family Services, on introducing the Bill, said a parent who did not affirm a child's choice of gender would be considered to be an 'abusive' parent. See: <https://christiantimes.com/article/ontario-approves-measure-that-allows-government-to-take-children-from-parents-who-oppose-gender-ideology/72273.htm> and see the [Recent British Columbia decision referred to at endnote xi above.](#)
 - 17 For example, the St Vincent de Paul Society was not permitted to insist that its conference president be Catholic: *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.
 - 18 In Australia, the government-funded National Gender and Emergency Management Guidelines caution against outsourcing response and recovery arrangements to third-party religious organisations because of the exemptions provided to religious organisations under anti-discrimination law. See: <http://www.genderanddisaster.com.au/infocenter/national-gem-guidelines/>. In Canada, prior to a backflip caused by public pressure, non-government organisations wishing to participate in the government's 'summer jobs' program were required to affirm their acceptance of abortion on demand and other 'progressive' causes. See: <https://www.canada.ca/en/employment-social-development/services/funding/canada-summer-jobs.html>.
 - 19 See, for example, the discussion of *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 in endnote vii.
 - 20 The charitable status of Catholic adoption agencies in the UK was removed because of a refusal to place children with same-sex parents, even though LGBT charities are still allowed to only place kids with LGBT couples. See: *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* 2009 UKFTT 376 (GRC).
 - 21 The government funding provided to Catholic marriage counselling services in Ireland is contingent upon them providing services to same-sex couples. See: <https://catholicherald.co.uk/news/2018/07/24/irish-catholic-counselling-agency-agrees-to-help-gay-couples/>.
 - 22 Victoria is set to introduce a ban on 'conversion therapy,' and NSW is looking to follow suit. Depending on how 'conversion therapy' is defined, these bans could include groups such as Courage that promote chastity.
 - 23 The case brought against Archbishop Julian Porteous in Tasmania is a classic example of this. See <http://www.theaustralian.com.au/national-affairs/state-politics/catholic-bishops-called-to-answer-in-antidiscrimination-test-case/newsstory/b98439693f2f4aa17aca9b46c7bda776>
 - 24 The Medical Board of Australia is looking to change its Code of Conduct for doctors such that they could be sanctioned for expressing a view contrary to the generally accepted view of the profession. See: <https://www.theaustralian.com.au/national-affairs/board-accused-of-trying-to-silence-doctors/news-story/5227d0907653a801fad2d4d6d1871a58>. In Canada, law graduates from Trinity Western University have been denied accreditation by certain law societies because of the university's view on marriage.



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- 25 The University of Sydney Union threatened to deregister the Catholic Students' Society for requiring that its executive were themselves of the Catholic faith.
- 26 The Human Rights Law Alliance told the Ruddock Review that a doctor received an official warning from the Medical Board after declining on conscientious ground to refer a lesbian couple for IVF treatment. Additionally, both Victoria and Tasmania require medical professionals with a conscientious objection to abortion to nonetheless refer to a doctor without such an objection.

