



## Defending Religious Liberty

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*It is time to change laws that are restricting religious liberty, an essential feature of freedom and liberal democracy, argues Morgan Begg.*

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Australian courts have described religious liberty as ‘the paradigm freedom of conscience’ and the ‘essence of a free society’.

Our courts say freedom of religion is a fundamental right because Australian ‘society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity’.

But the litany of laws that restrict speech, association and liberty of contract – predominantly in anti-discrimination legislation – impose a burden on religious freedoms that diminishes our liberal democracy. To protect religious liberty, we must protect freedom of speech and association and,

in particular, repeal laws such as section 18C of the *Racial Discrimination Act 1975*.

Religious liberty refers to the right of individuals, either alone or as a community, to actively seek and maintain a relationship with the divine. A helpful definition was provided by Justice Dickson, in a decision handed down by the Supreme Court of Canada in 1985:

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

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

But while religious liberty is a fundamental freedom in its own right, it is not a standalone concept. In order to conscientiously live in accordance with a religious worldview, several other basic freedoms are essential, the most basic of which is freedom of speech. It is not possible to have freedom of religion without the freedom to propagate religious ideals free of the threat of legal censure or restriction. Professor Patrick Parkinson of the University of Sydney has defined the five basic freedoms essential to religious freedom.

- Freedom to manifest a religion through religious observance and practice
- Freedom to appoint people of faith to organisations run by faith communities
- Freedom to teach and uphold moral standards within faith communities
- Freedom of conscience to discriminate between right and wrong
- Freedom to teach and persuade others.

Anti-discrimination laws and regulations have a unique impact on religious freedoms. They prohibit behaviour that is discriminatory against another person because of protected attributes, such as sex, sexual orientation and gender identity. This can conflict with the ability of faith-based organisations and individuals who run small businesses to operate in accordance with their faith and conscience. A key example in Australian law was a case brought against Christian Youth Camp Limited (CYC), an organisation that operated a number of faith-based camp facilities in Victoria. Cobaw Community Health Service Limited successfully sued CYC in 2014 under the provisions of the *Equal Opportunity Act 1995* (Vic) when it refused to accept a booking to hire the camp facility for the use of same sex attracted young people. The Victorian Civil and Administrative Tribunal and the Court of Appeal Victoria found that CYC had engaged in unlawful discrimination. Leaving aside the particular circumstances of the case, the decision sets out a number of principles that limit the ability of faith-based groups to determine with whom they enter into business relations, and exposes them to other restrictions, such as employment decisions.

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## FREEDOM TO PROPAGATE RELIGIOUS IDEALS FREE OF THE THREAT OF LEGAL CENSURE OR RESTRICTION.

There is a considerable amount of precedent from other jurisdictions about how similar discrimination instruments interact with religious freedoms of individuals and others. A small bakery in the United Kingdom was penalised under Northern Irish sexual orientation regulations for refusing to decorate a cake (for a political event) iced with the words 'Support Gay Marriage'. Florists, bakers, photographers, and wedding venue operators have been sued under state discrimination instruments in the United States in recent years for refusing to participate commercially in same sex wedding ceremonies.

In June 2018, the US Supreme Court ruled in favour of Masterpiece Cakeshop, a baker who declined to bake a cake for a celebration of a same-sex wedding in 2012. However, the court did not go as far as to explicitly protect religious freedom; instead the court found the Colorado Civil Rights Commission acted with obvious animus against the religious convictions of the baker. This is an unreliable precedent for future claims of religious freedom and does little to reduce the chilling effect on free speech posed by discrimination laws.

Any law that affects an individual's ability to participate fully in society diminishes human dignity and social cohesion. Free speech also contributes to solidarity by limiting the frustration that people may feel if they are unable to express themselves, and this is no less true for people who are expressing a view based on a religious belief. Even where that belief is deemed an unpopular view – for instance, the belief that marriage is limited to a man and a woman – it is better for society if that society fosters an environment where people are able to voice those thoughts, rather than be silenced and left to stew in resentment.

Unfortunately, the concept of the separation of the church and state has been misused by secular campaigners seeking to justify limits on religious freedoms, using the argument that legal measures to entrench religious liberty would constitute a breach of that principle. But this argument is specious and ahistorical. The doctrine of the separation of church and state can be traced to 1689, when John Locke published *A Letter Concerning Toleration*, a hugely influential document that informed the understanding of religious liberty among the founding fathers of the United States, and later the framers of the Australian Constitution. Specifically, Section 116 of the Constitution provides that the Commonwealth Government shall not 'legislate in respect of religion'.

Locke wrote *Toleration* in the aftermath of a period of great conflict and religious persecution in England, and he argued that the government and the church (or churches as the case may be) are 'perfectly distinct and infinitely different' entities with differing interests. In other words, the state is concerned with the 'civil rights and worldly goods' but cannot in practice command conscience, and therefore cannot command the spiritual good of society. The separation of church and state is a fundamental precondition to freedom of religion.

Section 116 is, however, insufficient to protect religious liberty, because it has been interpreted very narrowly by the High Court and provides no protection from laws passed by State

parliaments, the source of most contemporary threats to religious freedoms. That said, it is certainly no impediment to measures that enhance religious liberty, and to do so would in no way run counter to the doctrine of the separation of church and state.

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Some qualification to the practice of religious liberty should be expected because in some cases religious practices may impact others. The question then becomes, what amounts to an impact that can justify legal intervention? Some have suggested that some actions might have no tangible effect on another person, but still have an effect on someone's dignity or perpetuate moral stigma, and that would require a legal solution. However, this would have an exceptionally broad reach, as explained by Ryan T. Anderson and Sherif Girgis in a 2017 book:

*...[C]lipping our liberties for imposing dignitary harm would actually require trimming the whole field of religious liberty (and other civil liberties)... In a diverse society, after all, religious liberty always creates moral stigma. Religious freedom includes nothing if the rights to worship, proselytise, and convert forms of conduct (and speech) that can express the conviction that outsiders are wrong.*

Prohibition of dignitary harm is unreasonably broad, impossible to adjudicate sensibly, and necessarily arbitrary. Restricting religious freedoms to protect against dignitary harms would mean choosing to make the space for religious freedom so small as to extinguish it altogether.

Anti-discrimination laws at a state and federal level typically include provisions that, in a limited number of circumstances, shield churches and faith-based organisations (such as schools or social welfare agencies).

While some form of exemption for religious acts and practices are necessary to protect religious liberty in the current legal landscape, there are several shortcomings of exemptions in their current form.

Firstly, the scope of exemptions is limited to religious institutions, and so don't apply to individuals or proprietors of commercial enterprises who want to engage in a profit-making enterprise but to do so in a way that enables them to live in accordance with their conscience and religious beliefs.

Secondly, they require courts to make determinations on the legitimacy of particular religious beliefs, inviting the judiciary to make theological determinations from a secular perspective. Thus in the CYC case referred to earlier, the majority of the Supreme Court of Victoria effectively lectured the faith-based group on how it should have interpreted its own faith.

To protect religious liberty in Australia the following three issues must be addressed:

- Repeal of section 18C of the Commonwealth *Racial Discrimination Act 1975*, as well as similar state anti-vilification laws and local laws that unduly restrict activities like street



preaching.

- To protect freedom of association, the narrow exemption provisions for religious organisations should be expanded into a general protection for freedom of conscience for all Australians, including individuals and businesses.
- Religious values are an intrinsic part of our Western heritage, but religion is unmentioned or treated negatively in Australia's aggressively secular National Curriculum, so the right of parents to inculcate their values to their children consistent with liberal democratic values, must be protected.

Such reforms would also serve to underscore that freedom of religious speech is not distinct from freedom of speech more generally, and is no less fundamental to the liberal democratic society Australia is meant to be.