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Religious Freedom, Religious Discrimination and the Role of Law

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Please note that some of the material drawn on for this lecture is covered in more detail and with full citations in Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012, Federation Press).

Introduction

The intersection between Australian law and religious beliefs and practices is a complex and contested one. The Australian approach to issues related to religious freedom is characterised by its fragmented and partial nature. This has led to tensions between different elements of legal regimes both within a single jurisdiction and between State and federal laws. There is a cluster of approaches to dealing with law and religion in Australia that appear, at first glance, to be mutually reinforcing, and in some circumstances, they are precisely that. In others, however, they are in tension with one another. That tension gives rise to complexity for adjudicators – whether judicial or otherwise – who need to make decisions within our existing frameworks, although States such as Queensland, which have adopted a more comprehensive regime for rights protection, have clearer guidance about how to reconcile the competing elements.

The other major tension within the existing legal regime is the extent to which the law protects individual rights to religious freedom (which includes the right to reject, question or be undecided about religion) and the extent to which it protects the institutional autonomy of religious groupings and institutions.

As with a number of the questions that I will consider tonight, there is both complementarity and conflict between individual and group rights with respect to religion. Individuals may choose to exercise their individual religious rights with others. Both international law and Australian human rights Acts refer to this as an element of religious freedom. Section 20 of the Queensland Human Rights Act 2019, for example, protects, 'the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, *either individually or as part of a community*, in public or in private.'

The right of an individual to have a religion would be a thin one if they were not able to be part of an active and organised religious community and if those communities were not able to provide themselves with institutional forms that were given a degree of recognition and protection by the State (I note in passing that an increasing number of Australians choose to exercise their religion or spirituality outside of formal religious institutions, but that is irrelevant to the question of whether they should have a right to create such institutions). The

rights of religious institutions can thus far be considered derivative of the pooled rights of their communities of believers and are therefore consistent with and contributory towards individual religious freedom.

Yet religious organisations have an agenda and identity that can go beyond the mere aggregation of the rights of their members. At times they undertake actions that protect themselves as institutions, but which could be seen to be against the interests of their members. The most compelling example here is the covering up of child sex abuse cases by religious leaders, where religious institutions utilise the resources of the religious bodies to resist legal actions which aimed to hold them to account for their wrongs.

More regular and complex issues arise throughout a range of legal questions. One such issue is the common assumption that the views expressed by institutional leaders are the views of religious followers and that, therefore, to protect the interests of the institutions is also to protect the conscience of the individuals. This is a sleight of hand that we should be careful of. Last year, for example, it was used by religious hospitals with respect to Voluntary Assisted Dying. This law created conscientious objection rights so that medical staff in the public health system do not need to participate in voluntary assisted dying if doing so would be against their conscience. That's an important protection for freedom of religion or belief. They also protect religious institutions which are not required to participate directly in voluntary assisted dying. They do, however, require that such religious institutions allow medical staff from outside the institution to attend the institution and provide voluntary assisted dying on the premises of religious hospitals or aged care homes if a transfer would cause serious harm, undue delay in access, or prolonged suffering.

Religious institutions pushed back against the laws for a number of reasons. Some of them are about their institutional autonomy, which are reasonable arguments whether one agrees with them or not. There are independent reasons why it is socially useful to have religious institutions that have a degree of autonomy from prevailing social norms, and good reasons for governments to be cautious in over-regulating religious institutions. What weight should be given to this as compared to other rights is a value judgment about which reasonable minds may differ.

But other arguments raised by such institutions are about the distress that allowing voluntary assisted dying in, for example, a Catholic aged care home or hospital, would cause for the staff whose consciences would be harmed by such action. Religious institutions, however, do not provide freedom of conscience for their staff anywhere near the same degree as public institutions. There are undoubtedly staff in religious hospitals and aged care providers who sincerely believe that assisting a dying person with voluntary assisted dying is the most ethical action to take in some circumstances. There will be staff who are upset by the notion that an elderly person is forced out of their long-term home in an aged care residence to seek their right to die with dignity. There will also be those who completely agree with the position of the religion that runs the institution. But unlike the public sector, religious institutions are not giving staff the right to participate or not in voluntary assisted dying based on their own conscience. They're not taking a vote on staff beliefs. They are simply requiring all staff to behave in line with the teachings of the religion. In such circumstances, arguments to bolster

the position of religious institutions by appeals to the individual conscience of staff should be treated with some scepticism. There is certainly good evidence in other morally contentious areas, including same sex relationships and contraception, that employees of religious institutions do not all align with the views of the religious hierarchy.

With that introduction to some of the complexities of the landscape, let me turn now to an overview of the ways in which the Constitution, discrimination laws and human rights law deal with matters of religious freedom and discrimination.

The Australian Constitution

Any survey of the legal landscape in Australia must begin with section 116 of the Constitution. As I have said elsewhere, section 116 is a constitutional oddity. A provision about Commonwealth powers that sits in the chapter headed The States. A provision that appears to focus on the protection of rights in a constitution that deliberately rejected the concept of a constitutional bill of rights. A provision modelled on the religion clauses of the US First Amendment, yet with sufficient modest differences to help justify a wholly different role for it in the Australian legal landscape.

Despite being constitutionally entrenched and, therefore, theoretically the most powerful provision on law and religion in Australia, section 116 has what I will call both inherent and interpretative limitations, which means that it has been rendered largely irrelevant to date.

The inherent limitations are express and well-known. It is not an individual right but rather a limitation on power. It only restricts the Commonwealth and not the States. It is a limit on law ('the Commonwealth shall make no law') rather than administrative action or inaction – although, of course, statutes under which administrative actions are taken may be read down in light of section 116. This combination of inherent limitations would create a non-trivial set of barriers to individuals or institutions seeking its protection.

Yet those inherent limitations have been added to by an interpretative approach to s116, which has given it very little scope within even the guardrails set down by its wording. The High Court has taken a relatively generous approach to interpreting religion – although it did so in a non-constitutional case on payroll taxes with respect to Scientology – and it has therefore been reasonably easy for most religions to fit within the definition.

The courts have, however, taken a narrow approach to most other elements of the free exercise clause in s116. This was signalled in the very first case on s116 (*Krygger v Williams* (1912) 15 CLR 366) in which a Commonwealth law, the Defence Act 1903, was challenged by a man who claimed his Christian faith required him to be a conscientious objector. Justice Griffith declared with little reasoning that the appellant's position was 'absurd' and Justice Barton declared it was 'as thin as anything of the kind that has come before us.' Conscientious objection to military service has been a matter that has troubled and engaged both domestic and international courts around the world – I can't think of another example in a liberal democracy where it has been treated with such contempt.

While the reasoning was not clear in this case, it is aligned with reasoning that implicitly developed over time and was most clearly articulated in the *Kruger v Commonwealth* (1997) 190 CLR1. In that case, a majority of the High Court held that the correct test in determining whether a Commonwealth law was 'for' the prevention of the free exercise of religion is that the *purpose* of law had to be to restrict free exercise rather than restrictions on religion being a result of the law in practice. In *Kruger*, for example, the purpose of the law was not to disrupt the traditional religious practices of the Aboriginal children taken from their families, even if this was the result in effect.

Justice Gaudron, however, sounded a note of caution with respect to this approach and made two important observations about its problematic nature. The first was that the Constitution provides the Commonwealth specific powers and that these do not include a power with respect to religion. Any attempt by the Commonwealth to create a law for the purpose of directly restricting religion was therefore likely to be unconstitutional as beyond power. An approach to section 116 that focuses solely on the purpose of the law in question, therefore, runs the danger of interpreting it out of existence. The second was her concern that courts should 'construe constitutional guarantees liberally, even limited guarantees of the kind effected by section 116.' She wisely noted that such law might allow governments to do indirectly what they could not do directly and that, therefore, section 116 should be held to extend to laws 'which operate to prevent the free exercise of religion, not merely those which, in terms, ban it.'

The majority approach, however, is now orthodoxy in Australian law and has been followed a number of times.

This approach, combined with the fact that section 116, as even Justice Gaudron agreed, does not create an individual right of redress for unconstitutional laws, means the free exercise provisions of the Constitution do not provide much protection at all for individual religious rights.

The establishment clause of the Constitution has likewise been interpreted in a very limited way compared to its American progenitor. In the first major decision around this clause, *Attorney-General of Victoria (ex rel Black)* (1981) 146 CLR 559, commonly known as the DOGS Case, a challenge was made to the provision of Commonwealth financial support to religious schools. Those challenging the laws drew upon the significant US case law, which would have prohibited such funding, but only Justice Murphy was attracted by these arguments. The majority rejected the relevance of the US cases and held instead that the meaning of establishment was better understood by looking at the established churches in the United Kingdom. As the clause was a restriction on government power rather than a right, it should be interpreted narrowly. While their honours came to slightly different definitions, they adopted similar approaches to Chief Justice Barwick's conclusion that establishment required 'the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of …. the Commonwealth to patronise, protect and promote the established religion.'

Later attempts in the *Williams* case to revisit the issue also failed. While it is no element of the reasoning, the practical outcome of these cases is that the Commonwealth is free to fund and engage with religious institutions quite extensively without fear of constitutional constraint.

In sum, the narrow approach of the courts to s116 provided diminished protection for individuals whose rights were infringed upon by Commonwealth legislation but created greater scope for Commonwealth funding and support for religious institutions (although, double-edged sword that it is, funding and support could also come with constraints and indirect regulation).

Discrimination Law

Let us turn then to discrimination law. With little to be gained from constitutional challenges and no statutory bills of rights until comparatively recently, those who believed that their religious rights were being trampled on turned, in many cases, to discrimination law for relief.

Discrimination law is one example of the fragmented approach taken to issues of religion in Australia. Unlike some other characteristics, such as sex and race, there is not a uniform approach to the prohibition of discrimination on the basis of religion. The Commonwealth prohibits racial discrimination, which – as I will return to – provides some religious groups with some degree of protection. It also includes some specific workplace protections in the Fair Work Act that prohibit employers from acting in a discriminatory way with respect to religion. I don't have time to deal with the Fair Work Act tonight, but its provisions may prove over time to be the most potent of the various protections for religious freedom in Australia. The NSW laws prohibit only ethno-religious discrimination. South Australian discrimination law prohibits discrimination on the basis of religious appearance or dress. The other jurisdictions, including Queensland, use slightly different words but prohibit discrimination against a person on the basis of their religious belief or activity.

Because of the lack of a clear Commonwealth discrimination law with respect to religion, most of the law in this area has been developed at State level. That said, in some circumstances, there is a strong overlap between religious and racial identity; courts have been prepared to find racial discrimination in circumstances where religious identity is also in play. In a case last week, for example, both parties in the Queensland Supreme Court agreed that Sikhs were a racial category for the purposes of the Commonwealth Racial Discrimination Act. While this is sometimes useful to particular applicants, it does create an unfortunate division between religious groups depending on the extent of their overlap with racial or ethnic categories.

As you would be aware, discrimination can be either direct or indirect. Both historically and today, there has been overt, direct discrimination against people on the basis of their religion in Australia. Troublingly, such cases continue with, for example, a rise in reports of anti-Semitism in the last couple of years.

Generally, such cases tend not to play a significant role in the law, however, once the facts are proven, they are reasonably straightforward. An employer who won't employ Muslims or a hotel that refuses accommodation to Jewish travellers is clearly in breach of the law in jurisdictions that prohibit religious discrimination. Very recently, however, the sacking of CEO

Andrew Thornton by the Essendon Football Club on the basis of his membership (and perhaps leadership role) in City on a Hill Church looks on the current evidence to raise issues with respect to direct discrimination in both Victorian discrimination laws (which do prohibit religious discrimination) and under the Fair Work Act. The alignment with religious freedom is also strong in these cases, as those who are discriminated against because of their religion may feel pressure to hide or abandon their religion as a result. A society in which people are treated equally regardless of religion is, therefore, generally a society where people will feel freer to exercise their religion (although I will come to one complicating factor in a moment where there is tension between the claims of non-discrimination and those of religious freedom).

The cases that have tended to occupy the time of our tribunals and courts, therefore, tend to be indirect discrimination, which raises more complex questions.

The cases to date have fallen into a number of broad categories. The first is in environments in which the State has significant power over the individual, most commonly prisons. While in most environments, the main duty of government is to leave people to pursue their own religious obligations, in prison, the degree of control over prisoners is such that a more proactive stance is required. The most common types of cases arise with respect to the provision of food that complies with the religious requirements of inmates – for example, a religious requirement for food to be kosher or halal. The courts have generally been sympathetic to such claims even though the provision of different types of meals creates a financial and administrative burden on prisons. They have been less sympathetic to claims where tensions exist with the security or operations of the prison. While such cases have been brought under discrimination law in the past for lack of a better vehicle, with the advent of human rights Acts, these instances can now also be brought as direct religious freedom cases, which is arguably a more coherent fit.

Other cases have involved attempts to evade the usual application of the laws for religious reasons – what might be very broadly called conscientious objection cases. Examples include cases around refusing to have a photograph taken for a driver's licence or not wanting to work on certain days or times for religious reasons. Discrimination law is not particularly well designed to deal with these cases as they stretch the definition of indirect discrimination, and many of these cases have not been successful.

Very recently, Justice Brown in the case of *Athwal v State of Queensland* [2022] QSC 209 gave judgment in the most significant case on the intersection between religious freedom and discrimination law when she dismissed the application brought by a Sikh applicant which argued that the Queensland Weapons Act, as amended, made it very difficult for initiated Sikhs to enter school grounds as either a student or a parent as they were required by their religion to wear a kirpan or a religious item that resembles a dagger. The Weapons Act prohibited the carrying of knives in public subject to some exceptions, one of which was genuine religious beliefs. However, that exception did not apply in a school context (including both public and private schools). It was recognised in allowing for the genuine religious exception in other settings that this exemption was largely for Sikh men. The applicant argued that this legislation was in conflict with Section 10 of the Racial Discrimination Act because it meant that Sikh

men could not enjoy their rights to freedom of religion or movement to the same extent as other parents and students (some of whom may be able to carry a knife onto school grounds in limited circumstances). Her Honour, noting it was a complex case, determined after a detailed analysis of the case law around Section 10 that the applicant failed because:

> *"In this case, Sikhs and non-Sikhs enjoy the same right of lawful excuses to possess a knife as exceptions to the general prohibition in s 51(1) of the Weapons Act. While it may have been that the provision in s 51(2) for "other lawful excuse" may have extended to wearing a Kirpan for religious purposes, the effect of s 51(4) and s 51(5) of the Weapons Act in providing for lawful excuses does not have a practical effect of providing a greater of a right of wearing a knife for religious purposes to Sikhs and non-Sikhs. Those excuses in s 51(2) are however available to be relied upon by Sikhs and non-Sikhs alike."* [87]

I have some concerns that this analysis promotes form over substance, but it may be an illustration of the limitations of relying on discrimination law as compared to a Human Rights Act or legislated provision on religious freedom for cases such as these. I will come back to this shortly.

A final set of cases are worth a brief mention because they do show up some of the problems with religious intolerance that afflicts elements of our society. There have been attempts to use religious discrimination provisions to try to prevent the building of places of religious worship – generally mosques – on the basis that the existence of such congregations would prevent or intimidate others from exercising their religion. The legal system has, quite rightly, dismissed such claims out of hand. Similar claims, which sometimes focus on human rights laws and sometimes the planning processes, are a feature of many common law countries. Certain religious minorities have a much harder time establishing a place for themselves than majoritarian ones, and it is important not to allow religious discrimination arguments to be used to suppress the religious freedom of minorities.

Let me now turn to the tension within discrimination laws and their relationship with religious freedom. The primary institutions which are legally permitted to – and regularly do – directly discriminate on the basis of religion are religious institutions themselves (they are also permitted to discriminate in other areas, most notably sex and sexual orientation, in certain circumstances).

Some elements of these exemptions are relatively minor in terms of their impact and difficult to object to, for example, that clergy or ministers be of a particular faith.

But there are also more significant exemptions for religious organisations. In Queensland, there is a general exemption under s 109 of the *Anti-Discrimination* Act (1991), which says that the Act does not apply to 'an act by a body established for religious purposes if the act is—

(i)in accordance with the doctrine of the religion concerned; and

(ii)necessary to avoid offending the religious sensitivities of people of the religion.'

There are also specific provisions with respect to religion around employment, education and accommodation. There are also specific and more limited provisions with respect to religion

around employment, education and accommodation which allows religious body to impose a genuine occupational requirement around openly acting in a way that is contrary to the employer's religious beliefs. Employing someone of a particular religion to teach religious classes is also used as an example of a genuine occupational requirement (s25). In all of these cases, the law provides some capacity for religious bodies to discriminate of the basis of religion (and other attributes) in a way that individuals – even sincerely religious ones – cannot.

Religious institutions have defended these types of provisions – which appear in many discrimination laws across Australia – as critical for the purposes of religious freedom. Indeed, it was originally Christian churches that were opposed to laws to prevent discrimination on the basis of religion in Australia because they feared it would interfere with their existing practices. As they have become more concerned about protecting individual Christians from discrimination in secular contexts, they have become more favourable to such discrimination laws.

In arguing for such freedoms for themselves, religious groups have maintained that the creation of institutions which faithfully reflect the values and beliefs of their members is critical to protecting the religious freedom of their members, allowing them to live, educate their children, receive medical attention and so forth in an environment that respects their faith. This is particularly acutely felt in the educational context as the transmission of religious belief from one generation to the next is felt by at least some religious groups to be critical for the flourishing of the religion. Defenders of this approach point to the importance of respecting the autonomy of religious organisations and the inappropriateness of the State intervening in their affairs. Separation of church and state requires restraint when it comes to the regulation of religious bodies.

However, the implications of the relatively wide exemptions for religious bodies are significant. Unlike provisions which provide protection for relatively small classes of people, such as clergy, these exemptions apply to huge swathes of the workforce and service provision. Approximately 30% of all schools in Australia (and 94% of private schools) have a religious affiliation. Approximately 15% of hospitals and over 23% of aged care facilities are religiously affiliated. These institutions between them are huge employers – the Catholic Church in its various manifestations is one of the largest non-government employers in Australia – and provide services to hundreds of thousands of people. In some areas, for example, in regional communities, the local church may be the only provider of these services. The rights of religious institutions under such laws trump both the religious freedom rights and other rights of some individuals who would otherwise be protected by discrimination laws. The Queensland Human Rights Commission recently completed a report to parliament that recommends further limits on the capacity of religious schools to discriminate with respect to teacher employment, curtailing the power to do so to what is reasonable and proportionate with the aim of focusing the exemption primarily on those engaged directly in teaching religion.

The combined impact of the limited interpretation of establishment, which allows for significant government funding for religious bodies and their exemptions in whole or part from discrimination legislation, gives rise to an unusual situation in Australia of religious institutions

receiving substantial funding but not being obliged to utilise this funding equally for all Australians in terms of employment or service provision. This is more a political question than one for the legal system, but it is an issue on which there is a strong divide in viewpoints which will make getting agreement on a Commonwealth discrimination law difficult, as the last government discovered, and, I suspect, the new one will discover in due course.

Religious Freedom Provisions

Let me turn then to human rights Acts and the express protection of religious freedom. Over the last decade, various State and Territory human rights Acts have come into effect that include religious freedom rights, generally based on the International Covenant on Civil and Political Rights, although not word for word the same.

The ACT was first with a statutory bill of rights, the *Human Rights Act* (2004). Victoria followed not long after with the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Most relevantly to us, the most recent Act is the *Queensland Human Rights Act* (2019).

Human Rights Acts open up an individual rights path that neither the Constitution nor discrimination laws provide to the same extent. The framing of religious freedom rights also allows for religious rights to be understood and applied in the context of human rights more generally, creating a framework for resolving the tensions between religious freedom and other rights, such as equality on the basis of sex and sexuality and freedom of speech.

To date, there has not been a significant case law either in Queensland – which one would probably expect given the relative newness of the provisions and the extraordinary times in which we live – but also in the ACT and Victoria. Perhaps because both lawyers and adjudicators are more familiar with discrimination law, cases have not uncommonly been brought with both a claim of indirect discrimination and a breach of human rights.

The case regarding laws that limit the ability of carrying a kirpan into schools in Queensland provides a useful example of the difference that a more robust legislative protection of religious freedom at Commonwealth level might provide. The Canadian Supreme Court in *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6 dealt with an almost identical set of facts but was able to undertake in quite a different analysis that engaged more directly with the substance of the matter – that these restrictions limit religious freedom and the real question is whether the safety of students and staff (the same reason given in Queensland) justified the measure. The Court found for the appellant, noting, amongst other things, the wide range of objects in schools that could even more effectively be used as weapons (including scissors and baseball bats) and that the family and the school had agreed on a range of sensible measures that minimised the likelihood of harm, including the kirpan being worn sealed under the boy's school uniform. The Australian statutory bills of rights, which do not allow for legislation to be overridden, are not able to be used in this way, at least when there is unambiguous legislation.

One issue that the Human Rights Acts give more prominence to is that of the appropriate process that has to be undertaken before limiting rights. Those making administrative decisions must take human rights into account where they are relevant. For example, in a Victorian case,

Haigh v Ryan [2018] VSC, a prisoner sought a pack of tarot cards that he claimed were to be used as part of his religious belief. Prison authorities provided some of the cards but took out four that they said were demeaning to women – Haigh claimed that this undermined their religious usefulness. The court had some sympathy for the substance of the outcome reached but held against the prison because 'There is no indication that the decision-maker carried out that balance or evaluation [of the right compared to the need for the restriction]' (474, [74]). Given that a significant rationale for statutory rights Acts is to encourage decision-makers to take rights into account during a decision-making process, such a judicial approach makes sense and has the potential to give greater prominence to cases where religious claims may be overlooked. This will likely be of particular value to religious minorities whose views tend to be easier to ignore through ignorance or intolerance.

To date, however, the various Human Rights Acts have not provided any substantial body of case law or different approaches to religious freedom issues in addition to those already established by discrimination laws.

Issues Remaining

As a result, case law in Australia (whether based on constitutional, discrimination or human rights claims) is relatively thin compared to many other countries. There are issues that remain unresolved that are likely to need consideration over time if the experience of other jurisdictions is of guidance to us. Let me outline a non-comprehensive overview of some that are both complex but also potentially significant.

The first is the scope of the protection for religious activity. This is relevant in both discrimination law (which in Queensland extends to religious activity) and human rights laws which incorporate the right to demonstrate a 'religion or belief in worship, observance, practice and teaching.' There are some core areas of religious activity that are relatively uncontroversial for inclusion – the most obvious is engaging in religious worship, but courts have recognised others, including religious dietary and clothing requirements. The difficulty arises because for a sincerely religious person a very wide range of behaviours could be said to be motivated by their religious beliefs, but may not, for legal purposes, be a demonstration (to use the Australian term) or manifestation (to use the international legal term) of religion.

The European Court of Human Rights has struggled with this issue and has not treated it consistently across cases or issues. The European Court has at times toyed with the idea that something must be a requirement of a religion in order to be protected; that is, the religion must teach that this is an obligation rather than just a good thing to do. However, the Court has applied this principle inconsistently. It might lead to the rather odd result that even core religious activities such as attending a religious service might not be protected unless it is a requirement of a religion to attend a service on a regular basis or on particular holy days. Applying a test of whether something is a religious requirement also becomes a more complicated issue as Australian society moves away from organised, institutional religion where there is at least sometimes clarity about a set of rules or beliefs that bind members, and increasingly either rejects religion altogether or moves towards more individualised, spiritual

beliefs and practices, where it is far more complicated to understand what might be required by religion.

This debate has played out in Australia in the public and political realm with respect to what are sometimes called here statements of religious belief. This was the issue that arose in the Falou case when determining whether making statements through social media about matters of religious belief around sexual orientation and activity was a religious activity. The inclusion of a provision around declarations of religious belief in the proposed federal discrimination law last year was one of the issues that has caused the most controversy.

I'd make two observations with respect to this issue. The first is that I am not sure that it is helpful to single out in legislation particular manifestations of religion beyond those outlined in the International Covenant on Civil and Political Rights and reflected in most of the statutory Bills of Rights. In particular, I have concerns about earlier drafts of federal discrimination laws that not only singled out declarations of belief but made them superior to other forms of religious manifestation in that they were immune to the usual considerations around whether restricting them was justifiable or not.

The second, and more general observation, is that I am cautious about a test for determining whether an action is protected by freedom of religion with reference to distinguishing what is required by a religion from what is merely motivated by it. Such a test engages the judiciary in disputes and debates that most judges are not well equipped to adjudicate. These matters often are, and should be, contested within religions and within different sects or denominations of religion. Courts should, wherever possible, avoid developing tests that require them to engage in adjudicating the objective religious rules and instead focus on the subjective genuineness with which those beliefs are held.

The second issue that is likely to require resolution at some point in the Australian legal system is that of general and neutral laws that nonetheless restrict the ability of some people to fully exercise their religion. Sometimes laws can be what the US Supreme Court calls 'facially neutral,' meaning that while they appear on their face to be regulating with no regard to religion, however, on examination, they are really aimed at a particular religious minority and their activities. Such laws are, in the US, unconstitutional. But many laws are genuinely trying to regulate for a serious social purpose but with (often unintended) consequences. For example, health and safety laws requiring all people to wear a helmet on a motorcycle or in dangerous work environments are genuinely regulating for an entirely legitimate aim that has nothing to do with religion, but they nonetheless disproportionately impact Sikh men compared to other members of the population (due to the Sikh requirement to wear a turban).

In Australia, as I discussed earlier, the High Court has taken a purpose-based approach to laws, which tends to dismiss these unintentional consequences, and for the reasons that Justice Gaudron outlines, I have concerns about this approach. Statutory human rights Acts, of course, cannot be used to declare a law invalid, although there is a question of when declarations of inconsistency should be made when laws have an unintended impact on religious freedom.

Similar issues, however, can arise with respect to administrative decisions and sub-legislative instruments that are relevant under the Human Rights Acts. I recognise that in a diverse society

with a wide range of religions and beliefs it is important not to allow religious freedom to become an excuse for the avoidance of beneficial regulation of general application. But I am also conscious that in our democracies, the interests of larger religious groupings will tend to be taken into account in the regulatory process in a way that minority religions are not necessarily. During Prohibition in the United States, for example, there were legal mechanisms that exempted the continuation of Catholic mass with sacramental wine, whereas the traditions of Native Americans who used peyote in religious rituals were not taken into account in drafting drug prohibition laws.

For these reasons, it is better for the legal system to recognise that a law or regulation of general application *can* interfere with religious freedom and to deal with the importance of the social good that the law promotes in balancing up whether it is a reasonable limitation on religious freedom. It will generally be easier for a general and neutral law to be justified than one that is more directed to religion.

The third and final general observation in this paper is to consider the vexed question of limitations on freedom of religion and belief and the circumstances in which these can be justified. A wide range of actions have been or are justified by reference to religious beliefs, up to and including the torture and killing of others for breaching religious rules or rejecting religious beliefs. That a society committed to human rights and equality would reject such extreme actions in the name of religious freedom is uncontested in Australia except at the very margins.

More complicated cases arise with respect to conflicts with other human rights, most commonly with respect to equality rights, and with significant issues of public good, perhaps the most obvious at the moment with religious beliefs that reject vaccination.

There is, of course, no singular or simple solution to conflicts between different rights or between rights and other highly significant social goods such as public health. Religious freedom is not unique in this way. The benefit of using a comprehensive Human Rights Act approach to these questions, rather than a specific law solely on religious freedom, is that the more comprehensive approach better allows for the development of general legal tools such as proportionality and requires all relevant rights to be taken into account.

Courts in other Australian jurisdictions have set out some key principles of relevance. The first, and this echoes international human rights law, is that there is no hierarchy of rights – there is no principle, for example, that freedom of expression or freedom of religion will always prevail. In the Victorian case of *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) this is set out succinctly, saying none of the rights in question '*was to be privileged over the other.'* Despite this, particularly with respect to religious rights and equality rights, each side of the debate will often claim a special status that means that their preferred right should at least be preferenced. As we become a society that is increasingly divided between those who are and are not religious (and we have seen in the most recent census a further decline in religiosity, particularly among the young), judges and other decision-makers should be conscious of their own predispositions towards religion to ensure that all parties are treated fairly and all rights equally.

Second, the process of determining when rights may be limited is one that should be undertaken seriously and after an appropriate process. To take two passages from cases dealing with other rights, the Victorian Supreme Court has said that 'Speaking generally, limitations … may be compatible with human rights where justification is found to be demonstrably necessary after the various rights and interests have been carefully identified and properly balanced' (*PQR v Secretary, Department of Justice and Regulation (No 1)* (2017) 53 VR 45, 66). And in another case that, the limitation placed on a right or the way in which a limitation is interpreted should restrict the right 'only to the extent necessary to achieve its purpose' (*Victorian Legal Services Commissioner v McDonald* (2019) 57 VR 186, 189).

These general principles are useful and help to constrain governments that may find restricting religious rights convenient or which may overlook the legitimate concerns of minorities. They are not, however, simple to apply in contested cases, particularly where the social consensus, even around basic questions, such as whether religion is a social good or not, is breaking down.

There are no easy answers to many of the questions that I have touched on this evening. Socially, politically, culturally and legally, Western countries are facing significant divisions of opinion with respect to the appropriate place of religion, the role of religious institutions, the rights of religious individuals whose values are at odds with majority values, and the extent to which the law should recognise a special set of protections for religion as compared to other characteristics. In Australia, the legal system has played a far more limited role in religious disputes of various kinds than legal systems elsewhere. That is unlikely to last and will raise some serious challenges for our courts, at least some of which I have touched on tonight. I look forward to an opportunity to discuss these further with you.