CONSOLIDATION OF COMMONWEALTH ANTIDISCRIMINATION LAWS

Submission of Christopher Mills

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To:
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Summary

The conclusions reached by this submission are:

1. The Legislative Power of the Commonwealth is limited to giving effects to the principles enlivened by the International Covenants to which it is signatory;
2. Any proposition made in the Discussion Paper that religious freedom should be narrowed or subordinated to other rights is beyond the Legislative Power of the Commonwealth;
3. The extension of discrimination to include sexual orientation and gender identity is beyond the power of the Commonwealth and would not be beneficial given the infancy of thought in terms of the requirements of equality in these terms;
4. Several of the propositions raised in the Discussion Paper ignore the Constitutionally protected Free Exercise of Religion;
5. Any enactment which restricts or narrows the free exercise of religion goes beyond the power of the Commonwealth and is substantially inconsistent with the International Covenants;
6. In any case, questions of religion are not justiciable and are exclusively for determination and resolution in terms of conscience;
7. In a Federal system of government it is desirable to give religious organisations voice rather than exclusion. A more appropriate method by which to allow religious and other social institutions to develop and become engaged is to promote substantive neutrality and social tolerance rather than to restrict engagement;
8. At the very least, exemptions must be retained, but it is preferable that a set of legitimate purposes be established to which is attached a rebuttable presumption that behaviour engaged in is not unlawfully discriminant. It must then be for the complainant to rebut that presumption in order to establish a case for discrimination. It is important to note that, no matter which construction is used, this will be required of a complainant at some stage during the process, and the onus of proving that conduct is legitimised by the act still falls on the Defendant;
9. A test for discrimination which does not look to ensure that there has been differential treatment between a complainant and persons without the complainant's protected attribute is a deficient implementation of the principles of some of the International Covenants as it does not work to promote equal treatment. A mere detriment test is insufficient to adjudicate some forms of discrimination.

Introduction

The Commonwealth Department of the Attorney-General seeks submissions with a view to the possibility Consolidating Commonwealth Anti-Discrimination Legislation. Some of the proposed points raised by the Discussion Paper released by the Department raise contests between the values of Freedom and Equality and must be recast, as they are of concern to significant proportions of the community - particularly those who make the conscious decision to be moved by religious conscience.

The thrust of this submission is to outline the Commonwealth Legislature in respect of any impact on the exercise of religion in Australia. Aside from the direct Constitutional protection of free exercise of religion, the writer further requests that the Minister take notice of the broad array of views which are undoubtedly to be represented in response to this discussion paper and to realise that this is a sensitive issue which must be approached with balance and care. To that end, this paper proposes a method by which

the interests of equality and religious freedom may be balanced, and provides a Schedule which proposes particular enactments which strike such balance.

Accordingly, this paper is divided into three parts. Part 1 discusses the legislative power of the Commonwealth under the Constitution, Part 2 discusses the historical aspects of the principle of 'Separation of Church and State' and its application in the Australia, and Part 3 voices a reasoned opinion on the Requirements to understand the balance between Anti-Discrimination and other fundamental Liberties.

Part 1: The Constitutional Foundation - the Commonwealth's powers and their bounds.

Two significant Constitutional issues arise on from the Discussion Paper. It is submitted that the proposals made therein go beyond the power of the Commonwealth on two grounds:

1. The proposals are inconsistent with the relevant principles of the International Covenants which give rise to the Commonwealth's legislative power in respect of anti-discrimination - they ignore the international covenants regarding freedom of religion and do not proportionately implement the covenants with regard to discrimination; and
2. The proposals ignore the Constitutional prohibition on the enactment of laws for the prohibition of the free exercise of religion.

External Affairs

Anti-discrimination and Human Rights legislation is enacted by the Commonwealth under the Commonwealth's external affairs power by way of enacting international covenants and treaties which express particular principles with regard to the various anti-discrimination issues. As was outlined above, two related issues arise from these facts. The first issue, that any proposed legislation must, in some respect, give effect to particular covenants, is not a controversial point, and to this end there is no need to discuss it any further than to say that any elements of a proposed bill cannot go beyond the breadth or width of any international covenant or treaty which it purports to enact.[1] The second issue concerns to what extent the Commonwealth must enact the international covenants and treaties which give rise to its legislative power in respect of external affairs. Accordingly it is submitted that if the enactment of parliament does not substantively enact an international covenant or treaty, the enactment is made without power.

The relevant head of Commonwealth power is s 51(xxix) external affairs. It is accepted that treaties entered into by the Executive on any subject matter may be implemented by the Parliament,[2] not withstanding that they are domestic in character.[3] The issue of externality is thus not in question in respect to the implementation of the relevant covenants, however 'where a treaty relating to a domestic subject matter is relied upon to enliven the legislative power conferred by s 51(xxix) the validity of the law depends upon

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[1] *R v Burgess, ex parte Henry* (1936) 55 CLR 608.

[2] *R v Burgess*, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, *Commonwealth v Tasmania (Tasmanian Dam Case*) (1983) 158 CLR 1.

[3] *Tasmanian Dam Case* (1983) 158 CLR 1 at 121 (per Mason J).

whether its purpose or object is to implement the treaty.'[4] More specifically, it has been accepted that where legislation does not act 'in fulfilment' of a treaty, the subject of the legislation is not an aspect of external affairs:

> "And the purpose of legislation which purports to implement a treaty is considered... to see whether the legislation operates in fulfilment of the treaty and thus upon a subject which is an aspect of external affairs.'[5]

It was accepted by the majority in the *Industrial Relations Act Case* that an enactment must be reasonably proportionate to the treaty which it purports to implement.[6] Specifically, 'a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.'[7]

Finally, it was noted by Brennan J in the *Tasmanian Dam Case* that 'the obligation being to take appropriate legal measures for the protection and conservation of the property, the power is to make laws which are conducive to that end rather than to make laws which are thought by the Commonwealth to be conducive to that end.'[8]

Two issues arise from such requirements of the law:

1. What are the operative principles or 'ends' of the Covenants/Treaties that must be carried across to the legislation to retain its validity?
2. Are the relevant operative principles able to be reconciled within a single enactment?

The relevant international instruments with respect to discrimination to this enquiry include:

1. *Universal Declaration of Human Rights* ('UDHR')
2. *International Covenant on Civil and Political Rights* ('ICCPR')
3. *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW')
4. *Discrimination (Employment and Occupation) Convention* ('DEOC')
5. *Convention on the Rights of Person With Disabilities* ('CRPWD')
6. *International Convention on the Elimination of All Forms of Racial Discrimination* ('EAFRD')
7. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* ('DEIDRB')

Principles of the Covenants/Treaties

To best understand how the Commonwealth derives it's authority, it becomes necessary to determine the key principles of each of the Conventions or Treaties to which Australia is

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[4] *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

[5] *Richardson v Forestry Commission* (1988) 164 CLR 261 at 326 (per Dawson J). This view was accepted by the majority in the *Industrial Relations Act Case*.

[6] (1996) 187 CLR 416 at 487-488 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

[7] (1996) 187 CLR 416 at 489 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

[8] (1983) 158 CLR 1 at 231 (per Brennan J).

signatory. To narrow the focus of this enquiry, this submission intends to look particularly on the requirements of those Conventions to which the *Sex Discrimination Act 1984* (Cth) looks to derive its basis. It is accepted that DEOC and CRPWD are to some extent capable of implementation by looking to the detriment on the individual provided that the detriment is on the basis of a protected attribute and caused by discriminatory conduct. There are two major issues arising from these Conventions - the fundamental principle of the Convention which the legislation must enact in order for a proportionate implementation, and the overarching principles concerning sovereignty contained therein. It is noted that the principles of ICCPR are fundamentally consistent with the other Covenants - and in terms of CEDAW cast the same comparison as is set out below.

The fundamental principle of CEDAW is repeated throughout (emphasis added):

> 'Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the *equal rights of men and women*...'
>
> 'Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards *the promotion of equality between men and women*...'
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> 'For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise *by women*, irrespective of their marital status, *on a basis of equality between men and women*...'
>
> '...to eliminate discrimination against women in order to ensure them equal rights with men...'
>
> 'States parties shall accord to women equality with men before the law.'

It is clear throughout that the Convention is seeks to eliminate any form of delineation, subrogation, differentiation or segregation between men and women which has a detrimental effect on the dignity of a person or class.

There are two principles employed by the Conventions - arguably each of these principles already utilised by the various Anti-discrimination Legislation. The first is the promotion of opportunity for those who may otherwise be at a disadvantage. Such principle is at work in DEOC and CRPWD. The other principle utilised in chief by CEDAW (but also by EARD) - equal treatment and opportunity between classes of people in comparison to each other. As is mentioned above, the relevant test for CEDAW is that *compared* to men, women are treated equally and given equal opportunities. The base line for understanding sex discrimination according to CEDAW is the comparison between treatment of men and treatment of women. The key principle of this Convention is *comparative*. This requirement is recognised by the *Sex Discrimination Act 1975* (UK):

> 1. A person discriminates against a woman in any circumstances relevant for the purposes of a provision of this act if -
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>   a. on the ground of her sex he treats her less favourably than he treats or would treat a man;
>   b. he applies to her a requirement or condition which he applies or would apply equally to a man but -
>   i. which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it; and
>   ii. which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
>   iii. which is to her detriment because she cannot comply with it.

Two submissions are made in light of this:

1. CEDAW cannot be proportionately implemented without recognition of the fundamental aspect of comparison between those in possession of a particular attribute and those not in possession of the same;
2. Discrimination which CEDAW seeks to prevent is the unequal treatment of men and women - the purview is to eliminate prejudicial treatment based on the attribute of womanhood.

The second point is noteworthy: unequal treatment, for the purpose of sex discrimination (derived from CEDAW), must be defined in terms that relevant conduct must differentiate between men and women. It has been argued broadly that discrimination against a woman on the basis of homosexuality is such as to constitute discrimination against women. This construction is deficient on the basis that the cause of the discrimination is not womanhood, but sexuality. Discrimination on the basis of sexual orientation is not sex discrimination as CEDAW constitutes because there need not be a fundamental disparity between the treatment of men and women. See Spender J of the Federal Court of Australia:

> 'To give effect to the Convention, the legislation must be directed at the elimination of discrimination against women. Legislation which is directed at the elimination of discrimination generally could not fairly be characterised as legislation "giving effect to the Convention".'[9]

Sex discrimination defined in wider terms than this goes beyond the legislative power of the Commonwealth on the basis that it fails to recognise the fundamental principles of the Convention (as in *Aldridge*), thus failing to proportionately implement the Convention (as required by the majority in the *Industrial Relations Act Case*) and going beyond the scope of the Convention and thus the legislative power of the Commonwealth (as in *Burgess*). It is worth adding that any rights expressed by ICCPR are expressed on too vague terms to give rise to broader terms in this regard. A test for sex discrimination must be on the basis of different treatment between men and women.

The rationale for this is not to allow or stand idle whilst discrimination on the basis of sexual or gender orientation occurs, but rather to provide time to properly assess the appropriate response. It is accepted that the *Yogyakarta Principles* announce an agreed upon approach to ensuring that people are not deprived of civil and political rights (as established by ICCPR) on the basis of sexual or gender orientation, but such principles do not expound a clear and identifiable approach to resolving issues, nor can they be considered binding at this stage. Primarily, the Principles promote 'sameness' rather than equal treatment - they ignore difference and fail to allow for equality in a positive sense (which makes allowance for self-determination). The shortcomings occur simply because it is not clear what equality requires.

In terms of sexual orientation and gender identity, the prospect of merely broadening existing definitions to allow for the inclusion of the attributes of sexual orientation and gender identity fails to account for differences which must be recognised in order to promote true equality. A body of critical theory exists which strongly posits that by merely including people within already established heteronormative institutional structures,

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[9] *Aldridge v Booth* (1988) 80 ALR 1 at 18

inequalities which already exist will only be perpetuated.[10] Whilst the writer is supportive of the proposition that people should generally not be discriminated against on the grounds of their sexual identity or gender orientation, it is submitted that the Commonwealth ought to be concerned at the proposed advancement of a social trend which requires people who identify with a particular sexual preference to conform to heteronormative cultural values in order to obtain social legitimacy.[11] Sameness and equality are distinct ideas. It is not within the scope of this submission to discuss the social and political imbalances caused by the advancement of sameness over equality other than to submit that, at this point, a knee-jerk reaction by the Commonwealth is likely to deepen rather than resolve the issue.

At this time the requirements of equality in respect of sexual orientation or gender identity are not sufficiently clear for the Commonwealth to draft adequate legislation. Furthermore, the Commonwealth lacks the power to make legislation in respect of this ground. Perhaps, for the moment, a more appropriate inquiry is into the legal and historical development of certain social institutions,[12] and rather than attempting to legislate morality by enforcing 'sameness', considering how a moral institution can be incorporated into a framework which promotes difference-embracing equality.

Notwithstanding the above, it is submitted that there is room for the Commonwealth to establish an exemption class (or, as is argued for alternately below, a class of legitimate purposes which accords with the *Yogyakarta Principles*. Principle 20 states:

> "Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities."

It is submitted that it would be acceptable to provide an exemption (or class of legitimate purpose) for such associations, organisations or bodies corporate as exist to provide, support, assistance or services for persons of a particular sexual orientation or gender identity.

It is noted that UDHR, ICCPR and DEIDRB do not just address broad rights of discrimination generally, but also address freedom of religion and freedom of association. UDHR notes that:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others

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[10] Clarke, V. and S Finlay. 'For Better or For Worse? Lesbian and Gay Marriage'. (2004) 14 *Feminism & Psychology* 17; Ettelbrick, P. (1997) 'Since When is Marriage a Path to Liberation?', in Mark Blasius and Shane Phelan (eds) *We are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, pp. 757–61. New York: Routledge. At 759.

[11] For an alternate view on this point, view http://richardtwaghorne.wordpress.com/2011/04/05/gay-marriage/

[12] For example, a comparative exposition into the history of hereditary title in Roman, Feudal, Canon and Common law provides necessary insight into the development of the present-day relationship between social/religious institutions and their development at law, perhaps elucidating such elements of contemporary institutions which should and should not be determined by legal and political processes and should be better left to conscience.

and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[13]

"(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association."[14]

ICCPR notes that:

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."
"The States Parties to the present Covenant undertake to have respect for 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."[15]

"Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."[16]

DEIRDB notes that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."[17]

"In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia , the following freedoms:

(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

(b) To establish and maintain appropriate charitable or humanitarian institutions;

(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

(d) To write, issue and disseminate relevant publications in these areas;

(e) To teach a religion or belief in places suitable for these purposes;

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[13] Article 18

[14] Article 20

[15] Article 18

[16] Article 22

[17] Article 1

(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels."[18]

Accordingly, a proportionate implementation of these instruments requires the balance of freedom of association and freedom of religion against equality. An enactment which fails to pay due regard to these freedoms as set out by the covenants (yet purports to derive its legislative power from the covenants) is not a valid exercise of the Commonwealth's legislative power

Free Exercise of Religion

This express Constitutional protection must prevail over the provisions the International Covenants. Whilst the Commonwealth is given the *power* to legislate in respect of external affairs (and thus to create liability thereunder), Religion is given an *immunity* from the powers of the Commonwealth (thus disabling the Commonwealth from legislating in respect of religion). A Hohfeldian analysis indicates a simple hierarchy - the External Affairs *power* is subordinate to the Religious *immunity*. This is expanded as follows.

The only express right of broad scope provided by the Constitution is contained in section 116:

"The Commonwealth shall not make any law... for prohibiting the free exercise of any religion..."

Such freedom has been given a broad application by the High Court of Australia,[19] extends to the freedom not to have a religion,[20] and extends to both practices and beliefs.[21] Significantly, this is an express right given by the Constitution. It will be noted below that it was intended that this right would not be interfered with.

Any consolidation of anti-discrimination legislation thus cannot prohibit the free exercise (of practices or beliefs) of religion aside from as is 'necessary for the protection of the community or maintenance of social order'.[22] The exercise of religion is prone to being a ground of considerable contest by virtue of the strong moral and conscientious issues which are enlivened by such disputes, and the tension between equality of opportunity and freedom of religion has the potential to produce some of the greatest controversies. However, as will be discussed below, it is submitted that religious organisations have a

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[18] Article 6

[19] Ratnapala, S. (2007) *Australian Constitutional Law.* Melbourne: Oxford University Press. At p 309

[20] *Adelaide Company of Jehova's Witnesses Inc v Commonwealth* (1943) 67 CLR 116

[21] Above n 19.

[22] *Kruger v Commonwealth* (1997) 190 CLR 1.

social function within the democratic system, and with the correct balance of liberty can have an active and progressive role in federalism rather than standing outside and aloof from the process. If given the proper freedoms, religion could properly self-regulate in a social sense and not require limitations to its exercise for the maintenance of social order. Thus this tension between religious liberty and equality of opportunity commands great care when developing any proposed new legislation.

The Supreme Court of the United States has developed a jurisprudence to justly and effectively adjudicate contests between religious liberty and equality as is outlined in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 U.S. 1. The Court notes that the development of the law has been such that the Court recognises the differentiation between 'calling' and employment. To such end as the role taken up is a conscientious (in this case religious) calling or appointment, the Court will not interfere with the enjoyment of that legitimate interest. It is noteworthy that this construction is not merely statutory - it is derived from the United States' Constitutional free exercise clause (after which Australia's clause was modelled). Monsma provides a further outline of the US jurisprudence and suggests an interpretative approach to the construction of the US freedom of religion clauses which appears consistent with the Australian approach.[23] This is discussed further below.

Part 2: Church and State in Australian Federalism

The prohibition on the Commonwealth legislating in respect of three grounds relating to religion in s 116 of the Constitution is the enactment of the principle of separation and church and state, but to properly understand how this relates to the current issue, the philosophy of the relevant principles must be understood.

It is first to be noted that the framers of the Constitution intended that the clause be inserted in terms of non-establishment - that is, the avoidance of the establishment of a particular Church or denomination in Australia (as for example, the Church of England in the United Kingdom). The balance of s 116 leads to the conclusion that it was intended from Federation that there be a distinction between State affairs and Religious affairs, and such distinction is reflected in the attitude of the Courts:

> "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar": *Catch the FIre v Islamic Council* (1998) 206 FLR 56 at 69 (per Nettle JA).
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> "It hardly needs to be said that in this country the law recognises a complete freedom of conscience in matters of religion. No one is compelled to adhere to, or to abjure, any particular religious opinions": *Attorney-General (NSW) v Grant* (1979) 135 CLR 587 at 600 (per Gibbs J).
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> "The Truth or falsity of religion is not the business of officials or the courts": *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 150 (per Murphy J) (hereinafter 'the *Scientology* Case').
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> "[C]ourts should not decide questions of doctrine, practice or procedure in ecclesiastical government. This would exceed the judicial sphere and interfere with religious freedom. Judicial determination of religious doctrine and practice is as much state interference in religious affairs as legislative and administrative measures are.": *Attorney-General (NSW) v Grant* (1979) 135 CLR 587 at 512 (Murphy J).

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[23] Monsma, S. 'Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground' (2000) 42 *Journal of Church and State* 13

The foremost proposition in this respect is that that the State ought not, and indeed is bound not to intrude upon the religious conscience of individuals or organisations. The 'Free Exercise Clause', when understood alongside the non-establishment clause of s 116, instructs us that the Commonwealth can 'never, under any circumstances, allow itself to be used as an instrument to either suppress or promote, to any extent whatever, religious belief and worship.'[24] Put in simpler terms, the Commonwealth cannot be seen as for or against any religion. Australia was constituted to govern neutrally in respect of religion. Such neutrality is discussed further below.

If properly undertaken, religious organisations can become valuable contributors to the federal democratic process by providing a diverse field in which 'power' (in this circumstance specifically conscience) is exercised, allowed to self regulate and balance itself and thus provide valuable 'goods' to Australia's federal democracy.[25] To this end, Religion can be seen as a type of market which requires a large degree of autonomy in order to properly develop.

This concept is not foreign to the Courts. It is recognised that the Courts will not interfere with the Business Judgment of Company Directors who have acted in good faith, for a proper purpose and in the interests of the Company.[26] The rationale behind this is that Company Directors are better situated to make business decisions - the market is their domain and in the absence of *mala fides* the Court does not presume to make judgments which are ultimately beyond the scope of the law.

There are like market analogies with religion. Ahdar notes the dicta of Adam Smith from *The Wealth of Nations*:

> 'A deconcentrated religious marketplace was recommended: 'yet provided those [religious] sects were sufficiently numerous, and each of them consequently too small to disturb the publick tranquillity, the excessive zeal of each for its particular tenets could not well be productive of any very hurtful effects, but, on the contrary, of several good ones …'[27]

Starke and Fink analyse religious choice in terms of economic rational choice theory. Accordingly, engagement and participation by 'consumers' in religion constrains conduct by religionists[28] - the 'religious market' is the method by which 'religious power' becomes subject to checks and balances in a like manner to the market. Further discussion of the

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[24] *Catholic Church of the Diocese of Darwin Property Trust v Monteiro* (1987) 87 FLR 427 at 444-445 (per Nader J),

[25] I borrow the reasoning of Gerken, H. 'Federalism All The Way Down'. (2010) 124 *Harvard Law Review* 4, page 6.

[26] *Corporations Act (Cth) 2001* s 180(2).

[27] Ahdar, R. and I. Leigh. (2005) *Religious Freedom in the Liberal State*. Oxford: Oxford University Press. At p 93

[28] Stark, R. and R. Finke. (2000) *Acts of Faith: Explaining the Human Side of Religion* (Berkeley)

market forces acting upon religious entities has been entered by James Madison (author of *The Federalist Papers*)[29] and McConnell and Posner.[30]

There are two points to take from this:

1. Law is only one method by which a societal structure may be constrained;
2. Societal and economic pressures are the method by which 'religious power' is checked and balanced.

It is thus submitted that, similarly to the discretion of company directors acting on business acumen, it is proper that religionists, whether individuals, organisations or bodies corporate, be given the discretion to determine conduct in accordance with religious conscience. If that individual, organisation or body corporate considers that particular conduct is in the best interests of pursuing its religious conscience, decision-makers must be excluded from determining that question of religion. The limit to any such enquiry must be analogous to the Business Judgment Discretion: was conduct undertaken in good faith in pursuance of the religious conscience of that individual, organisation or body corporate? Fortunately, such a test can be expressed, rather in terms of religiosity, in terms of 'legitimate interests' and becomes suitable as an alternative to the exemption regime (discussed below under the heading 'Social Tolerance').

In order for religious liberty to flourish (and thus become engaged in the political process), Ahdar and Leigh posit two requisites:

1. Even-handed and neutral treatment of religion by government; and
2. Social tolerance.[31]

Neutrality

One form of neutrality that Ahdar and Leigh note is conducive to religious liberty is termed 'substantive or positive neutrality'.[32] Monsma notes that 'Substantive or positive neutrality, properly understood and applied, merely levels the playing field; it assures that government is not making following the dictates of one's religion either easier or harder to follow.'[33] Monsma's construction of substantive neutrality appears compatible with the section 116 jurisprudence of the High Court of Australia.[34] In practical terms, 'the proper

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[29] Madison discusses the desirability of a 'broad marketplace' which provides for diffuse power in a similar sense that federalism provides a desirable dispersion and decentralisation of power which gives voice to less powerful actors within the system. See further Eisgruber, C. 'Madison's Wager: Religious Liberty in the Constitutional Order' (1995) 89 *Nw U L Rev* 347.

[30] McConnell and Posner note that the First Amendment to the Constitution of the USA can be understood as providing that the realm of private choice (market) is the best method for external forces to act upon religion. Religion in that sense is a Constitutionally prescribed marketplace which is best regulated within the sphere of rational and private choice.

[31] Above n 27 at page 87

[32] *Ibid* at page 90.

[33] Monsma, S. 'Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground' (2000) 42 *Journal of Church and State* 13, at p 31.

[34] Note, for example, *Krygger v Williams* (1912) 15 CLR 366 and *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559

comparison can hardly be between someone who refuses available employment to observe the Sabbath and someone who declines work because it is his golfing day.'[35] To properly deploy religious freedom it must be recognised that the dictates of the conscience are not appropriately bound by the laws of the State in the same manner as other rights may be.

This is an obvious reflection of Berlin's conception of positive liberty. In certain circumstances it is simply insufficient for government to stand idle to allow liberty - sometimes it must positively act to promote adequate conditions for self-determination.[36]

This neutrality is consistent with the intention of the framers of the Constitution:

> "'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious. test shall be required as a qualification for any office or public trust under the Commonwealth.'
>
> While, therefore, a concession has been made to the popular opinion that some reverential expression should be embodied in the preamble, due care has been taken by the Convention that no reliance upon that provision, and no far-fetched arguments based upon it, shall lead to any infraction of religious liberty under the laws of the Commonwealth which we hope to create."[37]

In terms of a proposed consolidation of Anti-discrimination legislation, the cumulative conceptions of positive liberty and positive neutrality require the preservation of the *legitimate rights* of those whose religious conscience becomes disturbed by a requirement which would otherwise be fair - in other words the rights of a person to observe the Sabbath are more fundamental and in need of active protection than the right of a person to play golf. Arguably the exemptions regime makes this allowance, and at the minimum this needs to be upheld. But it is submitted that the exemptions regime is insufficient to satisfy Ahdar's second limb - and is thus insufficient to foster religious freedom in a secular state (as is at minimum implied if not required by the Constitution).

Social Tolerance

The issue of social tolerance goes to the legitimacy of certain democratic values such as freedom of religion. It is argued that such values are currently considered a social indulgence rather than a legitimate (and indeed fundamental) human right. It is submitted that the construction of a test for unlawful discrimination as is outlined below can assist to develop a healthier social attitude towards liberty.

The exemption regime, whilst providing legal utility, has social consequences flowing therefrom. Take as an example the following public comment by the NSW Anti-Discrimination Commissioner:

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[35] Above n 27 at page 89

[36] Berlin, Isaiah. (1958) *Two Concepts of Liberty*. Oxford: Clarendon Press.

[37] 1891 Australasian Federation Conference. Appendix. Commonwealth of Australia Bill. 9 April 1891 (per Barton, E.)

> "It's a breach of the Anti-discrimination Act, there's no question about it. But a religious school is probably exempt from that breach."[38]

The consequences flowing from this statement are such that the rights of an exempt organisation in respect of discrimination are viewed as something of an indulgence by society - the fact that conduct is viewed as discriminatory but for the fact that the party is able to 'get away with it' unnecessarily stigmatises that party, and to some extent lowers the public estimation of a party who falls within that exemption class.

It is submitted that the core issue is the construction of exemption categories as a defence. A fair analogy in this respect is to the operation of a defence in criminal law - specifically the defence is only available or necessary when the elements of the crime have been made out against the defendant. The same effect applies to exemptions, only social stigma is derived from the defendant having violated the value of equality (which it is argued has no equivalent value under the current legislative regime).

It is proposed that the method by which to address this shortcoming is to recast the objects of the Act and the test for unlawful discrimination. A more balanced approach is to acknowledge that equality is one among several values in democratic society, and particularly the values of liberty and fraternity are also indelible values which must be protected.

The balance thereto is not provided by the exemption regime. Whilst it acknowledges that behaviour in pursuit of religious conscience is not unlawfully discriminatory behaviour towards an individual, the exemption regime nonetheless stigmatises that behaviour.

It is submitted that, when one looks to the operation of exemptions, it is noticeable that exemptions operate to (legally) justify conduct undertaken in pursuit of a legitimate interest. A Roman Catholic Church is justified in appointing only male priests on the basis that the religious conscience of the Church is bound in that respect. Significantly, the exemption does not *mandate* sex discrimination in Churches, but leaves it as a matter of conscience to be decided by that Church.[39]

It is submitted that the operation of the exemption regime fails to promote social tolerance by leaving it open to be opined by the public that behaviour is improper and requiring a party to vindicate itself by proving that it falls within an exemption category.

A process which would promote social tolerance at minimal impact to a complainant and with substantially the same outcomes is thus to reverse the presumption: proscribe a set of discreet values to which a presumption of innocence is ascribed. The only burden to a complainant is that it must allege that conduct was not in pursuance of that legitimate interest in order to make its case. *Such burden will ultimately fall upon a complainant in any case* - at some point in the process the Complainant will reply to a Defence. There need only be a prima facie case, a defendant would then need to lead evidence that it did act in pursuance of a legitimate interest and that the presumption should be upheld. This method makes no substantive difference to the preparation of a Plaintiff's case – if anything it may streamline the entire dispute process and provide more certainty to the parties and the decision-maker. For the conduct of a dispute, this method may place more

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[38] 'School Rejects Daughter of Same-sex Couple'. *The Australian.* December 14 2011, page 7.

[39] Macfarlane P, and S Fisher. (1996) *Churches, Clergy and the Law*. Annandale: Federation Press. At p 152.

pressure on a Defendant to ensure that it has acted appropriately. However the net effect is that, rather than being seen as Society's indulgence, diverse viewpoints would be encouraged by acknowledging that liberty (for example Religious freedom) and fraternity (for example freedom of association) are equal rather than subordinate values to equality.

Part 3: The Necessary Element of Unlawful Discrimination.

If one has consideration to the current exemption regime, it is noteworthy that exemptions apply where a legitimate right caused discriminatory behaviour. For example, the religious conscience of a person may cause them to act in a manner which would otherwise be unlawful discrimination. The logical nexus between exemption and behaviour is considered in the comparator test - that is, a requirement that that differential treatment be demonstrated draws a decision-maker to consider why the impugned conduct was engaged.

The language of the Covenants has already been discussed. It is worth repeating at this point however, that the international obligation to which Australia has submitted is to promote '*equal treatment*'. The making of an award for detriment is equivalent to the promotion of equal treatment. To proportionately implement the Covenants, the Act must make include the element of unequal or differential treatment. The penalisation of detriment without the necessity of demonstrating differential treatment imposes a potential limitation on liberty without properly implementing the covenants or, more importantly, ensuring that a civil right has been adversely affected.

Conclusion

The issue as to Anti-Discrimination is far-reaching. It goes beyond the publicity of certain issues and reaches well into the private sphere and the everyday practice of individual conscience and decision. The Commonwealth ought to be clear-minded and cognisant of this fact prior to commencing the establishment of any rules which will have effect not only at a legal level, but also at a social, moral, private and conscionable level. This issue is not such as is given to prompt reaction and quick decision, but rather must be thought through to produce the correct balance.

The Constitutional basis of Commonwealth legislative power is founded on the requirement of substantively neutral treatment in respect of religion. In a Constitution noticeably scant on expression of rights, it has been considered appropriate to broadly protect the expression and practice of religious conscience by prohibiting its restriction by the Commonwealth. Aside from the illegality of creating enactments which prohibit the free exercise of religion, the requirement by any government that legislation replace conscience is inappropriate.

> "... when a man is denied the right to live the life he believes in, he has no choice but to become an outlaw".[40]

Such prohibition in the name of 'civil rights' is hypocrisy - the denial of freedom of conscience is one injustice which the civil rights movement decried. Issues of conscience speak directly to the core of society and must stand aside from legal interference. A misaimed attempt to secure freedoms is just as likely to establish the very prejudice which that attempt seeks to abolish. The realm of private and conscientious choice is to be

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[40] Nelson Mandela. (1995) *Long Walk To Freedom: Autobiography of Nelson Mandela.* London: Abacus.

relegated to private and conscientious decision - hence our Constitution separates Religion and Law and requires substantively neutral legal and political treatment of religion.

When crafting its response to the contemporary situation regarding discrimination and Human Rights, the Commonwealth must have regard to the breadth of legitimate rights and values to be enjoyed. It is unsatisfactory to perpetuate injustice on the basis of securing the primacy of equality - particularly given the danger of equality being substituted for sameness. A proportionate implementation of Australia's obligation under the Convention requires a balanced approach - not just looking to the Conventions to implement equality, but also with a view to ensuring that those liberties and other values promoted are also balanced thereto.

It is therefore desirable and proper that any proposed enactment consider not only the protection of equality, but the protection (both legally and socially) of the legitimate countervailing interests which Australia values - Liberty and Fraternity. A balanced approach is to ensure that Courts and tribunals are limited to answering questions of genuine discrimination - an act in pursuance of another legitimate right is not an act which has the effect of discrimination against a person. Certain questions - particular as to Religion - are not determinable by legal institutions and must be left to conscience. An adequate approach to ensure non-interference is to treat religion in market terms - just as a *bona fide* business decision made for a proper purpose is not a justiciable question for the Courts, so a *bona fide* decision made in pursuance of religious conscience must be for the individual, organisation or body corporate making such decision.

The most desirable outcome is to give diverse values voice rather than determining and enforcing a moral position. The method by which this can be achieved is by developing an environment in which self-determination and positive liberty can mature and lead to a mature framework which appreciates and values difference and fosters equality in diverse terms. Social structures and systems of morality which underlie society ought to be given voice and engagement in a diverse democratic environment which respects difference and develops an environment whereby difference is celebrated rather then scorned.

Schedule: Proposed Enactments.

Objects of this Act

1. The objects of this Act are:

    a. The provision of a just and consistent method for the resolution of disputes as they arise with respect to allegations of unlawful discriminatory behaviour;
    b. The protection and preservation of legitimate rights, values and interests, including freedoms, equality of opportunity and fraternity which this Act assigns to individuals, associations, organisations and other groups within the Australian context;
    c. The provision of just and equitable remedies to parties whose rights and interests have been infringed in factual situations where there is an absence of any proportionate or countervailing right or interest; and
    d. The reputational and social protection of parties who have not engaged in discriminatory conduct which is made unlawful by this Act.

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Unlawful Discrimination

1. Conduct is made unlawful by this Act if:

    a. The party engaging in that conduct (*the discriminator*) has not acted in pursuance of a *legitimate interest*; and
    b. On the grounds of a *protected attribute*, being:
        i. The sex of the aggrieved person; or
        ii. The race or ethnic background of the aggrieved person; or
        iii. The age of the aggrieved person; or
        iv. A characteristic that generally appertains to any such characteristic of the aggrieved person; or
        v. A characteristic that is generally imputed to persons who share the same of such characteristics of the aggrieved person;

    the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat persons who are not possessed of the particular protected attribute; or

    c. On the ground of a protected attribute of the aggrieved person the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons possessed of the same protected attribute as the aggrieved person.

2. An individual, organisation or body corporate is taken to have engaged in conduct in pursuance of a legitimate interest (and thus has not breached subsection 1) if that individual, organisation or body corporate;

    a. Engaged in the conduct in good faith;

b. Honestly believed that the conduct was undertaken in pursuance of the legitimate interest; and
c. Reasonably held that belief.

3. For the purposes of subsection 2(a), an individual, organisation or body corporate has engaged in an action or behaviour in good faith if;

   a. The individual, organisation or body corporate has considered the circumstances of the case;
   b. Has not been reckless in deciding to engage in conduct; and
   c. Has not acted or behaved in a way so as to intentionally cause injury to the aggrieved person.

4. For the purposes of subsection 2(c), when determining whether an individual, organisation or body corporate reasonably held the belief that conduct was undertaken for the legitimate interest;

   a. the court/tribunal may have regard to;

      (i) The circumstances in which that individual, organisation or body corporate formed that belief;
      (ii)Whether that belief would ordinarily be held by that individual, organisation or body corporate;
      (iii)The possible consequences of acting in the manner proposed by the aggrieved person;
      (iv)Any similar decisions previously made by the individual, organisation or body corporate; and
      (v)The past and other relevant circumstances of the individual, organisation or body corporate.

   b. The court may not form an opinion in respect of, nor have regard to;

      (i) The reasonableness of that belief;
      (ii)The aggrieved person's understanding of the belief.

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Legitimate Interests

1. Interests which are deemed not to give rise to discrimination include:

   a. Such conduct as are required by, prohibited by or as are otherwise consistent with the religious conscience of the particular individual, organisation or body corporate;
   b. Such as are necessitated by a particular occupation;
   c. Such as are a reasonable basis for membership of a particular organisation or association;
   d. Such as a reasonable for a business employing fewer than 25 employees on the basis of type of duties to be performed and the turnover of the business;
   e. Such associations, organisations or bodies corporate which provide support, assistance or services to persons of a particular sexual orientation or gender identity;
   f. Such other interests as are allowed from time to time, whether permanent or temporary, by the Australian Human Rights Commissioner [or whatsoever other Commissioner is appropriate].