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# AUSTRALIA


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## Introduction

1. ADF International is a global alliance-building legal organization that advocates for the right of people to freely live out their faith. As well as having ECOSOC consultative status with the United Nations (registered name "Alliance Defending Freedom"), ADF International has accreditation with the European Commission and Parliament, the Fundamental Rights Agency of the European Union, and the Organization for Security and Co-operation in Europe.

2. This report focuses on Australia's shortcomings in its obligation to guarantee freedom of religion, highlighting how the serious lack of protection for freedom of religion has had negative consequences for people of faith. The report has three main recommendations:

    (a) Enact legislation specifically protecting the right to freedom of religion, using ICCPR article 18 as a model;

    (b) Amend the definition of discrimination to exclude differentiation of treatment resulting from the good-faith pursuit of a legitimate objective, such as the exercise of a fundamental freedom recognized by the ICCPR;

    (c) Add religion as a protected characteristic in anti-discrimination legislation.

## (a) Recognition of Freedom of Religion in Legislation

3. Australia has ratified the International Covenant on Civil and Political Rights, although ratification does not confer rights in Australia without enactment of specific legislation. Australia has fallen short of its obligation to follow its commitments under ICCPR by failing to protect freedom of conscience and religion (art. 18), and the rights that are necessarily associated therewith, including freedom of expression (art. 19), and freedom of association (art. 22).

4. Specifically, Australia has failed to enact legislation guaranteeing freedom of religion to the level it is protected by the ICCPR. This absence is stark, given that the ICCPR asserts the freedom of religion is fundamental and non-derogable (art. 4(2)).

5. Australia should enact legislation on freedom of religion, using ICCPR article 18 as a model. In particular, such legislation should ensure that the right to hold beliefs is absolute, and the right to manifest religion or belief in worship, observance, practice, and teaching is only limited in narrow circumstances: where "prescribed by law" and "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (art. 18(3)). This is a high threshold.

6. Because the rights to manifest one's faith and to act according to the dictates of one's conscience are not firmly established in both federal and state law, these rights lose when they come into conflict with other rights and freedoms that are protected in law. Even perceived rights, like the "right" not to be offended are given more weight by courts.

7. The absence of legislative protection for freedom of religion has burdened people of faith and faith-based organizations, who have been punished or face threat of punishment—or possibly being forced to act against their conscience—for manifesting their religious beliefs. A robust protection in law of freedom of religion and the associated freedoms of conscience, expression, and association would allow them to live out their faith freely.

*Examples of violations of the freedoms of religion, conscience, expression, and association*

8. In one of the most famous cases in Australia, the "Two Dannys" case, which took place from 2002 to 2006, two Christian pastors were prosecuted under the Racial and Religious Intolerance Act 2001 (Victoria).[1] Section 8 of the law states, "A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons." Three Muslims in attendance brought a complaint under this provision and a hearing before the Victorian Civil and Administrative Tribunal ensued. The VCAT found against the pastors, deciding that the there were 19 vilifying statements made in the seminars and the pastors did not establish that their conduct was "engaged in reasonably and in good faith [ . . . ] for any genuine academic, artistic, religious, or scientific purpose," an exemption provided for in section 11. The Court of Appeal found that the Tribunal erred in its assessment of the statements and sent the case back to the Tribunal.

9. Although the original decision of the Tribunal was vacated, the case indicates a lack of respect for freedom of expression and freedom of religion. Fortunately, the exception in section 11 has since been amended to state that "a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising." However, the law restricts discussion of and debate on religious issues, and prevents criticism of controversial tenets and practices of religions.

10. Section 124a of the Queensland Anti-Discrimination Act is likewise concerning, as it bans public "incite[ment of] hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group." Although no case law on this provision exists, it provides an opportunity for increased favouring of the perceived right not to be offended when in conflict with fundamental freedoms.

11. In the case of *Christian Youth Camps Limited & Ors v Cobaw Community Health Service Limited & Ors*, the Victorian Court of Appeal in April 2014 upheld a fine against a Christian youth camp that felt it was against its Christian mission to allow a group promoting homosexual sexual activity to use its accommodations.[2] The Equal

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[1] David Palmer, *Religious harmony and anti-vilification laws: A pastor's perspective*, VIEWPOINT 29-32 (Oct. 2009), *available at* http://www.viewpointmagazine.com.au/download/viewpoint_issue1.pdf.

[2] Neil Foster, *Christian Youth Camp liable for declining booking from homosexual support group*, http://www.freedom4faith.org.au/resources/Reading/Christian%20Youth%20Camp_Neil%20Foster%20Summary.pdf.

Opportunity Act 2010 (a Victorian law) prohibits discrimination on the basis of same-sex sexual orientation, but allows an exemption for "anything done by a body established for religious purposes that (a) conforms with the doctrines of the religion; or (b) is necessary to avoid injury to the religious sensitivities of people of the religion."

12. The court treated the right to be free from discrimination as more expansive than the right to freedom of religion, and was narrow in its understanding of religious freedom. It found that the refusal of accommodation was based on sexual orientation, even though the camp said it was due to the promotion of homosexual activity and not orientation. The court also found that the camp was not a body established for religious purposes, despite its explicitly Christian goals in its founding documents, and even if the camp had been, it would not be protected because its refusal of accommodation was not justified by its doctrines or the sensitivities of believers. Judges should not be the arbiters of what constitutes core doctrines of a faith. Further, their understanding that commercial activity precludes a body from being established for religious purposes is severely limiting; religious bodies are not just houses of worship or faith-based schools.

13. The Abortion Law Reform Act 2008 (Victoria) and the Reproductive Health (Access to Terminations) Act 2013 (Tasmania) require that a doctor who has a conscientious objection to abortion refer a patient seeking an abortion or advice on an abortion to a doctor who does not conscientiously object to abortion. To doctors opposed to performing abortions, such mandatory referral amounts to being complicit in the performance of abortions. This violates doctors' freedom of conscience—their ability not to be compelled to participate in an act that goes against what they believe.

14. In Tasmania, the Reproductive Health (Access to Terminations) Act 2013 makes it illegal to protest within 150 metres of an abortion clinic. The 150-metre distance is very broad and includes protests on private property. Protests do not have to be threatening or violent; the law prohibits even peacefully handing out informational pamphlets that do not vilify women undergoing abortions. This outright ban ensures that no one is able to enjoy the freedom of expression within 150 metres of an abortion clinic. This violates the right to freedom of expression found in ICCPR article 19, as it severely curtails speech in an unnecessary manner. It covers such a large area and covers all types of protest; it is not narrowly tailored to prevent intimidation or harassment of those visiting abortion clinics.

15. Although not a religious freedom case, the case of Andrew Bolt is evidence of the alarming trend in law to prefer the "right" not to be offended, even when in conflict with fundamental freedoms, in this case the freedom of expression. In 2011, Bolt was found to have violated section 18C of the Racial Discrimination Act, which makes it unlawful to do a public act if it is "reasonably likely [ . . . ] to offend, insult, humiliate or intimidate another person or a group of people" and done due to "race, colour or national or ethnic origin." Bolt had made comments about people he

perceived had chosen to emphasize Aboriginal identity for personal gain.[3] The threat of punishment for offending or insulting someone has the effect of chilling speech, since it is impossible to determine what is likely to offend others.

16. In the state of Victoria, the Labor Party's 2014 Platform included introducing legislation that effectively makes it illegal for Christian schools and organizations to hire staff on the basis of their faith.[4] A Christian school could be forced to hire someone who fundamentally disagrees with the mission of the school or whose values are contrary to the values promoted by the school. Article 18(1) of the International Covenant on Civil and Political Rights recognizes that religious freedom includes the right to manifest religion in practice and teaching, and in community with others, such as in a religious school. Further, article 18(4) requires states "to have respect for the liberty of parents [ . . . ] to ensure the religious and moral education of their children in conformity with their own convictions." Parents cannot ensure their children will receive such education when religious schools are unable to hire staff whose values conform to those of the school.

*Recommendation to the Council for the Government of Australia*

17. Enact legislation recognizing a positive right to freedom of religion, using ICCPR article 18 as a model.

**(b) Change in Definition and Understanding of Discrimination**

18. Many of the above examples involve alleged "discrimination." Discrimination is broadly defined in Australian law. Little exception is made for differentiation of treatment on the grounds of religion. Religious exceptions should be clearer and stronger.

19. However, differentiation of treatment on legitimate religious grounds should not be considered "discrimination" in the negative sense, as acting according to one's faith is not the same as, for example, discriminating against a class of people for irrelevant reasons such as personal bias. Religious organizations, such as churches and schools, need to be able to employ staff who are able to uphold the ethos of the organization, and hiring decisions made with this goal in mind are not discrimination.

20. The Human Rights Committee recognizes this distinction in paragraph 13 of General Comment 18: "[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."

21. Law professors Patrick Parkinson and Nicholas Aroney have proposed a definition of discrimination that would allow people of faith and faith-based organizations to

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[3] Michael Bodey, *Andrew Bolt loses racial vilification court case*, THE AUSTRALIAN, 28 Sept. 2011, http://www.theaustralian.com.au/business/media/andrew-bolt-x-racial-vilification-court-case/story-e6frg996-1226148919092.

[4] Freedom 4 Faith, *Briefing Paper: Religious Freedom in Employment: The Victorian Situation* 4, 13 Oct. 2014, http://www.freedom4faith.org.au/resources/Work/Briefing%20paper%20re%20Nov%20 2014%20election_religious%20freedom%20in%20employment_13.10.14.pdf.

provide goods and services in such a way as to follow the dictates of their conscience. In particular, the definition focuses on what does not count as discrimination and therefore is permissible:

> (2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:
> (a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
> (b) it is made because of the inherent requirements of the particular position concerned;
> [ . . . ]
> (3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection (2)(a).
> (4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:
> (a) it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
> (b) it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or
> (c) in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.[5]

*Recommendation to the Council for the Government of Australia*

22. Adopt this understanding of discrimination and legitimate differentiation of treatment in both federal and state law to protect the right to manifest one's religion.

**(c) Religion as a Protected Characteristic in Anti-discrimination Legislation**

23. Religion is absent as a protected characteristic in federal and most states' anti-discrimination legislation. This is a serious omission in violation of Australia's obligations under ICCPR article 2, which specifically requires states to respect and ensure rights without distinction as to religion, and article 26, which specifically requires the law to guarantee protection against discrimination on the basis of religion.

*Recommendation to the Council for the Government of Australia*

24. Amend federal and state anti-discrimination laws to include religion as a protected characteristic.

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[5] Patrick Parkinson & Nicholas Aroney, Submission to the Attorney-General's Department International Human Rights and Anti-Discrimination Branch on the Consolidation of Anti-Discrimination Laws 5 (Jan. 2013).