

The Right to Freedom of Religion and Belief and Australia's Education Sector

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This article, written by a University of Canberra graduate student on a semester at Cardiff in 2019, offers a perspective on issues around Australia's contentious Religious Freedoms Bills. It explores questions about curriculum and delivery in Australian schools, discussing law's engagement or indifference to expression in classrooms within a multicultural state that has no established religion, lacks a constitutionally-enshrined justiciable Bill of Rights and adheres to international human rights agreements.

The universal right to freedom of religion and belief is the rock upon which those supporting integration of religion into education in Australia believe they stand. However, this is contested ground, and those who believe religion should be excluded from education equally believe it is they who stand fast upon that same right.

In Australia, disputes about the role of religion, and religious bodies, in education regularly play out in terms of "religious discrimination",¹ and as such, the compulsory education of children has become a key battleground regarding the relationship between religion and the State.² Highly public debates about humans rights and the design of education are made more complex by religious groups' assertions that their right to freedom of religion and belief warrants exemption from generally applicable anti-discrimination legislation, even where the services at the heart of these disputes receive substantial financial support from public coffers.³ Australia's legal system responds to these competing interests, recognizing it is the Parliaments which must determine the appropriate balance between rights.⁴ However, the legal system, and the protections it affords religious freedoms, are limited and inconsistent across Australia's Commonwealth and State/Territory jurisdictions.⁵ Further, given the dominance of Christianity in both private and state education, the required balance to protect the rights of persons holding to other religions or beliefs does not appear to have been achieved.

A *Religious Diversity in Australia*

Australia is a multicultural nation. Wave after wave of migrants have arrived on her shores over the past two centuries and all Australians, other than the indigenous peoples, are either immigrants or their descendants. With each wave of migration, a diverse range of cultures and religious beliefs have been added to this multicultural melting pot. In the first half of the 20th Century, Australia identified as a Christian country and almost all Australians identified as either Catholic or Anglican.⁶ Today, in addition to many smaller Christian sects, Australia boasts communities of Muslims,

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¹ Carolyn Evans, 'Religious Education in Public Schools: An International Human Rights Perspective' (2008) 8 *Human Rights Law Review* 449, 455.

² Evans (n 1) 455.

³ Gary Bouma, 'Religious diversity and social policy: an Australian dilemma' (2012) 47(3) *Australian Journal of Social Issues* 281, 282.

⁴ Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42 *Monash University Law Review* 72, 107.

⁵ Denise Meyerson, 'The Protection of Religious Rights under Australian Law' (2009) 3 *Brigham Young University Law Review* 529, 552.

⁶ Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413, 415-416.

Buddhists, Hindu, Baha'i, pagans and of many other religious beliefs.⁷ For many Australians, their religious beliefs and convictions underpin every aspect of their life. They are integral to who they see themselves to be, how they understand the world around them and determine how they participate in that world in good conscience. In many religions, a believer's failure to adhere to their convictions may have grave consequences, in this life or the next.⁸

Recent census data shows that Christianity remains the most commonly held religion within Australia, though its dominance continues to slowly decline. While in some instances ground is being lost to other religions, the fastest growing "religion" in Australia's most recent census was those who hold no religious affiliation at all.⁹ This group, though not well organised in comparison to the more traditional religions, tend towards concern for social justice issues and upholding individual freedoms, particularly those which are threatened by an adherence to religion. While their voice is struggling to be heard, groups of Muslims, Buddhists, Jews and others are each seeking to be heard and to ensure that their rights are protected to allow them to actively participate in Australian society.¹⁰ Inevitably, in this sea of voices there are different stances on ethical issues across social, political and policy spheres, be that in relation to matters such as abortion, health care refusal, euthanasia, the teaching of Creationism, or myriad other questions.¹¹ Increasing efforts have been made to recognise diversity within the Australian community. It is now commonplace to see religious leaders from various faiths participate in public meetings. Despite this, Australia's Christian traditions remain pre-eminent. For example, many public holidays celebrate key events on the Christian calendar. More subtly, every sitting day of the Commonwealth Parliament commences with the Lord's Prayer despite attempts to include the prayers of other faiths. Similarly, church bells may be heard to ring freely across the country, but a Muslim call to prayer will only be heard from a minaret in compliance with a strict set of conditions.¹²

B *Australia and International Humans Rights Instruments*

In Australia, freedom of religion and belief and associated rights and legal protections are shaped by a series of international human rights instruments to which Australia is a State Party. The key international conventions which relate to freedom of religion and belief are the United Nations Declaration on Human Rights¹³ (UDHR) and the International Covenant on Civil and Political Rights¹⁴ (ICCPR). The ICCPR addresses freedom of religion and belief, specifically at Article 18, where it provides:

1. 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.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

⁷ Bouma (n 3) 287-288.

⁸ Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35 *University of Tasmania Law Review* 106, 113

⁹ Cathy Byrne, 'Religious Education, Social Inclusion and Interreligious Literacy in England and Australia' (2014) 27 *Journal for the Academic Study of Religion* 153, 165.

¹⁰ Bouma (n 3) 287-288.

¹¹ *Ibid* 293.

¹² *Ibid* 283.

¹³ Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A (III)).

¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

3. Freedom to manifest one's religion or beliefs 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.
4. 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

Legal protections pertaining to religious freedom typically make a distinction between holding a religion or belief, and its manifestation. The right to hold of a religion or belief is considered absolute, and is one of very few rights attributed this recognition¹⁶ Within the ICCPR, the right to freedom of religion and belief is one of just seven rights, including the right to life, the right not to be tortured and the right not to be enslaved, that are non-derogable even during a state of emergency.¹⁷ Despite the importance ascribed to it, the right to freedom of religion and belief may be subject to limitations, particularly where the manifestation of that belief would cause harm to others. The ICCPR prescribes that these limitations must be both “prescribed by law” and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.¹⁸ Despite having ratified both these international human rights instruments, the obligations they impose on Australia do not become enshrined in its laws unless the Parliament (whether federal or State/Territory) adopts them through enacting legislation for that purpose.¹⁹

C Australia’s Federal Protections for Freedom of Religion and Belief

As a federation of States, the Australian Constitution (the Constitution) is Australia’s principal legal statute. It establishes Australia’s federal government (the Commonwealth Government) and judiciary, prescribes the limits of the Commonwealth Government’s legislative power, and governs the relationships between the Commonwealth and the States as well as between the States. The Constitution also determines the relationship between the State and religion in Australia. It contains very few provisions dealing with rights and where it attempts to define rights of citizens this occurs only in minor respects.²⁰

In accordance with the Constitution, the Commonwealth Parliament holds legislative power only where it has been expressly granted by the Constitution itself of that power has been ceded to it by a State under the provisions of Section 52. Many “heads of power” were granted to the Commonwealth at federation as prescribed in Section 51. Where the power to legislate has not been ceded to the Commonwealth, residual legislative powers remain with the States. However, following the decision of *R. v. Burgess; Ex parte Henry*,²¹ once the Commonwealth Government enters into a treaty or convention, it gains power to enact legislation to implement it.²² Through ratification of the above international human rights instruments, the Commonwealth

¹⁵ Bouma (n 3) 288.

¹⁶ Gray (n 4) 103.

¹⁷ Walsh (n 8) 111.

¹⁸ *Ibid* 112.

¹⁹ Reid Mortensen, ‘The Unfinished Experiment: A Report on Religious Freedom in Australia’ (2007) 21 *Emory International Law Review* 167, 186.

²⁰ Tim Wilson, ‘The Forgotten Freedoms – Freedom of Religion’ (Blackfriars Lecture at the Australian Catholic University, Canberra, 29 May 2014); The Hon Sir Anthony Mason AC KBE, “Foreword” in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) xi.

²¹ *R v. Burgess* (1936) 55 CLR 608

²² Meyerson (n 5) 529.

Parliament possesses the legislative power it otherwise would not have to establish national human rights standards which would bind both it and the States.²³

Within the Constitution, the only explicit reference to religion is contained in what are generally referred to as the “Religion Clauses” at s 116, which provides:

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.

Some authorities argue that the anti-establishment clause within this section of the Constitution, drafted with reference to similar clauses within the United States of America’s Constitution, provide a guarantee to the right to freedom of religion or belief.²⁴ However, the few cases which have examined s 116 do not support such claims that it serves as a guarantee of religious liberty.²⁵

The anti-establishment clause was tested in the principal case of *Attorney-General (Vic) ex rel Black v Commonwealth*²⁶, in which the High Court of Australia (HCA) considered whether the Commonwealth Government’s funding of Catholic schools was, in essence, establishing a religion in breach of s 116. The Court rejected this proposition, holding that the use of the word “for” in its drafting implied that s 116 applied only where a law was passed for the explicit purpose of establishing a religion or impairing religious freedom. Thus, should a law incidentally impinge upon a person’s right to freedom or belief under the international instruments, it appears that the Constitution affords no protection.²⁷ Further to this, the HCA’s decision also held that the Commonwealth may continue to fund religious schools. At present, there is no suggestion that the HCA is likely to revise this decision.²⁸ Two key cases have also considered the meaning of “free exercise” within s 116 of the Constitution and the protections it affords, namely *Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth*²⁹ (“Jehovah’s Witnesses Case”) and *Kruger v. Commonwealth*³⁰. The outcome of both of these cases was that they were rejected on the ground that the law did not have as its purpose the prohibition of the free exercise of religion.³¹ As such, it appears that the Constitution provides little protection against interference in religious matters by the Commonwealth Government.

In addition, as s 116 does not apply to the States, it also provides no protection against State laws being passed laws which explicitly or incidentally breach a person’s right to freedom of religion or belief. Despite two attempts to amend the Constitution to extend s 116 to the States and Territories, the most recent of which was in 1988, both referenda were unsuccessful. This failure to bind the States and Territories, as noted by Justice Gaudron, leaves Australians in a position where effectively there is no constitutional protection for the right to religious freedom as the States are not constrained from enacting legislation in breach of that right nor for the explicit purpose of doing so.³² As no protection is afforded by s 116 of the Constitution, a person seeking to exercise the right to freedom of religion or belief must then look to other means of legal protection in Australia.

²³ Mortenson (n 19) 186.

²⁴ Gray (n 4) 103; Meyerson (n 5) 538.

²⁵ Bouma (n 3) 288; Wilson (n 20).

²⁶ *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559.

²⁷ Meyerson (n 5) 538.

²⁸ Mason (n 20) xii.

²⁹ *Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth* (1943) 67 CLR 118-119.

³⁰ *Kruger v. Commonwealth* (1997) 190 CLR 1.

³¹ Meyerson (n 5) 539-540.

³² Mortenson (n 19) 177.

In 2009, the Australian Human Rights Commission (AHRC) (formerly the Human Rights and Equal Opportunity Commission) recommended that a national Religious Freedom Act be enacted to provide comprehensive protection of religious freedom in Australia. The AHRC premised this recommendation on the available protections being relatively weak rendering Australia not in full compliance with its international human rights obligations. Despite this recommendation, the Commonwealth Government has not enshrined the protections afforded by the UDHR and the ICCPR into domestic legislation.³³ Consequently, matters of religious freedom rarely, if ever, come before Australian courts and as a result there is little Australian jurisprudence which articulates the limits of religious freedom.³⁴ The limited protections which do exist at the Commonwealth level are spread across a number of laws, principally the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), and the *Fair Work Act 2009* (Cth) (FW Act).³⁵

The AHRC Act establishes the Australian Human Rights Commission (AHRC), Australia's principal body for the protection and promotion of human rights.³⁶ The AHRC is charged with the investigation of alleged breaches of human rights where the alleged breach is the result of Commonwealth Government action. This includes alleged breaches of the right to freedom of religion and belief as the key international human rights instruments are specifically referenced in the AHRC's enabling legislation.³⁷ The AHRC may also examine Commonwealth and Territory laws for compliance with human rights, provide reports and recommendations on how Australia might better satisfy its human rights obligations, and is responsible for public education in human rights.³⁸ However, the AHRC does not have the power to impose enforceable remedies to human rights violations. Instead, the AHRC may only seek to resolve a breach through conciliation or submit a report to the Commonwealth Attorney-General to be tabled in Parliament.³⁹ Similar approaches are taken within the *Racial Discrimination Act*, the *Sexual Discrimination Act* and the *Fair Work Act* to dealing with complaints of alleged breaches of rights, such as those relating to religious discrimination in employment under the International Labour Organisation Discrimination (Employment and Occupation) Convention⁴⁰. Under these acts, discrimination is attributed status a civil wrong, so rather than a report being tabled in Parliament where conciliation does not resolve a complaint, the complainant may then seek leave to commence proceedings in the Federal Court.⁴¹ At the Commonwealth level, protections for freedom of religion and belief remain either relatively ineffective or are embedded in the Commonwealth anti-discrimination legislative regime.

D *Australia's State/Territory Protections for Freedom of Religion and Belief*

As noted above, section 116 of the Constitution does not apply to the States and Territories,⁴² giving each State and Territory Parliament unfettered freedom to establish, forbid or impose any religious belief, practice or observance, or to require public office bearers to adhere to a specified religion or belief unless prohibited from doing so by their State constitutions.⁴³ Amongst the States, only Tasmania's

³³ Ibid 188.

³⁴ Ibid 202.

³⁵ Meyerson (n 5) 531.

³⁶ *Australian Human Rights Commission Act 1986* (Cth) ss 10A-29.

³⁷ Meyerson (n 5) 536-537.

³⁸ Mortenson (n 19) 187.

³⁹ *Australian Human Rights Commission Act 1986* (Cth) s11.

⁴⁰ International Labour Organisation, Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 [hereinafter ILO 111].

⁴¹ Meyerson (n 5) 536.

⁴² Gray (n 4) 90.

⁴³ Meyerson (n 5) 542.

constitution⁴⁴ provides explicitly for a right to freedom of religion and belief.⁴⁵ However, this again provides little protection as it is yet to be judicially considered and can be repealed by an ordinary Act of the Tasmanian Parliament.⁴⁶

Despite this, all states and territories except South Australia and New South Wales, have enacted legislation to prohibit discrimination on the basis of religion. New South Wales' *Anti-Discrimination Act 1977* (NSW) does offer some protection to religious groups who can be classified as an ethnic group as well.⁴⁷ The dispute resolution processes established under State and Territory anti-discrimination laws effectively replicate the two-stage process at the Commonwealth level. Again, unlawful discrimination is a civil matter without a government body responsible for its investigation or prosecution. Complaints filed with the relevant public agency are investigated and, where substantiated, resolution is sought through non-binding conciliation. Unsuccessful conciliation in the States and Territories is usually heard before a Tribunal rather than the courts, however, who may impose binding remedies including declarations, injunctions and payment of damages.⁴⁸

Two jurisdictions, the Australian Capital Territory⁴⁹ and Victoria⁵⁰, have each enacted legislation specifically to establish a human rights framework premised upon the protections afforded under the ICCPR. The right to recognition and equality before the law,⁵¹ the right to freedom of religion and belief,⁵² and the rights of minorities or cultural rights,⁵³ are each enshrined in the local legislation.⁵⁴ Both laws require public authorities within the relevant jurisdiction to comply with the human rights enshrined within them. Where a breach of those rights occurs, the Supreme Court within that jurisdiction may make a declaration that the relevant law is inconsistent with, or cannot be applied consistent with, human rights obligations. However, such a declaration has no effect on the operation of the law in question.⁵⁵

E Exemptions to Anti-Discrimination Laws for Religious Schools

As noted above, anti-discrimination legislation across the Commonwealth, States and Territories⁵⁶ specifically prohibits religious discrimination in relation to employment and education, however, in each jurisdiction there are exemptions for an 'act or practice of a body established for religious purposes' that either 'conforms with the doctrines of the religion' or 'is necessary to avoid injury to the religious sensitivities of people of the religion'.⁵⁷ Despite variations in the details of these exemptions, they follow general patterns, allowing religious educational institutions to exclude a range of individuals

⁴⁴ *Constitution Act 1934* (Tas) s 46.

⁴⁵ *Mortenson* (n 19) 185.

⁴⁶ *Meyerson* (n 5) 540.

⁴⁷ *Ibid* 544.

⁴⁸ *Ibid* 546.

⁴⁹ *Human Rights Act 2004* (ACT).

⁵⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁵¹ *Human Rights Act 2004* (ACT) s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

⁵² *Human Rights Act 2004* (ACT), s 14; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14.

⁵³ *Human Rights Act 2004* (ACT) s 27; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19.

⁵⁴ *Meyerson* (n 5) 543.

⁵⁵ *Ibid*.

⁵⁶ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

⁵⁷ Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 47,

from employment or admission on the basis of religion, gender, sexual orientation and activity, and marital status.⁵⁸ Notably, no blanket exemptions are provided to allow discrimination in education or employment based on race or disability.⁵⁹ These exemptions reflect an attempt to balance the fundamental human rights pertaining to religious freedom and equality.⁶⁰

Discriminatory approaches to employment and admission are commonplace amongst the broad range of religious organisations operating schools in Australia.⁶¹ For example, restricting admission by gender within Australia's education sector is rarely controversial and public debate typically focused on educational and social outcomes rather than religious matters.⁶² However, discrimination based upon the exceptions pertaining to sexual orientation and activity, and marital status consistent prove to be controversial,⁶³ particularly where exercised by schools receiving public funding.⁶⁴

Australian governments began funding non-government schools in 1963,⁶⁵ with the first recipients being Catholic secondary schools. The following decades have seen a major increase in religious educational institutions,⁶⁶ particularly following the revocation of government policies which had restricted the establishment of new non-government schools in the mid 1990s. This rapid expansion in the number of non-government schools saw a number of Jewish, Muslim and Montessori schools, as well as some non-religious schools in specialist fields (i.e. performing arts schools) established. However, more than 90% of new schools were Christian, and many of these were non-denominational faith-based schools "which now form the "Christian School" sector. These schools offer affordable private education taught according to Christian values and typically receive a significant portion of their funding from the public purse - in some cases, less than 20% of funding is derived from tuition fees.⁶⁷ The frequent exercise of the exemptions granted to such schools under anti-discrimination laws in relation to employment and admission, and their fierce insistence on operating independently of state control of their curriculum or ethos despite accepting substantial government financial support, has made the operation of these schools particularly contentious.⁶⁸ It is in these two broad areas that claims to the right to freedom of religion and belief come to the fore.

There is great variety within the extent to which religious schools exercise the exceptions available under the anti-discrimination legislation. Some schools rarely take advantage of the exemptions at all, others use the full range of exceptions and see any application of anti-discrimination law as a breach of right to freedom of religion and belief.⁶⁹ This diversity of views arises, in part, from the purposes for which religious schools have been established. For many, education without strong religious or cultural identity is adequate. For others, schools reflecting their religious or cultural identity and its teaching of religiously based beliefs, moral values, and practices is of critical importance. As noted, the ICCPR supports a parent's right to educate their children in

⁵⁸ Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 395-396; Harrison (n 6) 428.

⁵⁹ Evans (n 58) 397.

⁶⁰ Gray (n 4) 107.

⁶¹ Evans (n 58) 422.

⁶² Evans (n 57) 53.

⁶³ *Ibid.*

⁶⁴ Harrison (n 6) 429.

⁶⁵ Marion Maddox, 'The Church, the State and the Classroom: Questions Posed by an Overlooked Sector in Australia's Education Market' (2011) 34 *University of New South Wales Law Journal* 300, 301.

⁶⁶ Bouma (n 3) 285.

⁶⁷ Maddox (n 65) 302.

⁶⁸ *Ibid* 303, 306, 313.

⁶⁹ Evans (n 58) 422.

accordance with their own religious beliefs.⁷⁰ Religious schools therefore claim it is necessary to discriminate to select staff who share their religious beliefs, or who will honour the beliefs, values and codes of conduct of the school. Religious schools may also impose ongoing adherence to these religious beliefs or codes of conduct as condition for continuing employment.⁷¹ In so doing, religious schools claim to eliminate the tension that exists between hiring teachers or retaining students whose lifestyle is in direct contraventions of the teachings of the religion being wrong. In many cases, this results in the exclusion of unmarried female teachers who become pregnant or students or teachers who are gay, lesbian or in de facto relationships.⁷² As noted above, not all religious schools choose to discriminate in employment or admission and of those that do, not all discriminate on all of the permitted grounds. However, many religious schools have actively opposed any attempt to amend non-discrimination laws that would limit their capacity to do so.⁷³ Some religious organisations have further suggested that the removal of any of the exemptions which they currently enjoy would so gravely undermine their religious freedom that they would refuse to comply with the law.⁷⁴

F *Religion in School Curricula*

A striking example of the tensions that can arise between religious organisations and government interference in their operations can be seen in the Christian School sector's attempt to exert their independence from government control of school curricula in 2010. At that time, the South Australian Non-Government Schools Registration Board outlined its policy position, which rejected science curricula in non-government schools based on literal interpretation of a religious text pertaining to creationism or intelligent design. A conglomeration of religious education organisations, including the Australian Association of Christian Schools, Christian Schools Australia and Adventist Education, who collectively represent schools teaching more than 130,000 children across Australia, disputed the imposition of this policy. The fundamental premise of their opposition, they argued, was that it was not for the State to determine what can and cannot be taught within a non-government school as this impinged upon their right to freedom of religion and belief.⁷⁵

All school curricula will necessarily contain elements that will cause parents or students to raise concerns, whether it be in areas of sex education, sports, science or religion.⁷⁶ International human rights instruments provide a foundation which can inform approaches to the inclusion of religious material in curricula.⁷⁷ Noting that indoctrination is prohibited within education under these instruments, various international decisions have demonstrated that teaching on religious matters does not need to be excluded from a school's curriculum due to religious objections from parents or students.⁷⁸ Instead, school curricula and values need to be adapted to ensure parents' rights in relation to their children's education are upheld.⁷⁹ In some cases, allowing students to be excluded from certain subjects is sufficient to address any concerns. However, it is important to ensure that this approach does not deny the child a meaningful education as the right of parents to have children educated consistently with their own values must be balanced against a child's right to education as provided

⁷⁰ Harrison (n 6) 439.

⁷¹ *Ibid.*

⁷² Evans (n 57) 36, 39.

⁷³ *Ibid* 36.

⁷⁴ Evans (n 58) 424.

⁷⁵ Marion Maddox, 'Too Much Faith in Schools - The Rise of Christian Schooling in Australia' (2015) 127 *ZADOK* 5, 5.

⁷⁶ Evans (n 1) 472.

⁷⁷ *Ibid.*

⁷⁸ *Ibid* 457.

⁷⁹ *Ibid* 453.

for in the International Covenant on Economic Social and Cultural Rights⁸⁰ and the Convention on the Rights of the Child^{81, 82}

There are sound reasons for religion to be included in school curricula. Religion has been a central feature throughout world history. An understanding of religion is vital to understanding Australia's history, its social and political landscape and its legal system. Scholars have argued that given this, religious literacy is essential to developing a full understanding of other subjects within a schools curriculum.⁸³ Yet Australia's schools see children graduating without coherent religious literacy, which limits their understanding of the world and their communication with those not of their own cultural or religious backgrounds.⁸⁴ This is clear from Australian students being unable to distinguish between the Buddha and an ayatollah, knowing 'Jesus Christ' predominantly as a profanity and being generally unaware of the meaning of Good Friday.⁸⁵

A study of Australian religious schools showed that the majority, regardless of their admissions policy, require all students to participate in the religious life of the school. While the precise nature of participation may vary between schools, religious education and celebration of religious festivals was commonly required. In some instances, basic respect for the religious beliefs of the school was sufficient.⁸⁶ In other examples cited, religious requirements extended to dress codes and the integration of other religious elements into the overall operation of the school to support and maintain its unique sense of identity and community.⁸⁷

As noted above, it is the integration of religious material into school curricula which provides challenges to respecting the right to freedom of religion and belief. The management of curricula, exemption schemes and integration of religion into daily operation of schools has had little judicial consideration within Australia but has been internationally considered in *Folgero v Norway*⁸⁸ and *Zengin v Turkey*⁸⁹. These cases provide that religiously controversial material must be taught in an 'objective and neutral manner' which is 'critical and pluralistic'.⁹⁰ These decisions also made clear that participation in religious education activities may be more akin to religious instruction.⁹¹ Further, it was noted that exemptions may create loyalty conflicts for children or a sense of isolation and exclusion.⁹²

In Australia, each State and Territory manages the integration of religion into its curriculum differently. However, all appear to favour Christian religious instruction and chaplaincy over general religious education.⁹³ In some jurisdictions, general religious education is not offered at all despite repeated recommendations from a series of government reports that religious education taught by school teachers should progressively replace religious instruction.⁹⁴ Christian groups instead maintain a level of access to children through schools that is unparalleled, where religious instruction

⁸⁰ Article 13(1).

⁸¹ Article 29(1).

⁸² Evans (n 1) 453-454.

⁸³ P Loria, 'Religious information poverty in Australian state schools' (2006) 49(3) *Journal of Christian Education* 21, 26.

⁸⁴ Loria (n 83) 27.

⁸⁵ Byrne (n 9) 168.

⁸⁶ Evans (n 58) 403.

⁸⁷ *Ibid* 409.

⁸⁸ *Folgero v Norway* (2008) 46 EHRR 47.

⁸⁹ *Zengin v Turkey* (2008) 46 EHRR 44.

⁹⁰ Evans (n 1) 464.

⁹¹ *Ibid* 465.

⁹² *Ibid* 468.

⁹³ Byrne (n 9) 164.

⁹⁴ *Ibid* 154, 167.

volunteers are able to distribute DVDs, colouring books and calendars which espouse fundamentalist Christian doctrines, or are permitted to enter schools to hold concerts and dance performances which incorporate evangelistic messages.⁹⁵

G Religious Instruction in Australian Schools

The prominence of Christian religious instruction in education can be seen in NSW state schools, where religious education is offered only in grades 3 and 4 and receives little class time. In contrast, religious instruction commences at enrolment with children pre-enrolled in weekly segregated Anglican religious instruction classes. Parents are free to specify an alternate religion/denomination or to opt out in writing, however, few schools forward this information to parents as part of the admission process.⁹⁶ Options for religious instruction in other faiths or denominations are often quite limited. Each State determines who can deliver religious instruction in their schools. In NSW, the approval processes and requirements are neither in legislation nor publicly available. The language used in the policy and process, however, is markedly Christian and more than 90 percent of religious instructions providers in NSW are of a Christian persuasion⁹⁷ Non-religious groups have historically been actively excluded and the New South Wales Humanist Organisation was denied access to provide ethics courses in lieu of religious instruction due to not being classified as a religion. Conversely, other groups recognized as religions in the Australian census, such as various pagan groups, have also been denied access to provide religious instruction.⁹⁸

Religious instruction is almost universally taught by volunteers who require no teacher training to be eligible and may refuse professional teachers being present. Despite parents' concerns, complaints are directed to the religious instruction provider rather than the Department of Education.⁹⁹ Even where alternatives to Christian religious instruction have been approved, there is often no capacity for this to be offered to children across all state schools. This is in part due to such organisations not being eligible for the fundraising tax concessions available to religious organisations. For example, in NSW in 2012, a highly successful philosophical ethics course managed to reach only one percent of NSW children in its first 18 months of operation, and 60 schools were on a waiting list for Buddhist religious instruction. Christian religious instruction, offered through well established church networks or chaplains provided under the then National School Chaplaincy Program, was available in nearly all NSW state schools.¹⁰⁰ Queensland schools similarly permit volunteers to provide weekly religious instruction, however, professional teachers may offer Christian religious instruction as part of the regular curriculum in accordance with Departmental guidelines where volunteers are not available.¹⁰¹

The Commonwealth Government's National School Chaplaincy Program placed chaplains in Australian schools at a cost of more than \$429 million between 2007 and 2014.¹⁰² A single religion, Christianity, received almost all program funding, and 99.5% of chaplains engaged through this process identify as Christian. This is significantly more than the reported 61% adherence to Christian faith's reflected in the census at

⁹⁵ Maddox (n 75) 8.

⁹⁶ Byrne (n 9) 164.

⁹⁷ Ibid 165.

⁹⁸ Ibid 165-166.

⁹⁹ Cathy Jane Byrne, "Jeesis is alive! He is the King of Australia': segregated religious instruction, child identity and exclusion" (2012) 34(3) *British Journal of Religious Education* 317, 319.

¹⁰⁰ Byrne (n 9) 166.

¹⁰¹ Maddox (n 65) 314.

¹⁰² Ibid.

that time.¹⁰³ However, this was hardly surprising given the program structure was designed to engage chaplaincy service providers and every major provider of these services in Australia has a Christian mission.¹⁰⁴ Despite its initial construction, amendments to the program in 2011 saw qualifications in youth work and pastoral care, rather than ordination into a religious body, become the central skill requirement.¹⁰⁵ While this has addressed some concerns regarding its effective neutrality towards religion, the amendment has removed the spiritual wellbeing aspect of its initial design.¹⁰⁶

The school chaplaincy program is optional within schools and schools determine whether to employ a chaplain or not. Consultation with the school community is mandatory in making this decision and evidence of it must be provided in any application for funding. Further, participation in programs offered by a school chaplain cannot be mandated as any religious component requires compliance with government consent arrangements.¹⁰⁷ Chaplains (including secular student welfare workers) are not permitted to use theological language and must take care to present all statements regarding their faith as their personal beliefs rather than assertion of fact. Proselytism is strictly precluded as is discrimination on the basis of religion or sexuality in the provision of chaplaincy services.¹⁰⁸ While these restrictions serve to protect the rights of parents and children, they do little to protect the rights to freedom of religion and belief of the chaplain themself.

H Adequacy of Current Protections of Freedom of Religion and Belief in Australia

It is clear that the broad range of views regarding the role and place of religion in education cannot be easily reconciled. The diversity of views about the role of religion in education in modern Australian society are more contrasting than ever. The divide between opinions and the strength with which they are held has continued to grow commensurate with the unprecedented growth in the number and diversity of religious schools.¹⁰⁹ Ongoing debate regarding religion in education, if it is to have any place at all, will therefore continue and it is the role of the Parliament to reconcile the claims of competing fundamental human rights to strike an appropriate balance.¹¹⁰

Australia's reticence to regulate religious matters has led many scholars to see this minimalist-regulation model as a positive one which successfully avoids the limitations of other countries' more regulated approaches.¹¹¹ However, while this may be credited with having enabled a "vibrant and open religious market place" to flourish, Australia lacks the necessary mechanisms to effectively resolve the competing claims between advocates of religious freedom and advocates of equality (expressed as non-discrimination) and to ensure that each party's rights are upheld in that resolution. The net result of Australia's legislative approach being that the right to freedom of religion and belief lacks effective protection. In all jurisdictions religious schools are permitted, under the guise of freedom of religion and belief, to discriminate against employees and students on the basis of religion, gender, and in some instances sexuality, through exemptions under these laws.¹¹² Religious schools play a valuable role in the education

¹⁰³ Jeremy Patrick, 'Religion, Secularism, and the National School Chaplaincy and Student Welfare Program' (2014) 33 *University of Queensland Law Journal* 187, 212.

¹⁰⁴ *Ibid* 214.

¹⁰⁵ Peter C. J. James and David Benson, 'School Chaplaincy, Secularism and Church-State Separation in a Liberal Democracy' (2014) 33 *University of Queensland Law Journal* 131, 143.

¹⁰⁶ Patrick (n 103) 211.

¹⁰⁷ James (n 105) 148-149.

¹⁰⁸ Patrick (n 103) 215.

¹⁰⁹ Wilson (n 20).

¹¹⁰ Gray (n 4) 76.

¹¹¹ Maddox (n 65) 300.

¹¹² Evans (n 57) 49.

sector. Their distinct character, founded on the pillars of their religion and beliefs, is a fundamental part of modern multicultural Australia and is arguably deserving of protection. However, this protection must not be achieved at the expense of the principle of equality which underpins Australia's anti-discrimination laws.¹¹³ Perhaps, the enactment of Commonwealth legislation which enshrines the fundamental human rights to which Australia ascribes as a nation is an appropriate starting point, ensuring such rights are afforded appropriate protections. In the absence of such protections, many Australians who find that their human rights have been breached, including the right to freedom of religion and belief, may also find they have little means of recourse.

¹¹³ *Ibid* 56.