THE BATTLE FOR RELIGIOUS FREEDOM IN AUSTRALIA – FROM DISCIPLINARY PROCEEDINGS TO THE HIGH COURT

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ABSTRACT

Religious Freedom is in the air. Or rather the discussion of it and what it means is in the air. The high profile case of Israel Folau has attracted extensive commentary, as has the proposed Federal Religious Freedom Bill. *But on a daily basis, ordinary people (the quiet Australians) face growing curtailment of their freedom to live out their faith. This article discusses a sample of those cases from disciplinary tribunals to the High Court. There are many more. All of the cases are matters in which the writer has personally acted as counsel. The cases point unerringly to the reality that in 21st-century Australia the fundamental freedom of religion (perhaps the foundation of all freedoms) is under serious threat. It must be fought for. And it will be.*

I. INTRODUCTION

At 8.41 pm on Tuesday 23 July 2019 Senator Concetta Fierravanti-Wells spoke in the Senate on the need for a religious freedom act. Many of the cases she cited are cases that inform this paper. Unlike the high-profile case of Israel Folau's dismissal for expressing a biblically based post on social media, these are the "street warfare" cases. That is those involving ordinary Australians of faith, who daily are subjected to discrimination or intimidation they believe something different to that which the neo-orthodoxy of the sexual orientation and gender identity movement.

This paper recounts many of these cases and attempts to draw out lessons from them. Many of these matters settled at an early stage and are subject to confidentiality provisions. Therefore they have to be referred to in a level of generality which is consistent with the

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confidentiality provisions in each case. All of the cases are those in which I have acted as counsel.

II. RELIGIOUS FREEDOM IN UNIVERSITIES

The earliest universities were schools of Christian theology and related disciplines.[1] Regrettably the expression of the faith that begot the institutions of higher learning is now frowned on in the same institutions. At least that was the experience of one final year student.

The student, who for the sake of anonymity I will call James, spoke to a female class- mate who advised him that she was feeling stressed. He asked if he could pray for her. She agreed and he did. She then reported him to the University. A little later a group of his classmates asked James what he would do if he met a homosexual? James said he would be kind and loving but would not agree with the person's lifestyle or words to that effect.

James was summonsed to a meeting with the University authorities for alleged misconduct. The formal notification of that misconduct was:

> declared views about h*s in class, unwanted attention to female students –example praying for a student without consent.

This behaviour was allegedly contrary to the University's Code of Conduct which required 'safe and inclusive teaching, learning and social environment for all students that embraces diversity' (diversity that is for all that is for all save those with Christian convictions).

James was put on a behaviour management plan, part of which was that he was not to speak to the female student in question unless it was in relation to class activities. As he was organising the final year exhibition for his cohort he asked her in the class if she was to participate and he was reported again to the University. He was then summarily suspended, pending a hearing of a disciplinary tribunal. The irony that a human rights rich environment would first suspend a student and then hold an inquiry into whether the alleged conduct occurred cannot pass without mention.

[1] 'University', *Encyclopaedia Britannica*, <https://www.britannica.com/topic/university>, last accessed 24 June 2019.

The Tribunal confirmed the decision but decided that James would be allowed back the next year to complete his course. He would however be required to attend fortnightly counselling classes with for the whole year.

When my instructor and I were engaged we ascertained and argued that the University's Complaints Resolution Policy and its statute in relation to disciplinary proceedings had not been followed. The Policy required that there be efforts made for the complainant and the alleged wrongdoer to meet and seek to resolve the issues. That was not done. It required that if there was suspected wrongdoing that the matter go to the Vice-Chancellor but it had been handled at school level. There was no power for summary suspension. The constitution of the Disciplinary Tribunal was contrary to the University's statutory obligations. The whole process was flawed.

An appeal was lodged against the Tribunal's decision and negotiations occurred. As a result James was allowed to resume his course in the new year, without any record on his academic transcript and without the need for fortnightly counselling. He went on and completed his degree and is now nearly through a Master's degree.

James' story illustrates the need for prompt legal assistance at the intial level of disputes about religious freedom. It is ironical that the biblically inspired notion of the right to natural justice availed James in this instance, for as Callinan J has observed:

> That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, **enshrined in the scriptures, mentioned by St Augustine**, embodied in Germanic as well as African proverbs, **ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden**.[2]

Further the rubric of 'safe and inclusive teaching, learning and social environment for all students that embraces diversity' stifles open proclamation of Christian truth. Christian doctrine says 'For from within, out of the heart of men, proceed evil thoughts, adulteries, fornications, murders, thefts, covetousness, wickedness, deceit, lewdness, an evil eye, blasphemy, pride, foolishness. All these evil things come from within and defile a man' (Mark 7:21-23). It therefore challenges individuals at a deep moral level. Safety, inclusivity

[2] *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, 45 [140]. Callinan J was quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th ed., Sweet & Maxwell, 1995) 378–9. (emphasis added)

and diversity, as the institution sought to apply those terms in this case, do not welcome such a robust sifting of our inner beings. As that flabby thinking gains ascendancy, we are left the poorer in mind, soul and spirit.

III. RELIGIOUS FREEDOM IN SCHOOLS

E v X College[3] was a matter that commenced and settled in the Victorian Civil and Administrative Tribunal. X is a faith based school. E was a student at the school for about 6 months. E then left the school and about 3 years later sued the school alleging that between June 2012 and December 2012, X discriminated against E directly and indirectly in that it required E to wear a girls' uniform when E identified as a boy and suffered from gender dysphoria ("GD").

The case is important because of the relief that E sought both initially and as the proceedings progressed. That relief, in summary form, was:

- An order that the Respondent adopt the policy of the relevant Education Department to better support transgender and gender diverse students with a view to redressing the loss, damage and injury suffered by the Applicant within the meaning of the Act; *and*

- An order that the Respondent provide ongoing training to staff and students on how to support and include students of all gender identities in the school with a view to redressing the loss, damage and injury suffered by the Applicant within the meaning of the Act.

This relief, if obtained would have meant that x would have adopted a version of the "Safe Schools" policy, which would have directly contradicted its faith-based ethos. It would also have exposed X's staff to "training" from transgender activists.

X was helped in this case because its Constitution placed it under its parent church and its doctrines. The parent church had developed fundamental beliefs in relation to the binary

[3] The matter is de-identified because of confidentiality provisions in a settlement and because of client confidentiality.

nature of men and women. This gave meat to exemption/balancing clause defence which was pleaded.

The matter progressed to and settled at a mediation.

When the case first came to my instructor and me, the school was under pressure to settle along the lines of the relief referred to above. We were able to assist them to negotiate a far more acceptable settlement. The case illustrates the need for schools to have access to prompt advice as to how they may deal with an issue practically but so that they retain their freedom to teach Biblical truth.

The case is also important in the context of religious freedom in that the relief claimed would have seriously compromised the school's doctrinal position and that was one stated aim of the litigation.

IV. RELIGIOUS FREEDOM IN BUSINESS

Jason Tey is a photographer in Perth. He is also a Christian. He was asked to take photographs of a school acquaintance. He found out that she was in a same-sex relationship. He said to her that he had said to same-sex couples who wanted him to photograph their weddings that 'I am a Christian and have a conflict with my faith and photographing their wedding.' He said to her 'Not sure if the same applies and I'm happy to shoot family photos for you with skill and professionalism but think I should let you know my view on ss marriage.' She sued in the WA Civil and Administrative Tribunal alleging discrimination.

The claim was defended on the basis that there was no breach of *Equal Opportunity Act 1984* ("EOA") as there was as no "treatment less favourable".[4] Further under the EOA discrimination alone is not unlawful. Section 35Y requires that one of its 3 limbs must be fulfilled. Here there was no refusal to provide a service, no unfavourable terms and conditions attached to the provision of services or in the manner in which the services were provided.

The matter proceeded to conciliation. At the conciliation, the Conciliation Officer mentioned numerous times how this was a clear case of discrimination, and that the Equal Opportunity Commission ("EOC") would assist the complainant (and the EOC lawyer

[4] *Equal Opportunity Act 1984 (WA),* s 35O.

would represent her) if the matter was remitted to the Tribunal. Despite that pressure, Tey resisted an easy way out of the litigation and decided to defend the complaint in the Tribunal. The complainant then discontinued claim.

The complaint was based on mere expression of a Christian view in relation to same-sex marriage. There was an express willingness to do the work and to do it 'with skill and professionalism'. Yet there was a complaint. And it found some support from the EOC.

While the complaint was discontinued, Tey still had to go through the process of the action. The process itself can be the punishment. That is especially the case for a small businessman like Tey.

V. RELIGIOUS FREEDOM IN THE STREETS

Corneloup v City of Launceston[5] was a matter in which local government policy which prohibited public preaching was held to be invalid.

Corneloup applied to Launceston City Council ("LCC") for a permit to preach in public pedestrian malls in Launceston. Council's *Booking and Usage Guidelines* provided that religious and political spruiking are "non-permitted uses" of a mall. Therefore the LCC refused Corneloup's application. Corneloup sued the LCC in the Federal Court.

Corneloup alleged that:

- The decision made was beyond power because the Guidelines were inconsistent with the By-Law and therefore invalid;
- the Council employee who refused the permit had inflexibly applied the policy she discerned from the Guidelines and had regard to an irrelevant consideration;
- that the Policy was contrary to the Implied Freedom of Political Communication.

The Court held that:

- The decision maker was not an authorised officer under the By-law;
- the Guidelines did not apply to the permit sought;
- the Guidelines were inconsistent with the By-law and so were of no force.;

[5] [2016] FCA 974 (19 August 2016).

- therefore the issue of the implied freedom did not need to be considered.

Accordingly, the decision was set aside and Corneloup was able to reapply for a permit. This time he succeeded and preached relatively unhindered in the Launceston Mall for a number of months. The good citizens of Launceston did not melt in the face of such radical ideas like sinners need to repent.

The decision provided a salutary reminder that notwithstanding the High Court upholding the relevant roads by-law in the earlier street preachers' case *Attorney-General (SA) v Adelaide City Corporation*[6] (which required street preachers to apply for a permit and provided for a Speakers' Corner) all local council policies are not necessarily valid. Each by-law, policy and decision must be considered on its own merits.

The Corneloup case had a flow in effect in the next matter I discuss *Marzur v Cornerstone Presbyterian Church, Gee and Hobart City Council*[7] and *Gee and Cornerstone Presbyterian Church v Bolt and Mazur.*[8]

Gee as an evangelist "employed" by the Cornerstone Presbyterian Church. He preached regularly in a "Speakers' Corner" in a Hobart Mall. Mazur was a consistent adversary. Mazur complained to the Tasmanian Equal Opportunity Commission alleging certain conduct by Gee which supposedly breached the Tasmanian Equal Opportunity legislation, and, in particular section 17 which makes it illegal to, inter alia, cause offence to those with defined protected attributes.

The Commissioner, Bolt, took on the complaint. One matter that Bolt thought may offend section 17 was a statement that Gee had displayed in the context of the same-sex marriage debate which said 'the best place to raise kids is in a strong marriage… the state shouldn't redefine something that naturally provides for the best interests of children'. Gee and the Church defended the complaint and commenced proceedings in the Tasmanian Supreme Court challenging Bolt's jurisdiction to accept the complaint as Mazur did not have most of the protected attributes that may have been enlivened to take offence. Gee and the Church

[6] (2013) 249 CLR 1.
[7] Tasmanian Equal Opportunity Complaint.
[8] Tasmanian Supreme Court Action Number 2333 of 2017.

also challenged the constitutional validity of section 17, on the basis that it offended the implied freedom of political communication.[9]

For reasons which were not disclosed Mazur withdrew his complaint. The utility of the Supreme Court proceedings was therefore removed, and those proceedings were discontinued.

In one of his submissions to the EO Commission Mazur said 'Christianity, above all, consoles; but … you cannot save someone unless you make them feel as though they need to be saved... It should certainly qualify as breaching the insulting behaviour and reasonable person test rules….' Mazur thus made clear, that at least in his view, the preaching of the Glorious Gospel of the Lord Jesus Christ, the message which brought grace and truth to the debauched Roman world, ended slavery and changed cannibals to peaceful and loving men and women, should be illegal in Tasmania.

The case illustrates that there are some in the Australian community that want to stop the mere exposition of Christian truth. Nothing less.

VI. RELIGIOUS FREEDOM IN THE HIGH COURT

The summary religious freedom cases which began with a university disciplinary tribunal, ends in the High Court.

In *Clubb v Edwards; Preston v Avery*[10] the High Court heard two challenges to the 150m safe access zones or censorship zones around abortion clinics in Victoria and Tasmania. The challenges were predicated on the argument that the legislation in both states, which effectively prohibited communication about abortion within a 150 metre radius of an abortion clinic, improperly burdened the implied freedom of political communication. The Court unanimously rejected both challenges.

[9] Section 17 was found to not offend the implied freedom in *Durston v Anti-Discrimination Tribunal* (No 2) [2018] TAASC 48. Durston was unrepresented at the hearing of this matter and there are unsatisfactory features of the decision.
[10] [2019] HCA 11.

In *Brown v Tasmania*[11] the High Court had previously struck down anti-forestry protest legislation. In *Clubb* Edelman J said 'At first blush, the conclusion that the protest prohibition was reasonably necessary does not sit comfortably with the conclusion reached by the joint judgment in the majority in *Brown v Tasmania* that the protest prohibition in that case was not reasonably necessary for its purpose.'[12]

Theplurality in *Clubb* (Kiefel CJ, Bell and Keane JJ) considered that purpose of the legislation was rooted in the human dignity of a person saying:'Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person.'

They provided some insight into what this "forcing" of a political message which would affront human dignity might be when they said 'Silent but reproachful observance of persons accessing a clinic for the purpose of terminating a pregnancy may be as effective, as a means of deterring them from doing so, as more boisterous demonstrations.'[13]

It may be seen, therefore, that the prohibited "forcing" is arguably anything, even silent observation, which may communicate a different view from certain "approved" views. Such a stringent view of what is necessary to protect human dignity, which in the plurality's view may be considered to be a fragile quality, bodes ill for open proclamation of Christian truth. In Acts 17 the Apostle Paul spoke to the Athenians on the *Areopagus*. He said

'Forasmuch then as we are the offspring of God, we ought not to think that the Godhead is like unto gold, or silver, or stone, graven by art and man's device. And the times of this ignorance God winked at; but now commands all men everywhere to repent; Because he hath appointed a day in the which he will judge the world in righteousness by that man whom he hath ordained'.[14]

[11] (2017) 262 CLR 328.
[12] At [487].
[13] At [50] and [51].
[14] Acts 17:29-31 KJV.

In so doing he was saying that the whole belief system of the Athenians was wrong and that he was telling them of the one correct belief system. Perhaps in Australia that sort of speech may be held to affront human dignity.

Gordon J continued this theme of protecting human dignity when she said, 'there is nothing protectable about seeking to shame strangers about private lawful decisions they make.' Similarly, Nettle J said, 'the freedom is not a licence to accost people with ideas they do not want to hear.'

Gageler J however, recognised the importance of unwelcome speech being protected. He reasoned:

- A protest on the subject of abortion is inherently political;
- the provision was in the real world discriminatory;
- the burden was direct, substantial and discriminatory;
- unsolicited, unwelcome, uncivil or offensive political speech are not carved out as an exception to the freedom of political communication.

However he too dismissed both appeals.

Edelman J, in addition to recognising the seeming incongruity of the plurality's decision in this case when compared to *Brown,* also recognised the "stark difference" between the United States jurisprudence in relation to restrictions on speech of the kind in the *Clubb* and *Preston* cases and the jurisprudence here. He said, 'it is almost beyond argument that the relevant provisions of the Reproductive Health Act would be invalid on the present approach taken by the United States Supreme Court.' He further noted the: '…stark difference between the manner in which freedom of speech is approached in the United States and the approach to the implied freedom of political communication in Australia.'

Because Christianity is essentially a propositional faith, which relies on proclamation, and because it challenges our deepest held views about ourselves, this restrictive approach to freedom of speech also, necessarily, involves a restrictive approach to freedom of religion. It is regrettable that the High Court did not adopt a more robust view of human dignity by considering, for example, that the ability to receive and accept or reject differing views

enhances human dignity. Of course, it could not be that the Court was motivated by a value laden view about the desirability of women proceeding to have abortions, without receiving any contradictory views. The approach of the High Court in these cases bodes ill for any religiously based views being expressed in sensitive places.

VII. CONCLUSION

The battle for religious freedom in Australia is real and ongoing. An essential element to preserving the freedom is rigorous advocacy at all levels where religious freedom is challenged, from the lowliest disciplinary tribunals, to the superior courts and ultimately in the High Court. And even beyond the High Court, to the international human rights bodies like the United Nations Human Rights Committee. The book of Proverbs says, 'Those who forsake the law praise the wicked, but those who keep the law strive against them.'[15] Putting it another way, those who value religious freedom must be prepared to fight for it. And we will. We will never surrender!

[15] Pr 28:4 ESV.