# ETHOS SCHOOLS IN AUSTRALIA AND THE 'NEW AUSTRALIAN *RELIGIOUS DISCRIMINATION ACT 2020*'

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## ABSTRACT

*The Morrison government released a second exposure draft of the Religious Discrimination Act and delayed the reporting date for the Australian Law Reform Commission (ALRC) to report on consequential amendments to the Commonwealth's other discrimination legislation including the Sex Discrimination Act 1984 till December 2020. Does the Commonwealth have the power to pass a nationally binding Religious Discrimination Act? What can we expect in that Act now that the Commonwealth's draft has been through two separate public consultations? The Chief Commissioner of the ALRC, Justice Sarah Derrington set out her thoughts at the Freedom19 conference in September 2019. Has anything changed?*

## I INTRODUCTION

In the wake of the successful implementation of same-sex marriage in Australia, Malcolm Turnbull's leadership of the Liberal Party and thus the Australian Government, was in trouble because he was felt to have ignored the conservative elements within his party. This was despite Turnbull's establishment of the Ruddock Review of Religious Freedom which met from late 2017[1] and delivered its report to him on May 18, 2018.[2] The report and twenty recommendations of the Ruddock Review had not been released when Mr Turnbull was removed by a caucus coup later that year.[3] Even so, elements of that report were leaked during the Wentworthville bye-election won by Kerryn Phelps.[4]

When the new Morrison Government eventually released the full Ruddock Report and Recommendations,[5] the leaks which had suggested that religious freedom exemptions in existing law allowed ethos schools to eject same-sex or transgender students, were placed in context and were referred to the Australian Law Reform Commission (ALRC) for further review and recommendations by April 2020.[6] In the meantime, legislative efforts to repeal the exemptions failed.[7] It seemed to be acknowledged that the exemptions had never been used to eject same-sex and transgender students from ethos schools[8] and that it was unjust to remove religious school exemptions when most of them were transparent about their ethos. It was also significant that all of those schools had been chosen by parents and guardians for the education of their children

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in the knowledge of, and even premised upon their ethos. It remained politically significant that 35% of all primary and secondary students in Australia are educated in independent schools including ethos schools.

In August 2019, Christian Porter released a draft *Religious Discrimination Bill* (the Bill) for public comment by October 2, 2019.[9] At the same time, he reduced the scope of the ALRC's terms of reference so that the federal government now only requires recommendations concerning the need for consequential amendment to federal anti-discrimination law including the *Sexual Discrimination Act 1984* (Cth).[10] That reference reduction responds to coverage of ethos school space in the first draft of the *Bill*. The request for feedback to the first draft received nearly 6000 submissions[11] and the *Bill* was amended "to take account of that feedback" with a second draft released on December 10, 2019 with further submissions due by January 31, 2020.

This essay provides a brief overview of the scope of the *Bill*, identifies the issues that have engaged the most general concern, and then comments on the provisions that are most relevant to ethos schools. I do that in three parts.

In part one I briefly explain the basis upon which the Commonwealth government has proposed to pass Australian domestic laws dealing with religious freedom and education in ethos schools because no specific powers in the *Australian Constitution* authorise the Commonwealth to pass laws concerning human rights or education. In part two I discuss the Ruddock Review recommendations that the Commonwealth government has addressed in the *Bill*. Those issues include 'exemptions'[12] for big business and government and provisions which allow secular judges to decide religious issues inside ethos organisations that they do not understand.

Part three discusses the changes that followed criticism of the first draft of the *Bill*, but I note that big business and government appear likely to retain their 'exemptions.' I also discuss the issues under the *Sexual Discrimination Act 1984* (Cth) which the ALRC has been asked to address, what changes they are likely to recommend and how those changes will play out in the classrooms and toilets of ethos schools. I conclude that religious freedom in Australia will be better protected after the *Bill* is passed and that ethos schools will not notice many changes in the way they currently do business.

## II PART ONE – DOES THE COMMONWEALTH HAVE CONSTITUTIONAL POWER TO PASS LAWS ABOUT RELIGIOUS DISCRIMINATION AND EDUCATION?

Even though there are no specific powers in the *Australian Constitution* authorising the Commonwealth to pass laws concerning religious freedom and education, the Commonwealth has generic power under s 51(xxix) to pass laws carrying out promises made to the international community. The Commonwealth also has the financial power to direct educational policy and spending under s 96. While promises the government

makes under international treaties are not binding until new domestic laws are passed implementing them,[13] the Commonwealth's power to implement any agreement it has made with another country or under a United Nations treaty using the external affairs power in s 51 (xxix), has become well established since the High Court's decisions in the *Koowarta*[14] and *Tasmanian Dam*[15] cases.

Because Australia has ratified a number of treaties requiring it to improve the state of religious freedom at home, the Commonwealth has unassailable power to pass legislation to this end so long as that legislation does not exceed the scope of the relevant agreement or treaty.[16] There is thus no viable basis upon which to challenge the Commonwealth's power to pass either a Religious Freedom Act or a Religious Discrimination Act. Australia made its primary agreement to improve religious freedom at home in 1980 when it ratified the *International Covenant on Civil and Political Rights* (*ICCPR*),[17] reaffirming this commitment in 1993 when it ratified the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.[18]

## III CONSTITUTIONAL POWER TO PASS LAWS PROTECTING LGBTI PEOPLE?

The Commonwealth government's power to implement the education policies it chooses was also practically settled following a challenge by atheist school teachers and parents in the unhelpfully titled *DOGS* case in Victoria in 1981.[19] Though the federal government in the United States (US) cannot fund education that has any connection with religion at all, under ss 96 and 116 of the *Australian Constitution*, the Australian federal government can fund education in religious institutions in the states and territories on whatever conditions it thinks fit.[20]

One aspect of the current debate about the federal implementation of religious freedom norms in Australia does present an issue of constitutional power that has not yet been clarified. This relates to the Commonwealth's reliance on the provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* (*CEDAW*)[21] as the primary constitutional authority for the federal legislative protection of gay, lesbian and transgender rights across the nation.

It will be remembered from the summary above that the Commonwealth's generic power to implement domestic legislation under s 51(xxix) of the *Constitution* depends upon sufficient connection with the provisions of the relevant international agreement or treaty. The *Sexual Discrimination Act 1984* (Cth) was passed as domestic legislation relying upon Australia's ratification of *CEDAW* for its constitutional validity. This reliance is uncontroversial because the connection between the terms of *CEDAW* and eliminating sexual discrimination in Australia are clear enough. Yet, the *CEDAW* connections of the Gillard/ Rudd Labor Government's[22] 2013 amendments making it "unlawful to discriminate against a person on the basis of sexual orientation, gender

identity and intersex status"[23] are not as obvious and have not been tested.[24] No doubt these issues will be clarified when the ALRC responds to the federal government's reduced terms of reference mentioned above.[25]

## IV AUSTRALIA'S AVERSION TO RELIGIOUS FREEDOM LAWS

Despite international promises to implement more robust religious freedom laws, Australia has been very slow to do so.[26] In 1998, the Australian Human Rights and Equal Opportunity Commission recommended that the Commonwealth should pass a robust and broad Religious Freedom Act which would protect among many other things, the right of parents and guardians to organise family life in accordance with their religion or beliefs.[27] It also drew attention to Australia's promises in the *ICCPR* which included an obligation on "States Parties… to have respect for the liberty of parents, and where applicable, legal guardians to ensure religious and moral education of their children in conformity with their own convictions".[28] But even though Australia has kept its promises to outlaw racial and sexual discrimination,[29] party politics and doubts about the utility of human rights generally, has always made religious protection difficult in the past.[30]

## V PART TWO – THE RUDDOCK RECOMMENDATIONS AND THE MORRISON/PORTER DRAFT LAWS

Australia's enduring anxiety about the implementation of human rights and the protection of religious freedom, in particular,[31] came to a head during the debate surrounding the same-sex marriage plebiscite in 2017 and 2018. Before that time as Evans and Parkinson have explained, proposals to constitutionally or legislatively provide such protection, could not get any traction.[32] The politics that led to the establishment of the Ruddock Review panel and the delayed release of its report have been mentioned above.[33] Most commentators agreed that the *Bill* was a genuine and fair effort to address enduring concerns about the state of religious freedom in Australia.[34]

Sources within the Liberal caucus suggest that before it was released for public comment, the *Bill* had already been through more than 40 iterations as those politicians privately debated its content.[35] In part, the *Bill* responded to Australia's 1980 promise to implement the religious freedom set out in Article 18 of the *International Covenant on Civil and Political Rights* in 1966.[36]

The Human Rights and Equal Opportunity Commission reminded the Howard Government of that promise in 1998,[37] but there was no action and subsequent efforts to revisit the issue including the Brennan Commission's 2009/2010 consideration of the implementation of some form of human rights charter in Australia also stalled. When Prime Minister Kevin Rudd declined to follow the Brennan recommendations in 2010, sources within the Labor Party "claimed that any human rights law would hand power to 'unelected' judges and override parliamentary sovereignty."[38]

Religious discrimination has proven much more difficult to address than racial discrimination which was addressed by legislation in 1975[39] and sex discrimination which was dealt with in 1984,[40] both in similar response to promises made to the United Nations.[41] However, as of this writing, all states and territories except New South Wales and South Australia have passed laws prohibiting discrimination on the grounds of religion.

The first draft of the Commonwealth *Bill* was 52 pages long with 65 pages of Explanatory Notes. It generally preserved and deferred to state and territory laws and protected conduct that complied with state law.[42]

## VI AVOIDANCE OF 'EXEMPTION LANGUAGE'

Adjunct Associate Professor Mark Fowler observed[43] that the *Bill* has ditched the exemption language which was previously used in Australian anti-discrimination law when protecting religious belief and practice. This change in approach seems to mean that religious believers will be able to do anything they want in the name or practice of religion unless there is a law against it. The problem some commentators have seen with the *Bill's* deference to state and local government law is that state and local governments will still be able to pass any laws they like making any religious practices they choose illegal. The federal government cannot pass such legislation.

Section 116 of the *Australian Constitution* forbids federal law that prohibits the free exercise of religion, but the federal government rarely operates in religious space. While it sounds bad that state and local governments can legally proscribe religious practice, this is not anything new. In fact, it is simply a restatement of current law.[44] But this is the point. The hope of advocates of religious freedom had been that this new *Bill* would create some new bedrock - some new space where it would be illegal for all levels of Australian government to proscribe religious practices. Thus, some of the submissions made to the Attorney-General in response to the call for feedback, suggested that allowing state, territory, and local government power to pass such legislation, would defeat the intent of the proposed new Commonwealth legislation.

Other criticisms of the first draft of the *Bill* included

- concerns about the preservation of state and territory laws which override the conscience of health professionals requiring them to refer patients seeking a termination of pregnancy to health professionals who they know do not have a conscientious objection to that procedure;
- the drafting would require secular courts to adjudicate of matters of theology and religious practice which they are not qualified to decide;
- that the ethos of religious institutions that do not insist that all their employees subscribe to their faith but still require that they uphold the employing institution's ethos during employment, are not protected;

- that the protections proposed do not apply to religious faith-based charities and other religious bodies; and
- the provision of exemptions for government and big business.

Although the government has not accepted all of these criticisms, the second draft of the *Bill* has responded to many of them. I therefore next discuss how the government responded to these expressions of concern as well as the residual questions about gender identity which the government referred to the ALRC.

## VII PART THREE – REFINEMENTS FOLLOWING FEEDBACK AND THE ALRC ISSUES CONCERNING GENDER IDENTITY

The Explanatory Notes to the second draft of the *Bill* explain that the *Bill* seeks to implement recommendations 3, 15 and 19 from the Ruddock Religious Freedom Review.[45] Those recommendations were that the *Bill* be passed;[46] that all Australian legislation would acknowledge the equal status of all human rights including religious freedom in future;[47] and that the Australian Human Rights Commission would hereafter take a "leading role in the protection of freedom of religion."[48]

There was no comment on the government's rejection of recommendations that the *Bill* should bind all levels of government and big business, save for a statement that the *Bill* imposes additional requirements on big business. When big business "seek[s] to impose standards of dress, appearance or behaviour which would have the effect of restricting or preventing employees from making statements of belief other than in the course of employee's employment," those requirements must be objectively reasonable. But there is reassurance, as in the first draft of the *Bill*, that if these employer requirements "are not necessary to avoid unjustifiable financial hardship" to the employer, "they will not be reasonable, and therefore constitute unlawful discrimination."[49]

While the previous statement accurately reflects what the *Bill* says in s 8(3), the 'necessary' requirement is not stated in s 32(6) and it is diluted in s 8(3) by the phrase "unjustifiable financial hardship" since potential monetary loss by the employer will trump the employee's religious freedom. The retention of this double standard favouring big business in the second draft of the *Bill* is difficult to justify.

In the Explanatory Notes to the second version of the *Bill*, there is no mention of the failure to override inconsistent state and territory law. Those submissions were compelling because they leave unfulfilled Australia's 1980 promise to the international community that it would take "steps to adopt measures necessary to give effect to the rights recognised in the Covenant…in accordance with each State Party's Constitutional processes."[50] While that promise was qualified by the Commonwealth's stated belief in 1980 that it did not have the constitutional power to override the states and territories in these matters, the Commonwealth power to override in these matters is now well settled.[51]

The government, though, has heard concerns about state and territory laws that impose upon the conscience of health practitioners, and has provided that some unreasonable impositions will be unlawful. While it is disappointing that the language of the second draft of the *Bill* generally does not follow the *ICCPR's* requirement that religious freedom be limited only when limitation is necessary, rather than merely reasonable, and imposed by formal law, the provisions in s 8(6) and (7) which make State and Territory laws imposing on health practitioner consciences unlawful in some cases, come closer to the *ICCPR* standard.[52] Government has also heard the concern that the first draft of the *Bill* did not recognise that "religious hospitals, aged care facilities, accommodation providers in relation to employment…religious camps and conference centres…and voluntary bodies and clubs" could also be ethos institutions. These now have some protection by virtue of new provisions in s 32.

Drafting legislative language which would avoid requiring an unqualified judge to adjudicate religious matters under the new legislation is a fraught task since no draftsperson could contemplate all the legal questions that might arise for adjudication. However, the addition of the words "that a person of the same religion as the religious body" to s 11(1) along with new subsections (2), (3) and (4) with similar language, present as a practical solution. While a thoroughly unreligious judge will still be required to hear about matters of faith, theology, and ecclesiastical practice in which she has no experience, the amended provisions ensure that any judge will have to hear competent expert evidence before deciding or risk appeal.

This new language also resolves concerns expressed about the first draft of the *Bill* because it did not protect religious bodies employing believers and non-believers when the non-believers broke conduct promises they had made at time of hire. This will be important to ethos schools who hire staff who promise to maintain conduct standards defined at time of hire even though they do not subscribe to all the religious doctrines of the employer or its sponsoring church. However, the amendments to the *Sexual Discrimination Act 1984* (Cth), the *Age Discrimination Act 2004* (Cth), the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) which the ALRC has been asked to recommend about by December 20, 2020[53] are likely to have a more marked effect on how ethos schools are managed than anything discussed here so far.

## VIII ALRC RECOMMENDATIONS?

The nature of the amendments to these existing Commonwealth Acts that the ALRC might recommend is a speculative enterprise. This is because the ALRC recommendations "must…await [completion of] the consultation process for the Religious Discrimination Bill and any amendments to that Bill."[54] Justice Sarah Derrington, the Chief Commissioner has confirmed that the ALRC will not "resume work on its Inquiry until then."

In her address to the Freedom19 Conference in Sydney on 4 September 2019 one week after the ALRC received its amended terms of reference from the Commonwealth, Justice Derrington laid out the background to the ALRC's assignment. In addition, she discussed the approach that she thought the ALRC might recommend. Further, although she said that she was making those 'potential recommendations' remarks "in a personal capacity," she was prescient given the content of the Second Exposure Draft of the *Bill* in response to the first round of public consultation.

For the sake of context, Justice Derrington noted that "one [human] right should not be seen to be privileged over any other [human] right;" that the history of anti-discrimination law in Australia manifests government's reactive approach as legislatures "attempt…to keep pace with changes in standards of public morality;" and that while religious doctrines and practices evolve more slowly than social views, they do change in response to social views.

In order to demonstrate that change, Justice Derrington observed that "[o]vert racial discrimination has not been tenable under the cover of religious freedom since the success of the civil rights movement in the United States." Yet, she also noted that it would be "courageous" for anyone to dictate "what is and is not a legitimate expression of a particular doctrine or tenet of a particular faith"[55] despite the bi-partisan support which the Gillard/ Rudd Labor government's amendments to the *Sexual Discrimination Act* (Cth) received in 2013.[56] She then framed what she personally saw as an approach that might be taken to the reform of the *Sex Discrimination Act 1984* (Cth), though without the benefit of either round of public consultations or the government response in the second draft of the *Bill.*

Justice Derrington envisaged the repeal of the existing exemptions in ss 18, 37 and 38 of the *Sexual Discrimination Act 1984* (Cth) with a replacement new s 7E and amendments to the existing ss 14 and 21. The new s 7E would say generically, that there would be no unlawful discrimination under the *Sexual Discrimination Act* in the future where a person does anything within a religious body to comply with the doctrines, tenets of practices of that religious belief, and those expectations had been clearly communicated in a "publicly available written policy" at the time of hire or enrolment. Given the nuanced improvements which the government has made to s 11 in the Second Exposure Draft of the *Bill*, one might expect that the ALRC recommendations will similarly avoid asking unqualified judges to determine the validity of religious beliefs without expert evidence.

At the same time, Justice Derrington said that the ALRC's intent in all of this was to remove any suggestion that a religious institution was entitled to discriminate against anyone "on the basis of any protected attribute alone."[57] However, discrimination would not be unlawful if the institution could show that it was following its own publicly available ethos policies and that those policies were sincere and current.

Justice Derrington also outlined other amendments to give effect to this general regime in relation to non-educational institutions and in the provision of facilities, goods and services. On the surface those consequential amendments appear to be intended to change the result of cases like the *Cobaw* decision in Victoria in 2014. In that case, the Victorian Court of Appeal found that the Plymouth Brethren had breached Victorian anti-discrimination law when they withdrew consent to hire their Philip Island convention centre from a gay community support group with teachings inconsistent with those of the church.

Under Justice Derrington's proposal, if the federal *Sex Discrimination Act* were taken into consideration in a Victorian case in the future, provided the Plymouth Brethren had published their policies and could show that these matters were an established part of their doctrine and practice, then their withdrawal of permission to rent would not be unlawful discrimination "on the basis of a…protected attribute alone."

If the ALRC's recommendations to government follow Justice Derrington's September 4, 2019 outline, then ethos schools and other educational institutions have little to worry about. Although their exemptions will have gone and the new regime will have removed the suggestion that any protected human right has primacy over others, if ethos schools adhere to transparent published policy guidelines premised on the faith of the sponsoring institution and consistently observe them, their practices will not result in sustainable law suits. In this context, the shared toilets issue which became famous during the Obama administration in the US need not become an issue. So long as this issue is addressed in the published policy guidelines of schools and they are consistently followed, it will also be difficult for any complainant to sustain a case against a school on the basis of toilet practice.

## IX CONCLUSION

This brief essay discussed recent developments in religious freedom law and practice in Australia and how they will affect ethos schools. I have observed that since its re-election in May 2019, the Morrison government has moved promptly to implement a federal *Religious Discrimination Act* in accordance with election promises, and it has consulted widely on the terms of two drafts of that Act. While the terms of the new legislation have not satisfied everyone, the fact that Australia will soon have federal legislation in place to protect religious freedom is a remarkable accomplishment since all previous attempts to address this issue have been abandoned because of political divisions and church opposition.

While the new Act likely will not completely align with international religious freedom standards (including the fact that government and big business have exemptions), it will likely be politically difficult for government and big business to use their exemptions in the future on grounds of hypocrisy. Moreover, the new legislation will assist in educating the public about human rights even though Australia is still a long way from having comprehensive human rights legislation.

The reason the new legislation will contribute to human rights education is that it has abolished the idea that religious freedom is a privilege entitled to exemption. The new Act has created a regime where one well known human right must be balanced against others when they compete. However, most of the time, religious believers will be able to practice their religion without impediment so long as they do not break criminal laws.

Despite the noise that accompanied the Wentworth bye-election in 2018 after Malcolm Turnbull resigned from Parliament, ethos schools are not going to fade into oblivion. But, neither will they be able to expel gay, trans or intersex students unless they break the published ethos policies of their schools which they acknowledged at enrolment. Though ethos schools will likely pay even more attention to the detail and publication of their ethos policies in the future, for most it will be business as usual. It will also be business as usual for the 35% of Australian parents who choose private ethos schools for the education of their children.

***Keywords**:* Ethos schools, religious discrimination, LGBTI discrimination, freedom of religion, free exercise of religion, proposed Commonwealth Religious Discrimination Act

## ENDNOTES

1 The Ruddock Review was announced on 22 November 2017 ("Religious Freedom Review", *Australian Government, Department of Prime Minister and Cabinet,* <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>).

2 Ibid.

3 Friday 24 August 2018 (Jane Norman and Jon Healy, 24 August 2018, "How Malcolm Turnbull was replaced as Prime Minister in less than a week", *ABC News* <https://www.abc.net.au/news/2018-08-23/liberal-leadership-crisis-timeline/10155746>).

4 "Philip Ruddock plays down religious freedom report recommendations, says discrimination law should be contracted", 10 October 2018, *ABC News* <https://www.abc.net.au/news/2018-10-10/ruddock-plays-down-religious-freedoms-report-recommendations/10361522>.

5 13 December 2018 ("Religious Freedom Review", *Australian Government, Department of Prime Minister and Cabinet,* <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>).

6 "Review into the Framework of Religious Exemptions in Anti-discrimination Legislation" 10 April 2019, *Australian Government, Attorney-General for Australia and Minister for Industrial Relations,* <https://www.attorneygeneral.gov.au/media/media-releases/review-framework-religious-exemptions-anti-discrimination-legislation-10-april-2019>.

7 See for example the Di Natale bill ("Discrimination Free Schools Bill 2018" 16 October <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1147>) and the "Dissenting Report of Coalition Senators", 26 November 2018, *Parliament of Australia* (<https://www.aph.gov.au/Parliamentary_Business/ Committees/ Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report/d01>).

8 See for example, Renae Barker, "Transparency is the way forward for religious exemptions to anti-discrimination laws", 15 October 2018, *ABC Religion and Ethics* (<https://www.abc.net.au/religion/transparency-is-the-way-forward-for-religious-exemptions/10379256>).

9 "Morrison government delivers on religious reforms", 29 August 2019, *Australian Government, Attorney-General for Australia and Minister for Industrial Relations,*

<https://www.attorneygeneral.gov.au/media/media-releases/morrison-government-delivers-religious-reforms-29-august-2019>.

10 "Review into the Framework of Religious Exemptions in Anti discrimination Legislation", 10 April 2019, *Australian Government, Australian Law Reform Commission* <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.

11 "Religious Freedom Bills – Second Exposure Drafts", *n.d. Australian Government, Attorney-General's Department* <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>.

12 I acknowledge that my use of the word 'exemptions' here is politically incorrect because the drafting of the new *Bill* has been premised on removing the idea that religion is entitled to an exemption from law. The *Bill* thus correctly treats religious freedom as a fundamental human right rather than as an exemption from the application of other generally applicable laws. But the 'exemption' language is appropriate when applied to government and big business, since they are supposed to respect fundamental human rights including religious freedom along with everyone else. Their 'exemption' from the new comprehensive regime is thus more than a little ironic.

13 In *Chow Hung Ching v The King* (1948) 77 CLR 449, Dixon J said that the ratifying of a treaty only committed externally and had "no legal effect upon the rights and duties of the subjects of the Crown" (ibid 477-478). The High Court has followed this view in many subsequent cases including *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and McHugh J) and *Kiao v West* (1985) 159 CLR 550 (per Gibbs CJ).

14 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

15 *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1. For more detail, see A. K. Thompson, "A Commonwealth Religious Discrimination Act for Australia?", *Solidarity, The Journal of Catholic Social Thought and Secular Ethics*, Volume 7, Issue 1 (2017).

16 Again, for more details see Thompson (n 15).

17 Adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976. Australia ratified on 13 August 1980.

18 Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); reaffirmed by the United Nations by resolution 48/128 in 1993, and declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

19 *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559.

20 In the *DOGS* case, the High Court held that s 116 of the *Australian Constitution* was narrower than the almost identical First Amendment in the US, because it only prohibited funding that was "for" exclusively religious purposes whereas the US provision effectively prohibited funding that helped religion in any way.

21 The United Nations General Assembly adopted *CEDAW* on 18 December 1989 and entered into force on 3 September 1981.

22 The Amendment was finally passed on 25 June 2013, one day after the 'spill' which saw Kevin Rudd replace Julia Gillard as Prime Minister of Australia.

23 Australian Human Rights Commission, *n.d.* "New protection against discrimination on the basis of sexual orientation, gender identity and intersex status; What is changing?" <https://www.humanrights.gov.au/our-work/lgbti/projects/new-protection>.

24 The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) did not rely on its own international agreements or treaties but rather relied on the provisions of all the international agreements and treaties listed as "relevant international instruments"

in s 4 of the *Sex Discrimination Act 1984*. Arguably none of those instruments obliged Australia to pass legislation in relation to sexual orientation, gender identity or intersex status.

25 Above note 10 and supporting text.

26 Previous attempts to implement a general human rights framework in Australia have included Tasmanian Attorney-General Andrew Inglis Clark's attempt to have the *Australian Constitution* include a Bill of Rights at the time of federation; the Whitlam government's attempt to create some form of human rights protection under Attorney-General Lionel Murphy in the 1970s; the Human Rights and Equal Opportunity Commission's recommendation of a Religious Freedom Act in 1998, and the Brennan Commission appointed by the Rudd government and which received submissions and made recommendations between 2009 and 2010.

27 *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998, v, R2.3.

28 *ICCPR*, Article 18(4).

29 The *Racial Discrimination Act 1975* (Cth) implemented Australia's commitments under the *International Convention on the Elimination of all Forms of Racial Discrimination* (the *Racial Discrimination* Convention) (adopted and opened for signature and ratification by General Assembly resolution 2106 on 21 December 1965 and entered into force on 4 January 1969 in accordance with Article 19; ratified by Australia on 30 September 1975). The *Sexual Discrimination Act 1984* (Cth) implemented Australia's commitments under *CEDAW*.

30 For more detail, see Carolyn Maree Evans, *Legal Protection of Freedom of Religion in Australia*, The Federation Press, Leichardt, New South Wales, 1990, 167, Patrick Parkinson, "Christian Concerns about an Australian Charter of Rights," (2010) 15(2) *Australian Journal of Human Rights* 87 and George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory*, 6th ed., The Federation Press, 2014, 1147-1148. See also Thompson (n 15).

31 See above n 26.

32 See n 30 above.

33 Notes 1-5 above and supporting text.

34 See for example Neil Foster, "New Commonwealth Religious Freedom Laws" 5 September 2019 (<https://legalwiseseminars.com.au/new-commonwealth-religious-freedom-laws/>) and Mark Fowler, "Religious bill in the hands of the faithful" (<https://www.theaustralian.com.au/inquirer/religious-bill-in-the-hands-of-the-faithful/news-story/660b04f338fb0b633a50db606b044d66>).

35 Personal communications between the writer and Tim Wilson, August 7, 2019.

36 Australia ratified this Covenant on 13 August 1980. Note that the Preamble and A2 obliged parties to the Covenant to "take the necessary steps to… to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

37 *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998.

38 Mike Head, "The Rudd government rejects human rights charter", 24 May 2010, *Treaty Republic,* <https://treatyrepublic.net/content/rudd-government-rejects-human-rights-charter>.

39 *Racial Discrimination Act 1975* (Cth).

40 *Sexual Discrimination Act 1984* (Cth).

41 The *Racial Discrimination Act 1975* (Cth) was passed to implement Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (opened for signature 21 December 1965, 660 UNTS 195; entered into force 4 January 1969, and ratified by Australia on 30 September 1975 which is the same day as the *Racial Discrimination Act 1975* (Cth) was passed). The *Sexual Discrimination Act 1984* (Cth) was passed to implement Australia's obligations under the 1981 *Convention on the Elimination of All Forms of Discrimination Against*

*Women* (adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981 after the twentieth country ratified it ("Convention on the Elimination of All Forms of Discrimination against Women", New York, 18 December 1979, *United Nations Human Rights, Office of the High Commissioner* <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>).

42 Section 29(3)(a).

43 "Religious bill in the hands of the faithful", *Weekend Australian Inquirer,* 31 August 2019 (<https://www.theaustralian.com.au/inquirer/religious-bill-in-the-hands-of-the-faithful/news-story/660b04f338fb0b633a50db606b044d66>).

44 During the Convention debates at the time of Australian federation, Victorian atheists petitioned the Parliament to ensure Australia could not have an established church after South Australian representative, Patrick Glynn, succeeded in adding the words "humbly relying on the blessing of Almighty God" into the Preamble to the *Constitution*. The addition of the current s 116 followed, but it was agreed that the States should retain their power to pass laws abridging free exercise of religion but that the Commonwealth should have no such power.

45 "Second Exposure Draft of the Religious Discrimination Bill – Explanatory Notes" *n.d. Australian Government, Attorney-General's Department* (<https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills-second-draft/explanatory-notes-second-exposure-draft-religious-discrimination-bill-2019.pdf>) Para 17.

46 Ibid, Recommendation 15, refer Paras 20-21.

47 Ibid, Recommendation 3, refer Para 18.

48 Ibid, Recommendation 19, refer Paras 22-23.

49 Ibid para 28.

50 The full text of Australia's 1980 reservations to ratification on the *ICCPR* may be found under the heading "Reservations and Declarations" under "Article 2 and 50" in the Australia Treaty Series (<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>).

51 For detail of the constitutional basis upon which it is now settled that the Commonwealth can override inconsistent state and territory laws see Thompson (n 15). That settlement rests on High Court decisions in the *Koowarta* (1982) (n 14), *Tasmanian Dam* (1983) (n 15) and *Industrial Relations Act* (*Victoria v Commonwealth* (1996) 187 CLR 416) cases.

52 Note however that the notes in the draft *Bill* itself would allow a health practitioner to refuse to participate in an abortion or euthanasia procedure if someone else could be found to perform their role. But the health practitioner could still be prohibited from refusing to prescribe contraceptives to particular people or groups of people (eg single women).

53 The ALRC has responded to previous religious freedom references from the Australian government. For example, "Traditional Rights and Freedoms – Encroachments by Commonwealth laws", 31 July 2015, *ALRC Interim Report 127, Chapter 4* (<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/4-freedom-of-religion/>). The Morrison government referred further religious freedom questions to the ALRC for recommendations following the release of the Ruddock Review Panel recommendations on 10 April 2019. But it amended and narrowed the scope of the ALRC's terms of reference on 29 August 2019 immediately before it released its First Exposure Draft of its proposed the *Bill* for public comment. The amended terms of reference may be accessed at the following ALRC site - <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>. Note further than on 2 March 2020, the federal government further amended the ALRC reporting date to be "12 months from the date the Religious Discrimination Act is passed by parliament" < https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/?fbclid=IwAR3ycLXmZ4GSGY1-VQRcoaJhkFkxPUXHq_vUsk-ufWeME0ZfdA0ls3lnlTw>.

54 Justice Sarah Derrington, "Of Shields and Swords – Let the Jousting Begin!", 4 September 2019 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>. See the same address on the ALRC's website <https://www.alrc.gov.au/news/of-shields-and-swords/>.

55 Ibid.

56 The Amendment was finally passed on 25 June 2013, one day after the 'spill' which saw Kevin Rudd replace Julia Gillard as Prime Minister of Australia.

57 Derrington (n 54).