Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade: Freedom of Religion

Dear Committee,

A number of recent cases in Australia have highlighted an emerging tension between religious freedom and anti-discrimination law, particularly in relation to sexual orientation and same-sex marriage. Opponents of same-sex marriage claim that if same-sex marriage is legalised, anti-discrimination law could be used to restrict religious freedom which conflicts with same-sex marriage. Any constitutional protection of religious exercise in Section 116 is questionable due to the historically narrow construction of the free exercise clause by the High Court.

Consequently, this submission argues for a broader constitutional interpretation of freedom of religion with legislative implications. The desire to promote a truly democratic and inclusive society means that religious organisations and religious individuals should be provided with suitable legislative protection so they can freely exercise their religion in a public context. This is consistent with the High Court's implied freedom of political communication. Moreover, the protections for religious organisations should be extended to religious individuals, including religious individuals operating businesses, because the free exercise clause does not distinguish between individuals and organisations in protecting freedom of religion.

An example additional protection to be inserted into Commonwealth anti-discrimination law could be:

'Individuals who refuse to express a view or offer goods or services in a situation where to do so would conflict with the doctrine and practice of their religion, or who would have their religious convictions offended were they compelled to express the view or offer the good or service in that situation, are not subject to the anti-discrimination provisions unless the refusal directly results in concrete hardship for those who seek the expression or service.'

Contextually appropriate and clear legislative protections for freedom of religion are required for effective Commonwealth engagement with this continuing tension between religious freedom and anti-discrimination in a same-sex marriage context.

Please note that this submission is a modified version of an article to be published in Volume XX of the *International Trade and Business Law Review*. Thank you for your consideration.

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I AUSTRALIA IN THE CRUCIBLE: RELIGIOUS FREEDOM VERSUS ANTI-DISCRIMINATION

There is a fundamental legal tension in Australia between free exercise of religion and anti-discrimination law, and in particular laws dealing with sexual orientation. For example, in *Christian Youth Camps Limited v Cobaw Community Health Services Limited*,[1] Cobaw, an organisation providing suicide awareness and prevention support to young people experiencing same-sex attraction, sought to make a booking for a campsite that was generally available to community groups. Christian Youth Camps (CYC), a camping organisation connected to the Christian Brethren, refused to make the campsite available on the basis that it did not want to participate in the advocacy of homosexual activity. Dismissing an appeal, the Victorian Supreme Court found that CYC had discriminated against Cobaw because of sexual orientation.

Conversely, in *Bunning v Centacare*,[2] an employee of a Catholic family counselling centre was dismissed because of her involvement in polyamorous activities. She claimed discrimination on the basis of sexual orientation, but the Federal Court decided that polyamory is a behaviour rather than an orientation, so there was no discrimination. Recently, Tasmania's Archbishop of the Catholic Church released a statement affirming traditional marriage. Transgender activist and Federal Greens candidate, Martine Delaney, impugned this document on the basis that it breached Tasmania's anti-discrimination law by insulting, offending or humiliating an individual or group because of a listed attribute (homosexuality), and brought a case to the Tasmanian Anti-Discrimination Commission. Though the case was eventually dropped, Delaney argued that 'some freedoms are not absolute', and 'in a secular society religious freedom must sometimes give way to the law'.[3]

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1 [2014] VSCA 75.

2 [2015] FCCA 280.

3 *ABC News*, *Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says* (28 September 2015)

It is likely that these sorts of cases will continue to increase in frequency and complexity, particularly if same-sex marriage is legalised. Opponents of same-sex marriage argue it will undermine free exercise of religion by combining with anti-discrimination legislation to restrict free exercise and expression of religious perspectives and practices which may conflict with same-sex marriage. They claim such legislation may be used to 'enforce a new dimension of political correctness', instituting a 'new right' which would 'trump previously held rights' such as the right of religious ministers and institutions to be able to refuse to solemnise a same-sex marriage on the ground of their religious beliefs.[4]

Though proponents of same-sex marriage have responded by saying that exemptions will be passed to cover these circumstances, the fear is that either the promise for such exemptions is disingenuous, or that in practice the exemptions will not effectively operate to protect religious people, ministers or organisations from claims of discrimination.[5] This fear has been exacerbated by major political parties indicating that they may reduce or remove the anti-discrimination exemptions which already exist for religious organisations if they are elected, or the Shadow Attorney-General indicating that he does not believe there is any relation between same-sex marriage and encroachment on religious freedom.[6] Moreover, any protection given by s 116 of the Constitution, which

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<http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

4 Neville Rochow, 'Speak Now or Forever Hold Your Peace – The Influence of Constitutional Argument on Same-Sex Marriage Legislation Debates in Australia' (2013) 2013(3) *Brigham Young University Law Review* 521, 526–27.

5 Ibid 526.

6 See, e.g., Sen Penny Wright, *Caring About the Rule of Law: Protecting Human Rights* (25 July 2015) Australian Greens <http://greensmps.org.au/sites/default/files/130725_greens_rol.pdf>; See also *Could a Deal on the Gay Marriage Plebiscite be on the Cards?* (24 September 2016) News.com.au <http://www news.com.au/lifestyle/gay-marriage/could-a-deal-on-

contains a clause prohibiting laws which restrict the free exercise of religion, is questionable due to its very narrow construction by the High Court.[7]

The clause which prohibits laws restricting the free exercise of religion applies solely to Commonwealth laws and has only been tested three times, with the High Court yet to find a violation.[8] This dearth of judicial activity concerning the free exercise clause, and lack of use where it is relevant, belies its potential and developing importance in the arena of religious freedom and anti-discrimination, where anti-discrimination legislation may effectively operate to curb the free exercise of religion.

The central argument of this submission is that the free exercise clause should be understood more broadly to motivate legislative protection for religious freedom from the general operation of anti-discrimination law in particular circumstances. There are two components to this argument. The first component is the claim that the interpretation of the free exercise clause should be expanded. Within this claim, there are two issues considered. First, one problem with the current law on free exercise is the 'purpose'

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the-gay-marriage-plebiscite-be-on-the-cards/news-story/e09eafc5fbd2c4b729b347743976162f>.

7 *Kruger v Commonwealth* (1997) 190 CLR 1; Rochow, above n 4, 528.

8 See most recently *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 161 (Gummow J) where laws forcibly removing Indigenous Australians from their culture and heritage did not breach the free exercise clause. For the previous two cases see *Krygger v Williams* (1912) 15 CLR 366 where religiously grounded objections to compulsory military participation were not considered within the scope of free exercise of religion, and *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 where legislation dissolving the Jehovah's Witnesses organisation did not breach the free exercise clause. See generally David Bogen, 'The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws' (1998) 46 *Drake Law Review* 53, 57–8. No case has considered the free exercise clause since Bogen's submission.

requirement. To be a law invalidly restricting the free exercise of religion, the law must have the restriction or regulation of religion as part of its express purpose.[9] This means that the Commonwealth can potentially restrict the free exercise of religion indirectly through the effect of the law, circumventing and undermining the application of the free exercise clause. In Part II, the submission argues that in contrast to the current majority view which requires that the law restrict free exercise of religion in its terms, the Commonwealth ought to adopt Gaudron J's more expansive view that the free exercise clause operates to prohibit laws which restrict free exercise of religion by their indirect effect, as well as by their direct purpose.[10]

The second issue with the current law on the free exercise clause is the paucity of decisions and the strict method of resolving these decisions. This may be related to a general lack of scholarly consideration of the relationship between the free exercise clause and anti-discrimination legislation.[11] The free exercise clause has been interpreted narrowly, and this could present problems for the protection of religious freedom in the context of anti-discrimination. However, the true nature and extent of any potential problem is not really known because the justification, nature and limits of the free exercise clause are largely unclear and unarticulated in the modern context of tension with anti-discrimination legislation. To address this, the submission develops Gaudron J's view in Part III and applies it in Parts V and VI. According to contextual constitutional structure and principled argument, a broad view of free exercise is informed by reasoning similar to that underlying the implied freedom of political communication; namely, that democracy should be prioritised through limiting restrictions (such as anti-

9 *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 161 (Gummow J).

10 Ibid 131–32.

11 Instead, submissions have largely focused on a human rights clash between the right to freely exercise religion and the right to freedom from discrimination: See, e.g. Anthony Gray, 'Reconciliation of Freedom of Religion With Anti-Discrimination Rights' (2016) 42(1) *Monash University Law Review* 72.

discrimination legislation) on the public expression of religious views and practice. This further means that we may borrow from the implied freedom's methodology to articulate the limits of the freedom; this is discussed in Parts VI and VII.

The second component of the central argument is the claim that religious freedom should be protected from the general operation of anti-discrimination law in particular circumstances. The main issue here involves balancing free exercise of religion with anti-discrimination and complements the first component of the central argument by contemplating a different kind of expansion to the free exercise clause. The current religious exemptions in Commonwealth anti-discrimination law relating to sexual orientation and marital status, outlined in Part IV, are restricted to religious organisations and do not extend to religious individuals. However, the text of the free exercise clause does not distinguish between free exercise of religion for organisations and free exercise of religion for individuals. It simply states that free exercise of religion should not be prohibited, and an implication is that this applies to both individuals and organisations. Therefore, the submission argues in Parts V and VI that the discrimination exemptions for religious organisations which already exist should be preserved, and could also be extended to protect religious individuals who engage in religious practice at risk of restriction by anti-discrimination legislation.

Part VI consequently articulates an approach to freedom of religion informed by these textual and contextual considerations.[12] Finally, Part VII summarises the argument, indicating the importance of clear and specific protections for freedom of religion in preparation for a future where there will most likely be sustained conflict between religious freedom and anti-discrimination.

II FREE EXERCISE: BROADENING A NARROW APPROACH

[12] Moens calls for such an approach: see Gabriel Moens, 'Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195, 215.

The first task of this submission is to explain the current High Court doctrine regarding the free exercise clause contained in s 116 and consider the possibility of adopting the broad approach advocated by Gaudron J. Section 116 of the Australian Constitution states that:

> 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.[13]

Evans explains that s 116 has historically been given a very conservative and limited interpretation by the High Court, such that the boundaries of free exercise and issues of discrimination have largely been left to political and democratic processes. Courts have been generous and inclusive in defining religion, but very narrow in defining the scope of religious freedom.[14] Chief Justice Latham in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*

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13 For an overview and consideration of the legal and historical context of s 116, see generally Anthony Blackshield, 'Religion and Australian Constitutional Law' in P Radan et al (eds), *Law and Religion* (Routledge, 2005). For an overview of the legal state of the free exercise clause see Gabriel Moens et al, *The Constitution of the Commonwealth of Australia Annotated* (LexisNexis, 8th ed, 2011) 799–804.

14 See in particular *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ); *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 149–150 (Rich J); *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135–136 (Mason ACJ and Brennan J). See also Carolyn Evans, 'Religion as Politics not law: the Religion Clauses in the Australian Constitution' (2008) 36(3) *Religion, State and Society* 283, 284. Mortenson also observes the very narrow interpretation given to the free exercise clause, though he acknowledges that questions over the applicability of s 116 to the Territories and the fact that it only applies to Commonwealth legislation have also contributed to its restricted operation. See Reid Mortenson, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 170–71.

('*Jehovah's Witnesses*')[15] argued that since the 'free exercise' of religion is protected, this includes but extends beyond religious belief or the mere holding of religious opinion; the protection 'from the operation of any Commonwealth laws' covers 'acts which are done in the exercise of religion' or 'acts done in pursuance of religious belief as part of religion'.[16] However, subsequent cases noted these acts must be religious conduct, or 'conduct in which a person engages in giving effect to his [sic] faith in the supernatural'.[17] Religious conduct protected by s 116 extends to 'faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion'.[18] This is a narrow definition which restricts 'free exercise' to that conduct which is overtly religious and normally considered private in nature, such as prayer and church attendance.

Furthermore, not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom.[19] At a minimum, the High Court has stated that the narrowest limitations on free exercise of religion are appropriate – that

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15 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

16 Ibid 124–25 (Latham CJ). This follows Griffith CJ in the 1912 case of *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ), indicating that s 116 not only protects religious belief/opinion or the private holding of faith, but also protects 'the practice of religion – the doing of acts which are done in the practice of religion'. For further discussion and questions regarding the current applicability of this 'action-belief dichotomy', see Gabriel Moens, 'Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

17 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

18 Ibid 135–36 (Mason ACJ and Brennan J).

19 Evans, above n 14, 297; see generally *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

required for the 'maintenance of civil government' or 'the continued existence of the community'.[20]

The framers were conscious of this in their drafting process, acknowledging that the free exercise clause should not extend to protect those beliefs which include particular religious rites involving murder and human sacrifice.[21] So at one end of the spectrum free exercise of religion is restricted to overtly religious conduct which gives effect to a religious belief (e.g., prayer and worship), and at the other end of the spectrum, religious conduct which is incompatible with a civil government (e.g., murder and human sacrifice) is clearly not protected. However, there is limited jurisprudence on conduct which falls somewhere in the middle, such as public conduct influenced or affected by religious conscience – the running of a business, or a school. It is precisely this area which is affected by anti-discrimination legislation, and it is problematic that there is no exact statement explaining how the free exercise clause may protect this conduct.

In this sense, Chief Justice Latham was surely right when he observed that when defining a 'free' exercise of religion, 'the word "free" is vague and ambiguous' and must take its meaning 'from the context' – there is no universally applicable definition.[22] However, the decisions of the High Court in free exercise cases suggest that the Court nevertheless takes a very restrictive approach. For example, the last time the High Court considered the free exercise clause was the 1997 case of *Kruger v Commonwealth* ('*Kruger*').[23] In *Kruger*, the plaintiffs argued that a Northern Territory ordinance which authorised the forced removal of Indigenous children from their tribal culture and heritage was invalid as a law prohibiting the

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20 Mortenson, above n 14, 173; *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126, 131 (Latham CJ), 155 (Starke J).

21 *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 7 February 1898, 656 (Right Hon Sir E N C Braddon).

22 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126–27 (Latham CJ).

23 (1997) 190 CLR 1.

free exercise of religion. Leaving aside the Court's discussion of whether s 116 applies in the territories, the majority held that the impugned law did not mention the term 'religion' and was not 'for' the purpose of prohibiting the free exercise of religion in its terms, and so the law was upheld. Only laws could breach s 116, not the administration of laws.[24] Chief Justice Brennan, Gummow and McHugh JJ (in separate majority judgments) reinforced the traditional narrow approach, stating that to be invalid under s 116 the impugned law 'must have the purpose of achieving an object which s 116 forbids', and upholding the law on the basis that 'no conduct of a religious nature was proscribed or sought to be regulated in any way'.[25]

Thus the current High Court approach is narrow and focused on the explicit purpose of the legislation: if the impugned law does not restrict free exercise of religion as part of its purpose, it will be valid.[26] In *Church of the New Faith*, Mason ACJ and Brennan J even go so far as to say that 'general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them'.[27] So the current High Court position is that generally applicable laws for the maintenance of society cannot be prohibited by the free exercise clause unless the laws have the specific objective of restricting the free exercise of religion. This position has important implications for the relationship between the free exercise clause and anti-discrimination legislation. Anti-discrimination laws with the general (and commendable) objective of promoting equality in society will not breach the free exercise clause, because they are not directed towards the regulation of religion. Consequently, there may

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24 Evans, above n 14, 296.

25 *Kruger v the Commonwealth* (1997) 190 CLR 1, 40, 161 (Gummow J).

26 The result is foreseen by Moens: see Gabriel Moens, 'Church and state relations in Australia and the United States: The purpose and effect approaches and the neutrality principle' (1996) 4 *Brigham Young University Law Review*, 788–89, 809–810.

27 Evans, above n 14, 297; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

well be situations where there are significant restraints placed on religious freedom without a breach of s 116 being found.[28]

As discussed in Part IV, there are some exemptions for religious organisations, but this submission argues that generally applicable laws (such as anti-discrimination legislation) which incidentally restrict free exercise should contain exemptions allowing free exercise of religion for individuals as well as organisations. Otherwise, the Commonwealth could seek to do indirectly what they cannot do directly: restrict the free exercise of religion. In addition, as will be argued in Part V, this possibility of indirect restriction indicates the need for a broader approach which considers effect as well as purpose, exemplified by Gaudron J's dissenting judgment in *Kruger*.[29]

Justice Gaudron argues:

> There are two matters, one textual, the other contextual, which… tell against construing s 116 as applying only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion…the need to construe guarantees so that they are not circumvented by allowing to be done indirectly what cannot be done directly has the consequence that s 116 extends to

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28 For example, in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132–33 (Latham CJ), the Court held that the regulations purporting to dissolve the organisation did not infringe s 116. Cf S McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207, 208–209.

29 This approach is not without precedent before *Kruger*. In *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116 the Court mentioned that the purpose of the legislation may properly be taken into account, but a regulation which is neutral on its face yet burdens the free exercise of religion in its effect could offend the free exercise clause. See Mortenson, above n 14, 172–73; *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 136 (Latham CJ).

> provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.[30]

Justice Gaudron disagreed with the explicit purpose requirement for textual and contextual reasons, arguing that it was an inappropriate approach to construing constitutional limits on Commonwealth legislative power as it could allow the Commonwealth to do indirectly what they could not do directly. She consequently held that s 116 extends to protect laws which operate to restrict free exercise of religion in their effect, not just those which explicitly ban it. The textual reason Gaudron J gives is that the clause explicitly states that it applies to laws which restrict the free exercise of religion, whether this is direct or indirect. If free exercise is in fact restricted by the operation of a Commonwealth law, then the clause should apply.

Contextually, Gaudron J argued that in any case, the Commonwealth has no power to make laws for the explicit purpose of prohibiting the free exercise of religion. This means that if the free exercise clause were only to effectively apply to laws which prohibit the free exercise clause in their terms, it would render the clause superfluous. Therefore, the free exercise clause must operate at a broader level than prohibiting laws which restrict free exercise as a matter of purpose; it must extend to also prohibiting laws which restrict free exercise in their indirect effect.[31] Justice Gaudron's interpretation is plausible, taking into account the text of the free exercise clause and demonstrating that the interpretation of the majority would render the free exercise clause superfluous. Since the clause should be understood as expressed and not read down to be merely cosmetic, it follows that Gaudron J's approach may be the better approach.

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30 *Kruger v the Commonwealth* (1997) 190 CLR 1, 131–32 (Gaudron J).

31 Evans, above n 14, 296; *Kruger v the Commonwealth* (1997) 190 CLR 1, 131–32 (Gaudron J).

Expanding on Gaudron J's approach in the dynamic context of same-sex marriage and anti-discrimination provisions, the remainder of this submission develops related textual and contextual arguments for broadening the current understanding of prohibiting free exercise. The term 'textual' refers to the actual text and literal construction of the free exercise clause. The term 'contextual' refers to the general structure of the Constitution and the concerns which underpin interpretation of the structure and specific provisions. In particular, the contextual consideration of the implied freedom of political communication suggests an approach which prioritises democracy, allowing free exercise in the form of publicly expressing controversial religious views about same-sex marriage which may inform voting, and public religious practice as a form of civic participation. This contextual consideration implies that the current exemptions for religious organisations should be retained. Furthermore, the textual consideration that the free exercise clause makes no distinction between the free exercise of religion by religious organisations and free exercise of religion by religious individuals also implies that religious individuals should be granted the same anti-discrimination exemptions afforded to religious organisations in order to foster a robust and pluralistic democracy.

III A CONTEXTUAL CONSIDERATION: IMPLIED FREEDOM OF POLITICAL COMMUNICATION

A *Priority for Democracy*

It is generally accepted that free exercise of religion and the implied freedom of political communication intersect to protect the public expression of religious speech which may affect voting.[32] This part

[32] For background to the implied freedom, see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For analyses of the judgments, see Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 249–51; Arthur Glass, 'Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of

of the submission extends that contention to argue that the same concerns which underpin the implied freedom of political communication apply to free exercise of religion. It follows that there should be a broader approach to free exercise in order to facilitate representative democracy. Essentially, the submission will present a normative argument, supported by High Court doctrine on the implied freedom, that interpretation of the Constitution is grounded in a 'priority for democracy', and this priority is why the broader interpretation of free exercise should be adopted.[33] Priority for democracy means all religious, philosophical and scientific voices (like votes) should be considered equally when it comes to decision-making.[34] As Bader contends:

> Instead of trying to limit the content of discourse by keeping all contested comprehensive doctrines and truth-claims out, one has to develop the duties of civility, such as the duty to explain positions in publicly understandable language, the willingness to listen to others, fair-mindedness, and readiness to accept

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Constitutional Rights' (1995) 17 *Sydney Law Review* 29, 32–35; Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 38–41. For reasoning consistent with an intersection between the implied freedom and the free exercise of religion, see, e.g. *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 125–26 (Latham CJ) where Latham CJ mentions the effect of faith on politics; Cf *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138–39 (Mason CJ); Nicholas Aroney, 'The Constitutional (In) Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287, 303; D Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438.

33 V Bader, 'Religious Pluralism: Secularism or Priority for Democracy?' (1999) 27 *Political Theory* 597, 612–13.

34 Ibid 612–13. Cf for example Jeremy Waldron, *Law and Disagreement* (Oxford, 1999).

> reasonable accommodations or alterations in one's own view.[35]

This is not the same as a 'public reason' requirement of the type advocated by, for example, John Rawls, who prescribes certain minimum standards of equal citizenship by effectively preventing the public discussion of contested comprehensive doctrines, both religious and secular.[36] The focus is on creating a public space for free and fair discussion of contested views which are equally considered in the decision-making process. Allowing the opportunity for all views to be robustly proposed and debated in a civil manner is a primary feature of Australia's democratic system. One may of course disagree with what is expressed, but the nature of democratic discourse is that all kinds of views should be able to be proposed. It follows that a priority for democracy model should explicitly allow for all religious or non-religious arguments compatible with the democratic process, leading to a pluralistic encounter of perspectives which will combine and contribute to policy-making and allow true liberal democracy – the freedom to equally express and decide between a full array of perspectives, with the state promoting and excluding none.[37]

What is required is a sensible balancing of the different claims, taking into account minority religions, majority religions, and those who follow no religion.[38] Indeed, as their justification for implying the freedom of political communication, the judges in the leading cases rely on this idea of prioritising democracy, or the 'principle that free speech will facilitate the discovery of truth and the influencing of values and will thus assist the voters to make a meaningful choice'.[39] Free communication provides a broad scope

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35 Bader, above n 33, 614.

36 See, e.g. John Rawls, *Political Liberalism: Expanded Edition* (Columbia, 4th ed, 2011) 75.

37 Bader, above n 33, 617.

38 Ibid 608.

39 Kirk, above n 32, 52. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–40 (Mason CJ), 211–12

of opinions on an even broader range of topics, all of which enable voters to discover the truth and implement their associated values in the political context: electing members of particular parties advocating particular policies.

Deane and Toohey JJ argued as part of the majority in *Nationwide News* that the doctrine of representative government (government by representatives elected by and responsible to the Australian people) implicitly undergirds the Constitution.[40] The justices contended that voters would be unable to discharge their constitutional obligation to choose their representatives if they were unable to communicate with each other about the background, qualifications and policies of the candidates and the 'countless number' of other factors which are relevant to consideration of the interests of the nation and the people.[41] Consequently, Deane and Toohey JJ concluded that in the doctrine of representative government incorporated in the Constitution there exists an implication of free communication of information relating to the government of the Commonwealth.[42] Since the Constitution operates based on a system of representative government and representative government requires free communication to properly function, it follows that the Constitution implies a guarantee of free political communication so that responsible government can successfully occur.[43]

Chief Justice Mason for the majority in *Australian Capital Television Pty Ltd v Commonwealth* ('*Australian Capital Television*')[44] accepted the plaintiffs' argument that since the Constitution assumes and effectively prescribes the doctrine of representative government, free political communication is necessarily implied by the Constitution as an essential corollary of

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(Gaudron J), 230–32 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47–50 (Brennan J), 72 (Deane and Toohey JJ).

40 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

41 Ibid 72 (Deane and Toohey JJ).

42 Ibid 72–73 (Deane and Toohey JJ).

43 Aroney, above n 32, 249.

44 (1992) 177 CLR 106.

that system.[45] It is only by exercising this freedom that citizens can communicate their views 'on the wide range of matters that may call for, or are relevant to, political action or decision', and 'criticise government actions' and 'call for change', in this way influencing the policies and decisions of the elected representatives.[46] For Mason CJ, the scope of communication covered and the freedom of various communicators is necessarily broad, and 'in a representative democracy public participation in political discussion is a central element of the political process'.[47] This representative sample of statements by the High Court indicates that the functioning of a representative democracy is a primary consideration in the development of the implied freedom. There must be a space for people to freely communicate politically relevant views, and this may entail disagreement, offence and irrationality. However, these are necessary elements of a functioning democracy and are consistent with the Constitutional framework.[48]

The fundamental point is that since communication on any subject matter may influence voting on that subject matter, and every subject matter is potentially able to become involved in political processes, communication on any subject may be considered political and therefore covered by the implied freedom.[49] Ultimately, it is the substance of these communications which enables a voter to assess a government. For example, 'people may form their political opinions by discussion of matters not on the political agenda, including matters like religion and philosophy that develop more fundamental commitments'.[50] Just as the free exercise clause in s 116 protects religiously motivated speech, so the implied freedom of political communication protects political speech. Since voters'

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45 Ibid 136 (Mason CJ).

46 Ibid 138 (Mason CJ).

47 Ibid 139, 142 (Mason CJ).

48 Glass, above n 31, 32; *Levy v State of Victoria* (1997) 189 CLR 579, 622–23 (McHugh J); *Roberts v Bass* (2002) 212 CLR 1, 44 [110] (Gaudron, McHugh and Gummow JJ).

49 Kirk, above n 32, 53.

50 Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 389–90.

political predilections may be fundamentally influenced by their religious convictions and the expression of religious perspectives, it follows that the implied freedom of political communication operates to protect religious speech.

Aroney also reasons that just as commercial, and entertainment speech may possess a relevantly political dimension attracting the constitutional protection, so may religious speech.[51] He contends that 'the free exercise clause in s 116 undoubtedly protects at least some (if not most) forms of religiously motivated speech, and may also protect communication about religion even if such speech is not religiously motivated'.[52] This is the place where priority for democracy, which consistently undergirds the free exercise of religion and the implied freedom of political communication, becomes relevant. Insofar as religious exercise in s 116 consists of the public expression of religious views and conduct, it is a freedom which is similarly essential to representative democracy and therefore ought to be similarly protected from generally applicable laws. People may have regard to all manner of intellectual disciplines and resources in their political formation and public participation, including religion, and the freedom of political communication enables the free dispensation of this information as contributing to representative democracy. In the same way, priority for democracy provides the basis for arguing that Australia's constitutionally mandated system of representative government means that a broader view of free exercise which allows for full and free public participation should be adopted.

B *The Constitutional Framework*

There are indications that this type of priority for democracy model was assumed by the framers of the Constitution in relation to s 116. The emphasis in the pre-federation constitutional debates surrounding s 116 was on the protection of the free exercise of religion from impedance by the state, juxtaposed with the community expectation that the state would not privilege one

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51 Aroney, above n 32, 297.
52 Ibid 303.

religion over another.[53] For example, both Higgins and Barton were careful to emphasise that the mention of God in the preamble on one hand did not mean that people's rights with respect to religion would be interfered with on the other, and that there would be 'no infraction of religious liberty' by the Commonwealth.[54]

For the framers, rather than a strict insistence on the state as a secular entity which excluded public religion, what was important was the state avoiding the promotion of religion which would cause sectarian division in the community.[55] It was actually felt that the community as a whole should have a religious character, but this religious character would be hindered by explicit state involvement.[56] There should be a state impartiality towards religion, reflected both in the avoidance of religious preference and the protection of individual and group autonomy in matters of religion as participants in the wider community.[57] Religious identities are not treated impartially by declaring that religious conduct is a private matter or by excluding religious arguments from political and constitutional debates.[58] For example, for Mortenson it seems inconsistent with prioritising democracy that those who adhere to a secular worldview may be able to publicly express themselves in policy debate in terms of their secularism, but those who adhere to a religious worldview may not be able to so express themselves in terms of their religion.[59]

After all, there are many extra-political factors which influence public policy, such as economics, morality and culture. Any denial

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53 McLeish, above n 28, 219.

54 *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 17 March 1898, 2474 (H B Higgins and Hon Edmund Barton).

55 McLeish, above n 28, 221–22.

56 Ibid 222.

57 Ibid 223.

58 See Nicholas Wolterstorff, 'Why we would reject what liberalism tells us etc.?' in P Weithman (ed), *Religion and Contemporary Liberalism* (Notre Dame, 1997) 162–81.

59 Reid Mortenson, 'The Establishment Clause: A Search for Meaning' (2014) 33(1) *University of Queensland Law Journal* 109, 124–25.

of religious discourse without addressing other external influences would seem to constitute hostility toward religion specifically, undermining its free exercise.[60] True 'impartiality' toward religion, therefore, includes the state not acting to impede the autonomy of individuals or groups making and pursuing religious choices. There are certainly valid limits to expressive conduct and unnecessarily offensive material, as well as restrictions on insolent modes of expression. However, to effectively equate disagreement with incommensurability or offense worthy of restriction is a grave mistake, particularly in a robust democracy where disagreement on all manner of deeply held incommensurable beliefs and conduct (not limited to religion) is ubiquitous.

These notions are reflected in the intention of at least one framer. Symon states that through s 116, the framers are 'giving… assertion… to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he [sic] likes'.[61] To profess a faith presumably includes public expression of that faith in words and conduct; otherwise, the distinction made between holding a faith and professing a faith is superfluous.[62]

Many of the framers did not desire a secular society which rejected the public display and discourse of religion. The historical and cultural context of the development of s 116 was a general endorsement of religion and a climate of tolerance based on a concern for the advancement of religion.[63] Consequently, the purpose undergirding s 116 was 'the preservation of neutrality in the federal government's relations with religion so that full membership

60 McLeish, above n 28, 228.

61 *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 660 (J H Symon).

62 See Moens, above n 16, 216.

63 J Puls, 'Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139, 140.

of a pluralistic community is not dependent on religious positions'.[64] This is reflected in Symon's statement that 'what we want in these times is to protect every citizen in the absolute and free exercise of his own faith, to take care that his religious belief shall in no way be interfered with'.[65]

Thus, a narrow view of the free exercise clause as only preventing laws which directly restrict free exercise seems to be inconsistent with prioritising an authentically democratic culture encouraging full public and political engagement. If indirect restriction of free exercise is allowed through generally applicable laws, as it currently is, the result is religious individuals and organisations will be unduly burdened in their religious practice (as occurred for Indigenous Australians in *Kruger* and the Jehovah's Witnesses organisation in that case), and it follows that these religious people or organisations will not be able to fully participate as citizens in a democratic society.[66] Priority for democracy demands an approach to free exercise that allows citizens to fully participate in democratic society despite their religious beliefs and practice, just as priority for democracy demands an approach to political communication which allows the public expression of religious perspectives to create a free and informed choice at an election.

C *Democracy and Free Exercise*

Even prior to the High Court articulating the implied freedom of political communication, similar principles of prioritising democracy and civic participation informed interpretation of the free exercise clause. For example, speaking of Griffith CJ's construction

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64 Ibid 151; Cf Gabriel Moens, 'The Menace of Neutrality in Religion' (2004) 5(1) *Brigham Young University Law Review* 525.

65 *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 659 (J H Symon).

66 See e.g. Valerie Kerruish, 'Responding to *Kruger*: The Constitutionality of Genocide' (1998) 11(1) *Australian Feminist Law Journal* 65, 67–68.

of s 116 in *Krygger v Williams*,[67] which distinguished between protected beliefs and unprotected public acts consequent on those beliefs, Hogan states that 'such an interpretation, which would make "religion" apply only to the internal forum, with no relevance to public acts, would make s 116 a complete mockery'.[68] This extremely narrow interpretation has been rejected by the High Court.[69] Despite Latham CJ's efforts in *Jehovah's Witnesses* to show that s 116 protects acts done in pursuance of religion as well as the possessing of religious opinion, he also observed that:

> Section 116, however, is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.[70]

This could be read as Latham CJ espousing the separation of religion and politics, but such an interpretation seems incongruent with the rest of his judgment. Chief Justice Latham provided a number of different religious examples illustrating the opposing contention that faith is not completely separate from politics.[71] Rather, Latham CJ can be understood as arguing for a true state impartiality – not the strict separation of religion and politics, but the equal promotion (or at least, the equal lack of prohibition) of the

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67 (1912) 15 CLR 366.

68 Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53(2) *The Australian Quarterly* 214, 219–20.

69 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 124–25 (Latham CJ). See also the agreement expressed by Clifford Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41, 65–67.

70 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126 (Latham CJ).

71 See *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 125–26 (Latham CJ).

free exercise of any religion.[72] His reasoning is that since all citizens of any religion or non-religion can be good citizens and participate appropriately in the democratic process, there is no basis as a matter of citizenship for restricting the free exercise of religion in general, or the free exercise of any religion in particular. As Mason ACJ and Brennan J state in *Church of the New Faith*, '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society'.[73] Promoting a free society is an essential aspect of prioritising democracy. Thus, freedom of religion is a necessary component of prioritising democracy.

Pannam therefore concludes that 'section 116 guarantees the right to disbelief. It does not allow a non-believer to force his [sic] disbelief on others… His [sic] voice may be raised in the legislature against the merits of governmental assistance, it cannot be heard in the courts to prevent it'.[74] It is through public participation in the democratic process by religions that government actions in relation to religious belief and action can be determined. Importantly, the pieces by Hogan and Pannam were both written before the High Court articulated the implied freedom of political communication and therefore they cannot be taken as explicitly advocating a relationship between the two freedoms. However, they at least anticipate a willingness to accept freedom of religion as extending to external actions based on belief if these actions are compatible with the democratic process.

More precisely, freedom of religion should extend to protect all external actions which are not dangerous to society or democracy, even if those views or actions are deemed unpopular according to

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72 See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 125–26 (Latham CJ); Cf Aroney's implicit agreement and clarification of Latham CJ's position in Aroney, above n 32, 301–302.

73 *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

74 Pannam, above n 69, 86.

community values.[75] As Latham CJ observes, 'section 116 is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities'.[76] This protection of the external expressions or actions of unpopular views is consistent with the implied freedom and indicates that the principle of prioritising democracy which undergirds the implied freedom should also result in a broader approach to free exercise.[77] Since a democracy should allow for the expression of all views compatible with democracy as a matter of freedom and equality (even if they are unpopular), in the same way, a democracy should allow for the public expression of religious perspectives and practice compatible with democracy – particularly given the presence of the free exercise clause.

All this begs the question of how the free exercise clause would mean protection for a wider field of activity than the implied freedom of political communication. Given that the scope of the implied freedom is extremely broad, covering communicative conduct as well as speech, it could be objected that the role of s 116 is merely artificial. According to the assumptions of prioritising democracy, any public expression of religious views or conduct is covered by the implied freedom, excluding any role for the free exercise clause.[78] However, the types of conduct potentially covered by the free exercise clause extend beyond the kinds of conduct covered by the implied freedom. These include indirect restriction of free exercise such as in *Kruger*, the ability of religious organisations to choose employees consistent with their religious doctrine, and the ability of religious individuals to conduct themselves and their businesses consistent with their religious convictions. Such conduct potentially falls within the scope of free exercise, but is not, at least ostensibly, politically relevant and is

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75 See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149–50 (Rich J).

76 Ibid 124 (Latham CJ).

77 Cf *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

78 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43–44 [67] (French CJ); *Levy v State of Victoria* (1997) 189 CLR 579.

therefore outside the scope of the implied freedom. This leaves a unique role for the free exercise clause.

Zimmermann helpfully conceives the relationship between the two freedoms in the sense that an implied freedom of communication on religious grounds exists which is derived from the implied freedom of political communication, and from the same motivation of prioritising democracy.[79] Using the principles undergirding the implied freedom (which have been consistently endorsed by the High Court) to provide the conceptual and contextual framework for interpreting the free exercise clause allows an expanded view of free exercise, facilitating public expression of religious conduct and perspectives for the purpose of prioritising democracy. The reasoning undergirding the implied freedom of political communication is significant when it comes to the tension between religious freedom and anti-discrimination. Based on the argument in this part that unduly restricting free exercise undermines democracy, anti-discrimination legislation which burdens the free religious exercise of individuals and organisations in its effect as well as its purpose could be held invalid as breaching s 116. This fundamental contention is developed in the following parts.

IV A TENSE UNION: FREEDOMS AND DISCRIMINATION IN A SAME-SEX MARRIAGE CONTEXT

To reiterate, the free exercise clause is a protection against Commonwealth laws which restrict or prohibit the free exercise of religion.[80] The implied freedom of political communication is a protection against Commonwealth (and State) laws which restrict

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79 Augusto Zimmermann, 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws Are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution' 2013(3) *Brigham Young University Law Review* 457, 493–503.

80 *Adelaide Company of Jehovah's Witnesses In.c v Commonwealth* (1943) 67 CLR 116, 122–23 (Latham CJ).

political communication.[81] In order to invoke the freedoms, there must be specific Commonwealth legislation impugned as inconsistent with them or seeking to restrict them. Here, the tension or potential inconsistency exists between religious freedom and anti-discrimination laws relating to sexual orientation and marital status in a context where same-sex marriage may be legalised. In this situation, it is possible that the legalisation of same-sex marriage and the operation of corresponding anti-discrimination legislation could result in a restriction of free exercise. This part will outline the relevant Commonwealth law which may be inconsistent with the free exercise clause.

Marriage is currently defined in s 5(1) of the *Marriage Act 1961* (Cth) as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. In a context where same-sex marriage is legalised, an amendment might define marriage as 'the union of two persons to the exclusion of all others, voluntarily entered into for life'. This would effectively allow both different-sex (traditional) and same-sex marriage. The Commonwealth anti-discrimination legislation considered will be the *Sex Discrimination Act 1984* (Cth) ('the Act'). Section 5A of the Act states that discrimination occurs on the ground of sexual orientation where, in equal circumstances, the aggrieved person is treated less favourably than a person of a different sexual orientation by reason of the aggrieved person's sexual orientation. Section 6 of the Act provides an equivalent provision for discrimination on the ground of marital or relationship status.

Sections 14 to 27 of the Act provide for instances of discrimination in specific areas. For example, s 14(1) of the Act states 'it is unlawful for an employer to discriminate against a person on the ground of the person's… "sexual orientation" or "marital or relationship status"' in 'determining who should be offered employment or in the terms and conditions on which employment is offered', or 'by dismissing the employee'. Section 22(1) of the Act

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81 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–68 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

provides that 'it is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's… "sexual orientation" or "marital or relationship status" by 'refusing to provide the other person with those goods or services or to make those facilities available to the other person'.

Sections 37 and 38 of the Act provide exemptions for religious bodies and educational institutions established for religious purposes. Section 37(1) states that none of the sections outlined above affect the ordination, appointment, training or selection of members of any religious order, or any other act or practice of a body established for religious purposes which conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Similarly, s 38(1) specifies that nothing in the relevant paragraphs of s 14 renders it unlawful for a person to discriminate on the ground of sexual orientation or marital status in connection with employment as a member of an education institution conducted in accordance with the doctrines of a particular religion. Alternatively, s 14 does not apply if the discrimination occurs in good faith and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. These anti-discrimination provisions comprise the Commonwealth legislation which will be considered in the analysis of the free exercise clause in the following parts.

In a typical scenario, a minister of religion, as an agent for a religious institution, might refuse to provide a service to another because of their sexual orientation. Their reason is providing such a service is not in accordance with their religion. Following the legislation just outlined, such a case would be relatively straightforward. The minister would have discriminated in accordance with s 22 (1), but because their action conforms to the doctrine of the religion and falls within the exemption, a claim would not be successful. There is no need to directly invoke the free exercise clause in order to claim that the Commonwealth legislation is invalid. This is an example of the Commonwealth's attempt to

balance religious freedom with anti-discrimination, and the exemption is a generous allowance for the free exercise of religion in this context.

However, these generous exemptions exist specifically for bodies or organisations (educational or other) established for religious purposes. As discussed in the following parts, even these exemptions have been questioned.[82] Furthermore, exemptions do not exist for individuals attempting to freely exercise their religion. It is this kind of situation where the text of the free exercise clause in s 116 and a more expansive interpretation ought to be duly considered. In particular, a textual consideration seems to require that religious institutions, organisations established for religious purposes, and religious individuals should be protected from laws which prohibit the free exercise of their religion in their purpose or their effect.

V TEXTUAL AND CONTEXTUAL CONSIDERATIONS: EXPLORING THE BOUNDARIES OF FREE EXERCISE

A *Protecting Free Exercise: The Religious Organisation*

Evans and Ujvari consider this controversial question of the extent to which religious schools, as examples of religious organisations, should be exempt from non-discrimination laws that would apply to state schools.[83] Their work also raises important broader points about discrimination, religious freedom and generally applicable laws which are worth considering. They agree that what is most relevant is the situation where discrimination occurs on the basis of conflict with religious teachings, such as where a staff member is gay or lesbian, or, hypothetically, in a same-sex marriage.[84] In considering arguments for allowing exemptions from non-discrimination law, Evans and Ujvari discuss religious freedom in

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82 See e.g. Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 56.

83 Ibid 33.

84 Ibid 35.

the context of international conventions, but interestingly do not raise the free exercise clause in s 116.[85] It could, perhaps, be accepted that 'schools generally fall under the jurisdiction of state and territory laws', and therefore s 116 is inapplicable and not mentioned for that reason.[86] However, as Evans and Ujvari specifically state, the fact that 'some educational institutions are subject to Commonwealth law' and 'Commonwealth statutes prohibit specific forms of discrimination' means that Commonwealth jurisdiction should be discussed 'for the sake of completeness'.[87] It is problematic that analysis of s 116 is inexplicably omitted, particularly given what follows.

In noting arguments against allowing exemptions from non-discrimination law, Evans and Ujvari make the point (again without mentioning s 116) that the right to religious freedom is limited.[88] The existence of exemptions indicates an attempt to balance the competing interests of freedom of religion and non-discrimination. Resolution of this tension and the precise point of balance reached will depend upon the 'assumptions of various proponents about which value should prevail'.[89] With respect, though balancing the value of freedom through a right to free exercise against the value of equality through a right to non-discrimination is certainly a significant consideration, in a Commonwealth context it is also necessary to consider the Constitutional framework provided by the free exercise clause in s 116.

Moreover, articulating the boundaries of free exercise has important implications for weighing the competing values, particularly if the High Court adheres to the kind of broad priority for democracy reasoning which undergirds the implied freedom of political communication. If maintaining the constitutionally prescribed system of representative government (democracy) is paramount, this would seem to contextually imply that a more expansive

85 Ibid 36–40.
86 Ibid 44.
87 Ibid.
88 Ibid 40–42.
89 Ibid 53–54.

interpretation of free exercise is appropriate, since this would facilitate equal civic participation of various perspectives.

More emphatically, as Mortenson contends, the right to free exercise in the Constitution 'does not suggest a "balance" to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty'.[90] This view is implicitly supported by a High Court which has expanded its interpretation of constitutional liberties such as the implied freedom of political communication.[91] It appears that Evans and Ujvari are not the only analysts to neglect the influence of s 116 in this context of religious exemptions to non-discrimination provisions. Writing of the discussions that occurred as part of the drafting process for the *Sex Discrimination Act 1984* (Cth), Mortenson mentions that 'it is… disturbing to find that, when advising the Commonwealth on this very problem, both the Sex Discrimination Commissioner and the Law Reform Commission failed even to mention the possible impact of s 116'.[92]

In the particular instance of educational institutions operating for religious reasons, there is an appropriate balance given that there are generous exemptions for discrimination in accordance with religious doctrine. This provides for free exercise of religion in conjunction with non-discrimination. However, the general failure to take into account the free exercise clause and the corresponding constitutionally required preference for religious liberty suggested by s 116 is a broader problem which will become more exposed as tensions between religious freedom and non-discrimination increase. The indication by certain politicians or political parties that they may reduce or remove these kinds of exemptions, or do not consider that there is any relation between religious freedom and same-sex marriage, is an example of this problem. The problem is also apparent when it comes to the religious freedom of individuals.

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90 Reid Mortenson, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 231.

91 Ibid.

92 Ibid.

B *Protecting Free Exercise: The Religious Individual*

For example, a religious person may run a small business which normally provides services in accordance with their religious beliefs, and then refuse to provide a requested service to a same-sex couple because it will conflict with their religious beliefs.[93] This would be discrimination under s 22 (1). However, such a person cannot rely on the exemptions under ss 37(1) or 38(1). Though they may have a consistent practice of refusing jobs which would tend to injure their religious susceptibilities in accordance with the teaching of their religion, the business would probably not be viewed as an educational institution or a body established for religious purposes.

There is growing literature on both sides of this vexed question of individual religious conscience in commercial settings as new cases are raised. However, the majority of them are in the United States context and so discussion of this issue is subject to the Supreme Court interpretation of free exercise in the United States Constitution, as well as any relevant United States state legislation on religious freedom, conscience and anti-discrimination.[94] Though this submission focuses specifically on the Australian context, there

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93 See e.g. *Lee v Ashers Baking Co Ltd* [2015] NICty 2.

94 See e.g. Michael Kent Curtis, 'A Unique Religious Exemption from Anti-Discrimination Laws in the case of gays? Putting the Call for Exemptions for Those Who Discriminate against Married or Marrying Gays in Context' cited in Michael Kent Curtis (ed), *The Rule of Law and the Rule of God* (Palgrave Macmillan, 2014); Roger Severino, 'Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty' (2006) 30 *Harvard Journal of Law and Public Policy* 939; Douglas NeJaime, 'Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination' (2012) 100(5) *California Law Review* 1169; Christopher Eisgruber and Lawrence Sagar, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61(4) *The University of Chicago Law Review* 1245; Steven Jamar, 'Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom' (1996) 40 *New York Law School Law Review* 719.

are advocates for special legislative exemptions for religious small business owners, especially given the United States Supreme Court's position that any law contravening the free exercise clause must focus on 'belief', not 'effect on conduct'.[95] Consistent with the Australian situation, generally applicable laws which indirectly restrict free exercise are allowed.

For example, Berg argues that the same features which support the legalisation of same-sex marriage also support religious exemptions for individuals, particularly the common desire for religious individuals and same-sex couples to express their commitments (which are fundamental to their identity) in a public, holistic way. For the same-sex couple it is their love and fidelity to their partner, and for the religious individual it is their love and fidelity to the object of their religion, but in both cases the parties are claiming a right beyond private behavior which extends to all aspects of their public lives.[96] When religious individuals are prevented from publicly expressing their religion through conduct related to their social and business interactions, and when same-sex couples are prevented from publicly expressing their orientation and relationship, both are being 'told to keep their identities in the closet. Anyone who takes the claims of same-sex couples seriously must also give substantial weight to the religious objectors'.[97]

Promoting equality and liberty are essential features of prioritising democracy. Though anti-discrimination laws are directed at addressing inequalities such as discrimination against same-sex couples, religious individuals also have a relevant appeal to equality. Generally applicable laws, such as anti-discrimination legislation, 'fall disproportionately' or unequally on those whose religious practices conflict with them.[98] Those who do not engage in religious belief or practice are not subject to the same practical restrictions

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95 Thomas Berg, 'What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common' (2010) 5(2) *Northwestern Journal of Law and Social Policy* 206, 214.

96 Ibid 207–208, 215–16.

97 Ibid 218.

98 Ibid 225.

resulting from the laws. The need to allow for religious liberty, as part of a functioning democracy, is precisely why there ought to be exemptions for religious individuals running small businesses or charitable organisations.[99] Small businesses that provide personal services are often direct embodiments of the owner's identity, and if the owner feels direct responsibility for conduct to which they object on religious grounds, accommodations should be provided. To refuse such exemptions is to imply that religion should not be connected to business, and this imposes a considerable burden on those who wish to integrate their lives and identities.[100]

In the Australian context, such exemptions are not currently available. The religious individual running a business might attempt to invoke the free exercise clause to claim that this Commonwealth legislation restricts their free exercise of religion. However, based on the majority judgment in *Kruger*, the High Court would probably hold that the Act does not have the restriction or regulation of religion as part of its purpose, and therefore the validity of the legislation would be upheld. The fact that general religious exemptions are included in the legislation would also support that finding because free exercise has arguably been catered for. Nevertheless, the legislation has the effect of restricting free exercise by not allowing the religious person to refuse a job which injures their religious susceptibilities. This is one reason why the purpose or effect approach is too narrow. It allows Commonwealth anti-discrimination legislation to indirectly restrict the free exercise of religion for individuals in particular.

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99 Ibid 208.

100 Ibid 227–28. Berg cogently addresses a series of further objections to the view that exemptions should be extended to religious individuals at 228–35. In particular, he considers the claim that religious objectors can simply switch professions, limits on the exemptions for individuals in a commercial environment, and the greater harm suffered by legal sanctions against objectors than that suffered by those refused a service. This author has nothing to add to that analysis.

Focusing on the text of the free exercise clause is telling. The clause says that the Commonwealth 'shall not make any law…for prohibiting the free exercise of religion'. Critically, there is no mention of a distinction between religious individuals and religious organisations or organisations established for religious purposes. The clause explicitly states that where there is a prohibition of free exercise, the clause should apply to invalidate the law – whether or not the prohibition involves individuals or organisations. It follows from the text that if exemptions are granted to organisations to implement the free exercise of religion, as they currently are, exemptions should also be granted to individuals so that the clause is properly implemented.

It is true that some state anti-discrimination legislation provides exemptions for religious individuals, and s 10 of the *Sex Discrimination Act 1984* (Cth) states that state laws remain applicable.[101] So in effect, one could say that religious individuals are protected to at least this extent. However, since s 116 applies only to Commonwealth laws and not to state laws, such state protection is serendipitous and mutable rather than a principled acknowledgement of religious freedom grounded in a Constitutional provision. Protections for the religious freedom of individuals vary from state to state and can be restricted or removed at any time without the limit of Constitutional protection. State exemptions are therefore an unreliable version of protection for the religious freedom of individuals (or organisations).

Importantly in the Commonwealth constitutional context, an exemption for religious individuals would merely be a protection. It would not give rise to an enforceable individual right or individual cause of action, just as the exemptions for organisations are a protection rather than a right or cause of action, and just as the implied freedom of political communication does not give rise to an enforceable individual right or cause of action.[102] The potential applicability of the implied freedom returns us to the contextual

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101 See e.g. *Equal Opportunity Act 2010* (VIC) s 84.

102 This is explained more in Part VI. See e.g. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

question of justifying proposed exemptions for Commonwealth anti-discrimination legislation to account for the religious freedom of individuals, based in a broader view of free exercise, which is in turn influenced by the priority for democracy reasoning undergirding the implied freedom of political communication. The implied freedom does not seem to be directly applicable to the religious individual running a business, since they are not engaging in politically relevant conduct or speech (at least in a way which is intrinsic to the business – though one could potentially imagine a business operating politically through advertising or financially supporting a policy platform), and so it is outside the scope of this situation. The fact that some religious 'conduct' is beyond the scope of the implied freedom does not contradict the earlier statement all religious speech could be political, for not all conduct is speech.

However, if it is assumed that the High Court wishes to facilitate robust political engagement to further democracy, as the justification for the implied freedom of political communication indicates, the fact that some religious conduct would not attract the protection of the implied freedom does not mean the principles underlying the freedom (priority for democracy) do not have implications for allowing the free expression of religious individuals in a democracy. In other words, a general constitutional approach for prioritising democracy could provide a framework for expanding (or at least maintaining) religious freedoms in a democracy. The priority for democracy approach endorsed by the High Court involves the interaction of various, conflicting perspectives from the different cultures and traditions which inform the voting process: a pluralist framework.[103] This approach facilitates free and equal

[103] See e.g. Tim Soutphommasane, 'Grounding Multicultural Citizenship: From Minority Rights to Civic Pluralism' (2006) 26(4) *Journal of Intercultural Studies* 401. This is distinct from something like an egalitarian notion of citizenship, which tends to remove identity markers. See e.g. Harry Brighouse, 'Egalitarianism and Equal Availability of Political Influence' (1996) 4(2) *Journal of Political Philosophy* 118. There is a significant literature on citizenship and democracy which, due to scope, cannot be engaged with here. A pluralist priority for democracy framework is assumed because this

political engagement and public displays of conduct which may not be agreed to by all, but can fairly be evaluated by all in the pursuit of democracy. This specifically includes public religious speech and conduct which may come into conflict with anti-discrimination law. Mortenson observes:

> However, one inherent paradox in *all* discrimination laws is that, although they aim to protect social pluralism, the principles of equality they usually promote also present a threat to the protection of religious pluralism in the political sphere. This occurs when, despite the traditional recognition of rights of religious liberty, the discrimination laws apply to religious groups that deny the moral imperatives of, say, racial, gender or sexual orientation equality. In this respect, Caesar has generally been prepared to render something to God through the complex exemptions granted in the discrimination laws to religious groups and religious educational or health institutions.[104]

Mortenson recognises this tension between free exercise and anti-discrimination in a pluralist context, and acknowledges that the state has been prepared to concede discrimination exemptions to religious organisations and institutions to promote pluralism. However, even Mortenson does not address exemptions applying to individuals freely exercising their religion. The same reasoning allowing exemptions for religious bodies and institutions could also allow similar exemptions for individuals. A democracy is composed of individuals and the plurality is formed by the interaction of conflicting individual perspectives as well as conflicting group perspectives. It would not be compatible with democratic and pluralist principles to curtail the dynamic interaction of individual people and perspectives by not allowing these individuals to freely exercise their religion due to anti-discrimination legislation.

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seems most consistent with the High Court's understanding of representative democracy in Australia, as argued in Part III.

104 Mortenson, above n 90, 231.

However, to remain consistent, exemptions for individuals should be of the type afforded to organisations or institutions.

For example, the religious person could appeal to a provision which states that individuals who refuse to offer goods or services in a situation where to do so would conflict with the doctrine and practice of their religion, or who would have their religious susceptibilities offended were they compelled to offer the good or service in that situation, are not subject to the anti-discrimination provisions unless the refusal directly results in 'concrete hardship' for those who seek the service (that is, if there is no equivalent service reasonably available).[105] This more expansive protection of free exercise complements the implied freedom. The implied freedom protects religious communication as a category of political communication contributing to democracy. If religious communication did not contribute to democracy as a general principle, it would hardly attract the protection. Hence, as a matter of context, to expand the free exercise protection to individuals in an anti-discrimination context is more consistent with the general priority for democracy undergirding the implied freedom of political communication. This claim, then, finally brings us to the fundamental consideration: how broadly the free exercise clause in s 116 specifically should be interpreted within this dynamic context of anti-discrimination law, bearing in mind priority for democracy.

VI Expansions And Limits: Religious Freedom And Equality In Our Democracy

To recapitulate, Mortenson notes that if the free exercise clause were 'given a more substantive operation', this would have an impact on Commonwealth discrimination laws, particularly given the exemptions are often untested and ambiguous.[106] At the very least, s 116 would seem to require discrimination laws to have some sort of religious exemption. In particular, based on United States case law, Mortenson asserts that to 'honour rights of religious liberty, religious groups are probably entitled to broad exemptions

105 Cf Berg, above n 95, 208.
106 Mortenson, above n 90, 219.

from the operation of sexual orientation discrimination laws'.[107] Though proposed reforms to the Act overlooked the possible constraints in s 116, preferring to focus on international conventions, they did possess generous exemptions of the kind envisaged by s 116.[108] But again, and this is evident in Mortenson's statement, these exemptions are only for religious organisations or institutions operating for religious purposes. The same protection is not given to individuals.

Perhaps this is because the High Court has characterised s 116 as a limit on Commonwealth power, rather than as an individual right which would give rise to a cause of action.[109] Accepting the presumption that it would be inappropriate to interpret the free exercise so broadly as to characterise it as a right giving rise to a cause of action, it does not follow that the free exercise clause cannot be interpreted as prohibiting Commonwealth action which restricts the free exercise of individuals, as well as religious bodies or organisations established for religious purposes. It could be understood as a limitation on the Commonwealth exercising legislative power against both religious organisations and religious individuals, and even if the High Court has not found any breach of the clause, the Court has historically understood it as applying to individuals as well as organisations.[110] The corollary of this in the anti-discrimination context is that there seems to be no reason why religious individuals should not also receive protection through anti-discrimination exemptions.

On the question of whether a law infringes the free exercise clause, Gaudron J specifically articulates the test to be adopted when stating

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107 Ibid 228–29.

108 Ibid 225–26.

109 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 122–23 (Latham CJ); Cf Puls, above n 63, 161–162.

110 See e.g. *Krygger v Williams* (1912) 15 CLR 366, 369–371 (Griffith CJ); *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 123–24 (Latham CJ).

'the criterion of invalidity selected by s 116'.[111] Legislative 'purpose… is the only matter to be taken into account in determining whether a law infringes s 116'.[112] Gaudron J contends that:

> A law will not be a law for 'prohibiting the free exercise of any religion', notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need… whether the interference with religious freedom, if any, effected… was appropriate and adapted or, which is the same thing, proportionate to the protection and preservation of those people. And as the purpose of a law is to be determined by reference to 'the facts with which it deals', that question would necessarily have to be answered by reference to the conditions of the time in which it operated. However, the answer to the question depends on an analysis of the law's operation, not on subjective views and perceptions.[113]

It is important to distinguish between the majority's view of purpose and Gaudron J's view of purpose as the only matter to be taken into account. When the majority in *Kruger* talks about purpose, they are referring to the sole and explicit purpose of the impugned legislation being to restrict or regulate religion. Justice Gaudron incorporates the effect of a law into her understanding of a law's purpose as part of examining how the law actually operates; this is emphasised by her caution that any analysis of purpose must be conducted in the context of the specific case. She then discusses the need for proportionality in determining whether a law infringes s 116 – where a law by the Commonwealth actually (in effect as well as purpose) operates to restrict the free exercise of religion, but is reasonably capable of being considered appropriate and adapted to

111 *Kruger v the Commonwealth* (1997) 190 CLR 1, 132 (Gaudron J).
112 Ibid.
113 Ibid 133–34 (Gaudron J).

achieving some legitimate overriding public purpose, that law will be valid.[114]

After all, the claim for a more expansive interpretation of free exercise is not to say that there should be no limits at all to free exercise. All the justices who have considered this issue have concluded that free exercise of religion is not absolute. As mentioned in Part II, not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom, and restrictions on violent 'religious' conduct (such as murder or sacrifice) incompatible with democracy are necessary.[115]

Evans and Ujvari hold that those who oppose anti-discrimination exemptions for religious groups may 'legitimately question' this asymmetry which allows laws regarding murder and sacrifice to apply to religious organisations, but sex discrimination laws not to apply. They argue that such an asymmetry implies that 'discrimination is relatively minor compared to other forms of harm [murder and sacrifice]' and 'equality is a goal of limited value'.[116] With respect, the assertion that discrimination is relatively minor compared to murder and sacrifice is technically correct. It seems absurd to advocate otherwise. This is not to undermine the harm that may be suffered as a result of discrimination (there is no doubt that such harm may be real and significant), but to emphasise the far more severe harm of murder and sacrifice, and their utter incompatibility with Australia's system of representative democracy. As Evans and Ujvari admit, the distinction or 'asymmetry' is relative, not absolute. Fundamentally, harm imposed by discrimination is generally not as great in gravity as the harm imposed by murder and sacrifice, which means there is a distinction between the types of harm. This implies that there may also be scope for distinctions relating to how the exemptions operate.

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114 Luke Beck, 'Clear and Emphatic: The Separation of Church and State Under the Australian Constitution' (2008) 27 *University of Tasmania Law Review* 161, 184–85.

115 Evans, above n 14, 297; see generally *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

116 Evans and Ujvari, above n 82, 42.

Moreover, as mentioned earlier, religious groups and individuals suffer a 'discrimination' or 'inequality' of a kind when they are subject to anti-discrimination provisions in a way that injures their religious convictions.[117]

This point is related to the second issue identified by Evans and Ujvari. It does not necessarily follow that religious exemptions to anti-discrimination laws imply that equality is a goal of limited value. Rather, what it may imply is that the exemptions are necessary in order to preserve equality.[118] Anti-discrimination provisions fall disproportionately on organisations or individuals with religious convictions that conflict with the provisions, and specific exemptions are required to address this specific situation where there is an unequal or disproportionate application of law.[119]

The need to foster a free and equal society consonant with prioritising democracy entails that freedom and equality must be extended to religious entities as well as members of the LGBTI community affected by unlawful discrimination, particularly given the specific Constitutional protection of free exercise. However, this freedom and protection must be compatible with democracy. Religions involving murder and sacrifice are not compatible with democracy and therefore do not attract the exemptions or protection by the free exercise clause. Limited discrimination based on sexual orientation may be compatible with democracy and therefore may attract the exemptions, but as discussed in the final part, this submission proposes a proportionality test so that there is principled reasoning for whether an exemption is appropriate.

Thus, to simply imply that religious exercise will be invalid where it conflicts with the general law is facile and incongruent. For example, Evans and Ujvari claim that 'religious institutions are

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117 Berg, above n 95, 225.

118 See for example Moens, Action-Belief Dichotomy, above n 14, 213–15.

119 Ibid 225.

supposed to adhere to the general law'.[120] Such a statement is either without reference to the free exercise clause (which seems possible since the clause is not mentioned in their submission), or the phrase 'general law' cannot mean all Commonwealth law in existence. Invoking the clause to invalidate Commonwealth law prohibiting free exercise assumes the existence of a general law which contravenes the free exercise clause. An interpretation which claims that religious freedom must always bow to Commonwealth law would render the free exercise clause redundant by making it impossible to breach.[121] A more textually and contextually appropriate interpretation is to engage in Gaudron J's type of proportionality test, where the question of whether a law unduly infringes the protection is left to the Court to determine.[122]

Given the reason for expanding the scope of the free exercise clause involves consistent application of the principles undergirding the implied freedom of political communication, it follows that use of a proportionality test ought to consider the High Court's discussions of the applicability, utility and procedures for proportionality under the implied freedom. In *Lange v Australian Broadcasting Corporation*,[123] the High Court first articulated the precise test for determining whether a law breaches the implied freedom:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government… if the first

120 Evans and Ujvari, above n 82, 42; Cf ABC News, above n 3, where Martine Delaney made a similar claim at a more popular level.

121 See *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 130 (Latham CJ).

122 Ibid 131 (Latham CJ).

123 (1997) 189 CLR 520.

> question is answered 'yes' and the second is answered 'no', the law is invalid.[124]

In *Coleman v Power*[125] a majority of the High Court recast the second limb of this test (the compatibility and proportionality aspects) to state that the question is whether the impugned law is 'reasonably appropriate and adapted to serve a legitimate end *in a manner which* is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…' In *McCloy v New South Wales*, the majority of the High Court (French CJ, Kiefel, Bell and Keane JJ) observed that the test from *Lange* remained authoritative, but the way the proportionality aspect had been phrased and executed was vague and based on holistic 'impressions', subject to 'value judgments', and lacked 'generally applicable', 'objective criteria'.[126] However, proportionality testing retained 'evident utility as a tool for determining the reasonableness of legislation which restricts the freedom and for resolving conflicts between the freedom and the attainment of legislative purpose'.[127]

Therefore, the High Court articulated three specific criteria to give substance and objectivity to the proportionality analysis – the law must be suitable, necessary and adequate in its balance; all three criteria must be satisfied. The law is suitable if it has a rational connection to the purpose of the provision; the law is necessary if there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom; and the law is adequate in its balance if a value judgment consistent with the judicial function describes the importance of the purpose served by the restrictive

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124 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–68 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

125 (2004) 220 CLR 1.

126 (2015) 325 ALR 15, 32 [66], 35 [74]–[76] (French CJ, Kiefel, Bell and Keane JJ).

127 *McCloy v New South Wales* (2015) 325 ALR 15, 35 [73] (French CJ, Kiefel, Bell and Keane JJ).

measure as greater than the extent of the restriction it imposes on the freedom.[128] Without entering into substantive debate, this submission accepts the general utility of proportionality analysis for the free exercise clause, and agrees with the High Court that the criteria assists with providing more objective criteria for evaluation.[129] What remains, then, is to articulate a possible version of such a test within the expanded view of the free exercise clause.

VII Preference Over Balance: The Future of Religeous Freedoms And Anti-Discrimination

This submission has suggested that in some circumstances it may be appropriate to privilege religious freedom over anti-discrimination, particularly given the explicit constitutional protection for religious freedom and democratic principles such as the importance of freedom, specifically religious freedom. However, there should be clear and specific legal principles governing when this can occur, including very explicit limits to the scope of application in order to minimise the potential for harm suffered by the LGBTI community resulting from unlawful discrimination.

In particular, the submission has adopted, expanded and developed Gaudron J's textual and contextual arguments in *Kruger* that the current approach to the free exercise clause is too narrow, and ought to be broadened. It argued that this broad approach is more consistent with the priority for democracy reasoning which is the rationale for the High Court's implied freedom of political communication in *Nationwide News* and *Australian Capital Television*. The broader approach should involve the consideration of a law's effect in restricting free exercise of religion, not just its purpose, and the inclusion of individuals as well as organisations.

For example, drawing on Gaudron J's test and the implied freedom of political communication test, the proportionality test for determining whether a law breaches the free exercise clause could

128 Ibid 18, [2] (French CJ, Kiefel, Bell and Keane JJ).
129 Cf McLeish, above n 28, 235–36; Puls, above n 63, 156–57.

be something like this: A law will be a law for prohibiting the free exercise of religion if it restricts the free religious exercise of individuals or organisations in either its purpose or its effect, and if it does so restrict, the interference with free exercise is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. That is, the law will not prohibit the free exercise of religion if it is suitable, necessary and adequate, even if it does restrict free exercise.

Without arguing the point here, according to this test (and even the narrower view of free exercise), at the very least religious organisations can discriminate such that any reduction of the current exemptions could breach the free exercise clause. However, Evans and Ujvari contend that even the present exemptions go too far, acknowledging that religious schools 'play an important role' and are 'deserving of some protection of their distinctive worldview', but stating that such protection is 'consistent with the idea that that they should be subject to more aspects of discrimination law than is currently the case in Australia'.[130] In particular, they criticise permitting discrimination to avoid 'injuring religious susceptibilities' on the basis that the phrase is 'rather vague', 'provides little guidance', and that 'religious freedom does not normally protect religious sensibilities'.[131]

It does seem fair to say that the terms 'sensibility' and 'susceptibility' are ambigious as applied to religion. For this reason, religious 'convictions' or 'beliefs' may be more clear terms, at least insofar as religious beliefs of organisations or individuals can be compared with established religious doctrine to see if these convictions are injured (that is, if free exercise is restricted). That will be a question of fact in any given situation. Nevertheless, if we assume the claim of Evans and Ujvari that religious freedom does not protect religious sensibilities also applies to the protection of religious convictions, such a claim represents a comprehensive

130 Evans and Ujvari, above n 82, 56.
131 Ibid 53.

failure to take into account the operation of the free exercise clause. Even the narrowest view of free exercise involves the protection of religious convictions or beliefs, and even actions consequent on those beliefs.[132] It also involves a constitutional preference for freedom of religion over anti-discrimination.[133]

It follows from the constitutional preference for the free exercise of religion over anti-discrimination that the current anti-discrimination exemptions for religious organisations are justified, so that the organisations are free to exercise their religion in accordance with their religious doctrine. The expanded view of free exercise, taking into account effect as well as purpose, and applying to individuals as well as organisations, arguably justifies additional exemptions for individuals affected in their religious practice by anti-discrimination provisions. The possible test outlined above is a method of undertaking a principled evaluation on a case-by-case basis.

This version of the test, though very preliminary, is compatible with the majority test from *Kruger* and antecedent cases which emphasise the purpose of the law and its consistency with the maintenance of an ordered society, as it incorporates these aspects. However, in accordance with priority for democracy principles, it is also broader to allow for the consideration of effect so that the Commonwealth cannot seek to do indirectly what they cannot do directly. Furthermore, consideration of the effect on individuals as well as organisations promotes democracy by harmonising the constitutionally required preference for religious liberty suggested by s 116 with the constitutionally prescribed system of representative government undergirding the implied freedom of communication, which emphasises individual freedom to participate in the democratic process and society in general.

Berg refers to a specific United States example where a wedding photographer was forced to pay $6600 in legal fees after declining, on religious grounds, to photograph a same-sex commitment

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132 *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 124–25 (Latham CJ).

133 Mortenson, above n 90, 231.

ceremony.[134] This example can serve as a test case for the expanded view of free exercise. If such a situation occurred in Australia in relation to a same-sex marriage ceremony, the photographer could not appeal to an exemption under Commonwealth anti-discrimination legislation. The exemptions only exist for religious institutions or organisations, not individuals or small businesses. Furthermore, the photographer could not appeal to the current view of free exercise as expressed by the majority in *Kruger*, because the anti-discrimination legislation is not for the specific purpose of restricting religious exercise. The legislation would therefore apply, and the wedding photographer would either be compelled to photograph the wedding against their religious convictions or be forced to suffer some legal penalty.

If the expanded view of free exercise applies, the first part of the test (the burden aspect, to follow the language of the implied freedom of political communication) would be satisfied. The anti-discrimination legislation restricts religious exercise in its effect by preventing the wedding photographer from conducting their business in accordance with their religious beliefs. The second part of the test is the compatibility aspect, which asks whether the purpose of the law and the means used to achieve that purpose are compatible with the constitutionally prescribed system of the representative system of government in the sense that they do not impinge upon the functioning of that system.[135] The purpose of the anti-discrimination legislation is to promote equality in society, and the means used to achieve that purpose is to prohibit discriminatory conduct.

The purpose is clearly legitimate, but prohibiting discriminatory conduct as the means to achieve that purpose may impinge upon the functioning of representative government by preventing the wedding photographer from fully participating as a citizen in society in a way consistent with their religious convictions. So it is necessary to consider the third part of the test, which is the proportionality

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134 Berg, above n 95, 206–207; *Elane Photography, LCC v Willock*, 309 P3d 53 (NM, 2013).

135 *McCloy v New South Wales* (2015) 325 ALR 15, 18 [2] (French CJ, Kiefel, Bell and Keane JJ).

analysis or whether the anti-discrimination law is suitable, necessary and adequate. The law is plainly suitable as it has a rational connection to its purpose, which is to promote equality by prohibiting unlawful discrimination. The law may not be adequate in the sense that though the importance of promoting equality through preventing discrimination is obviously considerable, the extent of the burden on religious freedom is significant because of the injury to religious conviction or the imposition of a legal penalty for non-compliance. The point is arguable and is a question of fact.

Most importantly, the law is probably not necessary, in the sense that there is an obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom. This would simply be to provide an exemption of the type described earlier: a provision which states that individuals who refuse to offer goods or services in a situation where to do so would conflict with the doctrine and practice of their religion, or who would have their religious convictions offended were they compelled to offer the good or service in that situation, are not subject to the anti-discrimination provisions unless the refusal directly results in 'concrete hardship' for those who seek the service (that is, if there is no equivalent service reasonably available).[136]

This achieves the purpose of promoting equality by acknowledging the disproportionate effect anti-discrimination legislation has on those with religious objections, and provides a means by which such individuals and businesses can continue meaningfully participating in society without restricting their free exercise.[137] It also achieves the purpose of equality for those discriminated against by imposing a limit on the exemption where there is no other equivalent service reasonably available so that there is no substantive damage or hardship suffered as a result.

It seems the experience of concrete hardship would be a relatively rare case. Certainly, in the situation Berg alludes to, another

136 Berg, above n 95, 208.
137 Ibid 225.

wedding photographer was found through a friend and there was no evidence presented of any costs incurred for finding another wedding photographer.[138] However, the limit is present and would operate where there is no other wedding photographer reasonably available. Price, skill and geographical factors could be considered in that evaluation. Furthermore, if a service provider was 'holding out' on someone seeking the service, and deliberately causing hardship and anxiety rather than genuinely avoiding compromise on a religious conviction, the exemption would not apply.

Including relevant and appropriate exemptions for discrimination by religious individuals as well as organisations facilitates religious speech and conduct which contributes towards democracy. The test also imposes limits where religious speech and conduct is not reasonably appropriate and not compatible with the fostering of democracy; unreasonable and/or malicious conduct, insults, incitement, violence, oppression and the like would not be allowed, but debate and discussion and disagreement over what marriage is, including religious perspectives which could affect voting and the ability to reasonably refuse services which injure religious convictions, would be allowed. This assists in maintaining a pluralist democracy without conflicting with the constitutional preference for religious liberty. Ultimately, whatever one thinks of these proposals, what is certain is that the conversation needs to occur. The intrinsic tension between religious freedom and anti-discrimination will only increase; this much is suggested by the recent proliferation of relevant cases. To address such an important emerging issue, the scope of the free exercise clause should be clearly and appropriately articulated for the benefit of judges, legislators, and the public which comprise the Australian democracy.

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138 Ibid 206–207; *Elane Photography, LLC v Willock*, 309 P 3d 53 (NM, 2013).