



Précis Paper

Religious Freedom and the Constitution

Associate Professor Neil Foster from Newcastle University discusses freedom of religion under Australian law.

Discussion Includes

- Freedom of religion is more narrowly interpreted in Australia than in the United States
- Section 116 of the Constitution acts to prohibit an undue infringement on people's exercise of their religious freedom. However, this right must be balanced against other rights and considerations such as national security (*Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116)
- Anti-discrimination laws have exceptions which protect religious freedoms
- Historically, the common law has not afforded strong protections for freedom of religion

Précis Paper

Religious Freedom and the Constitution

1. In this edition of BenchTV, Mr Neil Foster (Associate Professor) and Mr Ian Benson (Solicitor) present on the extent of freedom of religion protections under Australian law.

Freedom of Religion

2. Mr Foster explains that freedom of religion is the right people have to live in accordance with the fundamental beliefs by which they structure their lives. It is part of a group of core human rights generally recognised by international human rights instruments. Notably, Mr Foster quotes the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 136 at [6], that "freedom of religion, the paradigm freedom of conscience, is of the essence of a free society".

Freedom of Religion in Australia and the United States

3. Mr Foster notes that the *Australian Constitution* affords very few individual rights, highlighting the importance of s 116, which contains four key prohibitions:

The Commonwealth shall not make any law for:

- i. establishing any religion; or
 - ii. for imposing any religious observance; or
 - iii. for prohibiting the free exercise of any religion, and
 - iv. no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
4. Section 116 was modelled on the 1st amendment to the *United States Constitution* and Bill of Rights which protects freedom of religion, alongside freedom of speech. However, s 116 has been interpreted in a way that has made it distinctive and different to the operation of the 1st amendment in the United States.
 5. In the United States, the prohibition on the establishment of religion has been interpreted broadly so as to avoid entanglement between the government and religion, which Mr Foster describes as a metaphorical 'wall of separation' between church and State. Contrastingly, the prohibition on the establishment of religion has been interpreted more narrowly in Australia.
 6. In Australia, the Commonwealth government is able to provide funding to religious schools so long as it is done on an even-handed basis. The prohibition under s 116 operates to prevent the creation of a national church, but does not extend to preventing the Commonwealth's

involvement in the actions of religious groups. As such, funding may be provided to religious schools so long as it does not favour one group over another. Additionally, Mr Foster notes that a key difference between Australia and the United States is that s 116 binds only the *Commonwealth*, whereas the 1st amendment also binds the States. However, it should be noted that s 48 of the *Tasmanian State Constitution* provides religious freedom protection.

Free Exercise of Religion

7. In *Employment Division of Oregon v Smith* 494 US 872 (1990), it was held that where the law was not targeted at religious exercise, but rather was general in operation, the US free religious exercise clause would not be interpreted to allow someone to be exempt from such a general law. However, Mr Foster notes that this has been a very controversial decision which has been somewhat overturned by congressional legislation.
8. The High Court of Australia in *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116 considered whether the government could prohibit a Jehovah's Witness operation, which was undermining the war effort. Latham CJ found that s 116 prohibits an undue infringement on people's exercise of their religious freedom. However, whilst the Court recognised that religious freedom was an important right, they found that the right would have to give way when issues of national security were at stake.

No Religious Test Required as a Qualification for Any Public Office

9. *Williams v Commonwealth* [2012] 248 CLR 156 and *Williams v Commonwealth (No 2)* [2014] HCA 23 were cases that challenged federal funding of a school chaplaincy program. It was argued that the program was in breach of s 116 where the Office of Chaplain required persons concerned to have a commitment to a major religion. The High Court read s 116 narrowly and found that as the chaplains were not employed by the Commonwealth, but rather engaged by bodies funded by the Commonwealth, there was no direct office of public trust held by the chaplains. However, the funding agreements were struck down due to other reasons.

Balancing Religious Freedoms with Anti-Discrimination Laws

10. Mr Foster discusses religious freedoms being protected by anti-discrimination legislation, where parliaments recognise long standing traditions with certain religions, for example, where historically only men are able to become priests. There are provisions in the sex discrimination legislation which stipulate that the legislation does not affect the decisions of churches to appoint members of clergy. Similarly, in *OV & OW v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606, the court found that a church organisation providing foster care had the right to decline an application by a same sex couple to become

foster parents. The court found that the *Anti-Discrimination Act 1977* (NSW) did not apply to a religious body acting in accordance with its fundamental beliefs by virtue of s 56 and Wesley Mission was able to decline the application. Section 56 of the *Anti-Discrimination Act 1977* (NSW) is noted below:

SECTION 56:

Religious bodies

Nothing in this Act affects:

- (a) *the ordination or appointment of priests, ministers of religion or members of any religious order,*
- (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,*
- (c) *the appointment of any other person in any capacity by a body established to propagate religion, or*
- (d) *any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*

11. Contrastingly, in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VCSA 75, a Christian camp provider which declined a booking from a group that raised awareness for homosexuality, was found to have unlawfully discriminated against Cobaw Community Health Service and did not fall within any religious exemptions.

Common Law Protections for Religious Freedom

12. Mr Foster notes that the common law protections for religious freedoms have not been particularly strong due to our common law being derived from England, which has an established church. The Church of England is tied up with the fabric of their government as historically the law of England made it compulsory to attend church and required the imposition of certain tests for adherence to Protestant faith for holding public office. Currently, ecclesiastical law in England can be adjudicated upon by ecclesiastical tribunals, which are recognised within the court hierarchy.
13. In *Wylde v Attorney General* (NSW) (1948) 78 CLR 224, Dixon J believed that there had been an established Church present when the colony was first established, but by the mid-19th century, the privileged position of the church of England had dissipated and was no longer considered established. In Australia, the courts have recognised that the common law principles of free speech inform the development of the common law. Mr Foster notes that freedom of religion may be protected through the principle of legality, which stipulates that

where parliament is unclear about its power or legislation, the courts will assume that it did not intend to undermine fundamental rights.

International Law Affords Strong Protections for Religious Freedom

14. There are a number of international conventions and instruments that provide strong protections for religious freedom. Most prominently, the *Universal Declaration of Human Rights* (UDHR), article 18 of the *International Covenant on Civil and Criminal Rights* and article 9 of the *European Convention on Human Rights*. Notably, *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VCSA 75 and *Iliqfi v The Church of Jesus Christ of Latter-Day Saints Australia* [2015] FCAFC 26 referred to international instruments as a source of interpretive principles and illustrations of the application of the law.

BIOGRAPHY

Neil Foster

Neil Foster is an Associate Professor in Law at Newcastle Law School, in NSW. His primary research interests include law and religion, property law, torts and workplace health and safety law. He has published leading textbooks in these areas including *Property Law in New South Wales* (2012), *Torts: Cases and Commentary* (2013) and *Workplace Health and Safety Law in Australia* (2012), among others. He has also published more than 25 articles for various Australian and International law journals.

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Cases

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Employment Division of Oregon v Smith 494 US 872 (1990)
Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia [2015] FCAFC 26
OV & OW v Members of the Board of Wesley Mission Council (2010) 79 NSWLR 606
Williams v Commonwealth [2012] 248 CLR 156
Williams v Commonwealth (No 2) [2014] HCA 23

Legislation

Anti-Discrimination Act 1977 (NSW)
Commonwealth Constitution (Australia)
Tasmanian State Constitution
United States Constitution

International Treaties

European Convention on Human Rights
International Covenant on Civil and Criminal Rights
Universal Declaration of Human Rights