

Human Rights Month 2019 Speaker Series: “Freedom of religion and freedom of expression: Balancing rights”

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PROFESSOR EVANS: Thank you, Scott, and good afternoon everybody. Thank you for being here today. Can I join in acknowledging the traditional custodians of the land on which we meet and pay my respects to their Elders, past, present and emerging.

I've spent the last 25 years working particularly on religious freedom. Today in 20 minutes we're going to cover that, we're going to cover freedom of expression and we're going to cover balancing rights. It will of necessity be a tad superficial, so I hope during question time you have the opportunity to dig down into something that you might find particularly interesting.

I'm going to start by giving a bit of an overview of each right and some of the complexities that might come with understanding them. You'll probably see my slight bias on the religion rather than expression side, but I think it is slightly more complex, and then I'll talk a little bit about balancing rights and limiting rights in this context.

So let's start with section 20, freedom of thought, conscience, religion and belief, which as many of you will know is modelled pretty closely on article 18 of the International Covenant of Civil and Political Rights. Now, one of the things you'll notice straight off is there is no definition of any of these key terms in the Act or indeed in the ICCPR. In Australian case law - international case law has been very fuzzy in this area. One thing that is clear is that atheism, agnosticism, scepticism, new religions, spiritualities, are all caught in the definition of religion or belief, but the exact boundaries of those core terms are not very clear.

There is an Australian case dealing with the question of whether Scientology is a religion. It was a case for the purposes of the Tax Act, in fact, rather than a broader constitutional case, but the justices looking at it looked at it in a much more broad context. Two of the justices in that case, Acting Chief Justice Mason and Justice Brennan came up with a definition that's been used a lot in Australian law, but it's not the only definition of religion that's used in Australian law, but it might be helpful to you as a starting point, and in fact it's been picked up internationally, including in the United Kingdom.

It says there are two criteria for a religion. One is a belief in the supernatural being, thing or principle. That might be God or gods, it might be karma, it might be ancestors, something like that, but a dimension beyond the physical. And the second is some accepted canons of conduct in order to give effect to that belief, accepting that the two criteria might be weighed and balanced a bit differently in different circumstances.

That case doesn't speak to what belief is. That's quite complex. It certainly does include things like atheism and agnosticism. International courts have tended to interpret it a bit more widely to include structured, thoughtful, philosophical engagements, things like pacifism – not “I don't want to go and fight in this war,” but “I have a structured philosophy

that is opposed to the use of violence in international relationships.” That boundary is even more fuzzy than the boundary with religion.

Good news on a day-to-day basis is that the overwhelming majority of cases in a country like Australia in fact deal with something which is pretty straightforwardly a religion. That's not normally the complex topic. The place where it does sometimes get a little bit complex is in what is looking like a fraudulent claim of religion.

Not uncommonly these come in the context of prisons, prisoners who suddenly convert to a religion that's about light worshipping and requires them to, you know, be out of their cells for six hours a day in the sunlight or something like that. Courts have reasonably taken a bit of a sceptical approach to that, or a religion that is only about the taking of certain illegal substances. It's not unreasonable to cast a sceptical eye over some of those things.

You'll note that in section 20, thought and conscience, everybody has a right to have that, it's very much unrestricted. Religion or belief is given a somewhat narrower scope, but it is given more extensive protection. So you only have the right to have your thoughts, you can sit in a corner, you can think what you like, but with the religion and belief you have the right to - what the Act calls 'demonstrate', international law often says 'manifest'.

These rights are only held by individuals, as you know, under your Act as compared to some elements of international law. That's where international law started with religion. It ended up moving away from that position, for example in the European Court of Human Rights, because religious freedom for a group of religious people was often better protected through the agency of a church or a religious grouping of some kind, sometimes formally incorporated, sometimes not. Freedom of speech is often also quite well protected or threatened through the agency of incorporated entities like newspapers, television stations and so forth.

There's going to be quite a complicated issue that will need to be come to terms with when you might say, we're just stopping a newspaper from publishing this, and that newspaper is an incorporated entity, not a human being, but of course the people working on the newspaper are human beings whose voice is also being silenced, and as we'll see when we come to freedom of expression, there is also a right to seek information and receive information. If you stop one incorporated entity from doing something, you say that's not a human rights breach because they're not an individual, you might need to look behind it to see also are individual rights being also infringed.

Let's turn now to that notion of freedom of expression. Every person has the right to hold an opinion without interference and to free expression. As I say, it includes the right to seek, receive and impart information and ideas of all sorts – so it's not just my right to speak to you today, it's your right also to hear what I'm saying.

In religion there's a very clear negative right as well. I can have this religion or that religion, but I can also say no to all religions. Absolutely equal status. It's a little less clear in expression, that you have a right to not hear certain ideas or things, but the scales probably weigh a little bit more heavily on the right of people to impart information. There might be some limitations to that, to protect your rights.

Do note this is a broad freedom of expression, not some narrowly constricted freedom of speech. It includes lots of expressive conduct. It includes refusing to speak. That's part of the negative right, “I will not say anything”. But it could include artistic expression, it can include protests, holding signs, t-shirts - lots and lots of things are being determined to be expression. So it's a little bit less difficult than religion, though as we'll come to in a moment, it can sometimes still be a little bit complex.

So let's look then at the issue of these rights and conflicts with other important values or with other important rights. I'm going to focus a little on freedom of religion or belief because, again, it can be a little bit more complex, sometimes even to determine whether you have had a limitation in the first place. I think there are three broad classes of different types of conflicts that you can have in terms of freedom of religion or belief.

The first is a law or a policy or a government action that clearly and directly targets a particular religion, or all religions, and goes to the heart of what that religion is about. You would see - this is not terribly common in liberal democracies like Australia, but it's common in other parts of the world and you absolutely see why it needs to be protected in international human rights law. Probably the case you see most commonly in Australia is attempts by people to try and pressure governments into making these decisions in local government planning in particular. So when mosques are planned for particular areas where there's a lot of hostility, you will see some sort of arguments that there's not going to be enough parking, all those sorts of things, but you will see a group of people simply saying, "we don't want Muslims in this neighbourhood," "Islam is connected to terrorism," those things, and they will say it straight out, "If it was a Uniting Church we'd be happy to have it, but we don't think we should have it because it's a mosque." Australian law is pretty clear on that. You can't do that. You couldn't do it before Human Rights Act came into effect and you certainly can't do it now.

Sometimes in times of particular national stress there can be a temptation to target minority religious groups. In Australia this happened during the First World War with respect to the Jehovah's Witness in Adelaide. Jehovah's Witnesses are quite radical pacifists, as you might know, and had a very strong opposition to the war. The government was under a lot of pressure with respect to the war and they shut down the Adelaide company of Jehovah's Witness. They nailed shut the doors of their main place of gathering. That was very directed action and the High Court said it wasn't a breach of section 116 of the constitutional protection of religious freedom, though it's problematic for other reasons. It doesn't happen very often.

The second type of conflict is much much more common and that is a general law, a perfectly reasonable general law that's trying to do something sensible and good, and that would be perfectly fine in 99 cases out of 100, but which has a particular impact, and it is usually on a religious minority. When democratic processes come into play, large politically powerful religious groups normally make sure they get the right exemptions or structure of legislation.

Common example here would be, for example, around helmets and protective head wear. You bring in a law to say people have to wear a helmet on motorcycles, you're not thinking at all about Sikhs when you do that, you're just looking at road trauma, looking at trying to reduce head injury, absolutely good quality public policy decisions, absolutely fine, but of course disproportionately impact if you have to wear a turban as part of your religion.

Those cases are much more complex and different courts around different countries have gone backwards and forwards on the extent to which they fall in human rights acts or not. But they certainly raise the issue when you're developing policy, when you're thinking about your own actions, when you're advising on legislation, just to try and think through the issues from the lens of different religious groups. Is an exemption justified? It's not always. Sometimes the public good countervails and is sufficiently strong so it overcomes that. Is it possible to modify the law in some ways that still serve most of the purpose but don't impact on the minority religion in the same way?

The third is conflicts between rights. Again this is reasonably common and both freedom of expression, and to an even greater extent I think freedom of religion, are involved in conflicts with other rights. I'll come in a moment to circumstances where they might conflict with each other. They don't terribly often conflict with each other. I think the reason for that is that they're both in what I call the cluster of freedom rights: the cluster of rights, which is largely about "governments stay out," you know, "don't stop me saying what I want to say, practising my religion as I want to practise, living in compliance with my faith as I want to live in compliance with my faith, just don't interfere with me." They tend to come more into conflict with the sort of rights that require more positive government action like equality and non-discrimination where you need the government to intervene in the usual state of affairs to try and protect particular groups.

Probably the case that everybody's thinking about at the moment, which I won't talk about too much given it's still active, in the Israel Folau case, for example. Both freedom of expression and freedom of religion would argue in favour of allowing that expression. It's somebody saying something that they wish to say, so if you punish them or stop them from doing that, that's a breach of freedom of expression, and it's an articulation of religious belief, and normally stopping somebody from articulating their religious belief is a breach of freedom of religion or belief. So they line up together on that. What they're in tension with is equality rights and non-discrimination rights.

I've just realised, reading your little flyer, you call this a three-step process and I've called it a two-step process, but step one is really two steps. So is there a right is the first question. You can assume we've covered that. Sometimes that's very straightforward. Sometimes it's a lot more complex. It's normally - expression is normally easier to get your head around, whether somebody has been involved in something or there's expression. Religion is a bit trickier. Then, has the right been limited, and if it has been limited, is it a reasonable limitation under section 13. You've got your neat little flyer about that. I'll come back to some of those issues in a moment.

One of the things I would encourage, and it seems to me, having read a lot of human rights case law over the years, it's a particular problem in religion because I think a lot of decision makers are uncomfortable with religion, and that's a temptation to skip over the step that says has the right been limited and just go straight on to justification.

Many decision makers, courts and others, saying let's just assume the right has been interfered with and we'll just look at all of the reasons that that's okay. Now, the difficulty with that is that you don't take a moment in time to look at the real impact on the people whose rights are being limited, and to at least acknowledge and say to them, yes, your rights have been limited, we do accept that, but we do think that there's a good reason for it as well.

It means that there's a moment in time when you focus on their arguments and the concerns that they have. Once you move on to justifications for limitations you look at the position of the state, the argument the state might have, the argument that those who might be opposed to the right have. As I say, it seems to just be particularly prevalent in freedom of religion, possibly because people feel awkward talking about it.

Let's look at what I've called the first question, but it would be the second question in your little flyer, which is has the right been infringed. That's quite a complex area for religion, and again I think decision makers, both public servants and judges, can fall into a little bit of a difficulty here. Some religions make it quite easy, they're quite legalistic, they have a lot of rules, they have a clear hierarchy, it's clear in the hierarchy who gets to say what the religion is, there's an Archbishop, a Pope, whatever it might be, that person makes the rules. It can be a lot more complex with religions that are less legalistic, less hierarchal, more

individualistic, and the more you start moving into personal spirituality and so forth the more difficult that issue becomes.

There can also be a temptation to start asking what I believe are the wrong questions, and I think there are Australian judges who are asking the wrong questions of themselves with respect to whether something is a religion. To me the right questions are around is this a sincere belief in something that meets the definition of being religion, and is there a reasonable connection between what that person believes and probably even - it can be historic or some clear connection between the action which is being described as being required by the religion, and in that sense a religion.

There can be a real temptation for people to go to search for the 'true' answer. What does Christianity really say about homosexuality, for example, in the Israel Folau case, and so you can get a lot of - there are a lot of debates in religion, of course there are, and that's fine. So you get somebody sometimes - I've seen this in the Australian case law again from a completely different denomination or a different religion coming in saying, "no, that person is wrong in believing that Christianity, for example, requires X, Y and Z. I believe the correct interpretation of the Bible is A, B and C." That, I think, is not something that secular arms of the government should be involved in. The public service, the judiciary shouldn't be involved in it. You don't want to be involved in it if you can avoid being involved in it. We're not religious authorities. We have no authority to speak on those religions. There's often not one settled answer. There are competing versions of the truth.

If you think something is fraudulent, or just made up for the sake of trying to gain some advantage - tax or, you know, more freedom to do something that would otherwise be illegal - that's fine, but we really want to avoid getting into, "sorry, you're mistaken. You think you have to wear a head scarf in compliance with Islam, but I've got an imam over here and he says it's all good, you can take the head scarf off." That's a debate for within religion. It's not a debate for the secular arms.

You can see the court in the Victorian Supreme Court in the Haigh case, which I've given you the reference for there, looked at that in the case of tarot cards. So somebody claimed that he was a Pagan, tarot cards were part of that religion, and this probably is pushing the boundaries a little bit. The prison authorities took away the tarot cards that had pictures of women in a state of undress. He said you couldn't do it properly without the full pack of tarot cards. Interestingly, both the prison authorities and the Supreme Court accepted that. They didn't step behind that. In this case they almost, I reckon, might have asked a few more questions, but they thought, no, they're not going to go there. They're not going to - there is a legitimate body of belief that would make that argument. They would simply accept it.

It can be difficult, again in the case of religion, to work out where the boundaries of what demonstrating your religion or belief is and what's just inspired by your religion and belief. So there are some pretty core cases - praying, worshipping together are probably, at least for some religions, wearing sorts of clothing, you might have certain requirements around facial hair or so forth - but for a deeply religious person almost everything they do in their life at one level or another is connected with their religious belief. How far out does that practice go?

Courts have often said fairly unhelpfully vague things. The European Court of Human Rights, for example, says that not every piece of conduct which is merely inspired by religion fits the definition of what in Europe is a 'manifestation' of religion or belief. It's helpful to know it isn't, but it doesn't actually tell you what it is. At some point there's a dividing line. Perhaps to use an example that doesn't come from the case law, but for example a Catholic who says contraception is wrong should not be forced to have contraception, to use contraception, it's wrong for them. Does that mean that they can't be asked if they work in a

pharmacy to sell it to others? Does that mean they can't be asked to be a cleaner in a pharmacy that sells contraception? How far out does that chain go before it breaks?

Freedom of expression tends to be a little easier to understand. Expression is fairly straightforward in definition, and when you stop somebody expressing themselves it's reasonably straightforward that you've done that. There still can be boundaries. I've given you just a fairly low level case there on whether wearing facial hair of a particular type was a form of expression or not. Those are the marginal cases, but it tends to be a little bit easier and you're not caught up in such complex questions there.

You've then got the questions of if you have limited, is that limitation justified, and you've got your section 13, your little handout you have with you there. There are some pretty common areas of conflict between religious freedom and freedom of expression. A number of them come around in equality and discrimination rights. So at what point does my belief that, for example, in order to work in my school you have to have - to behave in compliance with the requirements of my religion around sexuality and sexual practice, to in fact accept all of the tenets of my religion. That might be - might say that's the maximalist version of my freedom of religion - as a religious body we want to get to choose who we get to teach in our schools, to be the gardeners and the cafe people, and this is one of the - we just need to create a whole community that reflects our religion perfectly.

That's fine. That all works, but of course once you start taking a discrimination or equality lens, that's a lot of people who are suddenly excluded from a very, very wide number of areas of employment. This is probably the most fundamental tension in this area is the tension between non-discrimination, equality and religious freedom, but there are others. Right to life - people refusing medical treatment, and particularly on behalf of their children becomes particularly problematic in the belief they shouldn't do that. Jehovah's Witness refusing blood transfusions, for example. And when you get a conflict - I think the key conflict - between religious freedom and freedom of expression which is around vilification. In some - to the extent that you use your freedom of expression to really denigrate a religion and to create hostility against that religion and belittle people of that religion and perhaps encourage others to think it would be okay to encourage in discrimination or violence or hostility against that religion, you're engaging your freedom of speech, expressing yourself, any limitation is a limitation on that, but of course you make it a lot harder for people to, in practice, have their freedom of religion because if they exercise their freedom of religion they could be subject to all sorts of discriminatory practice. We think of the rise of anti-Semitism in Australia, for example, makes it quite difficult for people to exercise their freedom of religion.

So freedom of expression then has another...one of the areas that's becoming increasingly questionable, of course, is codes of conduct. Again we saw that with the Israel Folau case.

I'm almost out of time, so I'm just going to really quickly whip through a couple of principles you might find useful in your day-to-day life with balancing these rights.

First is, no hierarchy of rights. You can't say equality always trumps religion or religion always trumps equality or expression always trumps religion. It's simply dangerous to fall into that. If you find yourself, when you're making decisions, subconsciously, because of your particular background - you might need to have a look at your own biases, if you're always preferencing A over B when it comes to rights. You've just got to be careful you're not falling into that trap.

Speaking generally, you've got to look at all of the rights in their collective, look at them hard, look at them carefully, balance them together, and then only if it's necessary limit one or both of those rights.

Limitation should restrict the right only to the extent necessary to achieve its purpose. So you might say a code of conduct is fine because we do need in our organisation to have a level of civility in the way that we deal with each other, but that doesn't mean any code of conduct which prohibits a whole range of speech and forms of expression is okay.

Finally, proper consideration is absolutely critical. One of the things I think we've learnt from the Victorian courts is that the courts are struggling with what the proper approach to rights are. Some questions about decisions, but one thing they know they can get you on, for those of you who are decision makers, is if you haven't properly considered the right. That happened indeed in the tarot case. The court was prepared to say pretty clearly if you considered the rights properly and decided yes, we do need to limit - we've considered religious freedom, but we need to limit it for these reasons, we might well have gone along with you, but you didn't consider it.

So if you take no other lesson from this I would take this one. Look carefully for the rights, and particularly things like religious freedom which people might not be as familiar with, and if you're going to limit it, look at it hard, put down in writing that you've looked at it, say that you've considered it and then explain why you've limited it. If you can't do those things maybe you shouldn't have limited it in the first place.

I'll just leave those final comments on the powerpoint for you to have a look at because I'm conscious of leaving enough time for questions. Let me open it up now to questions.