



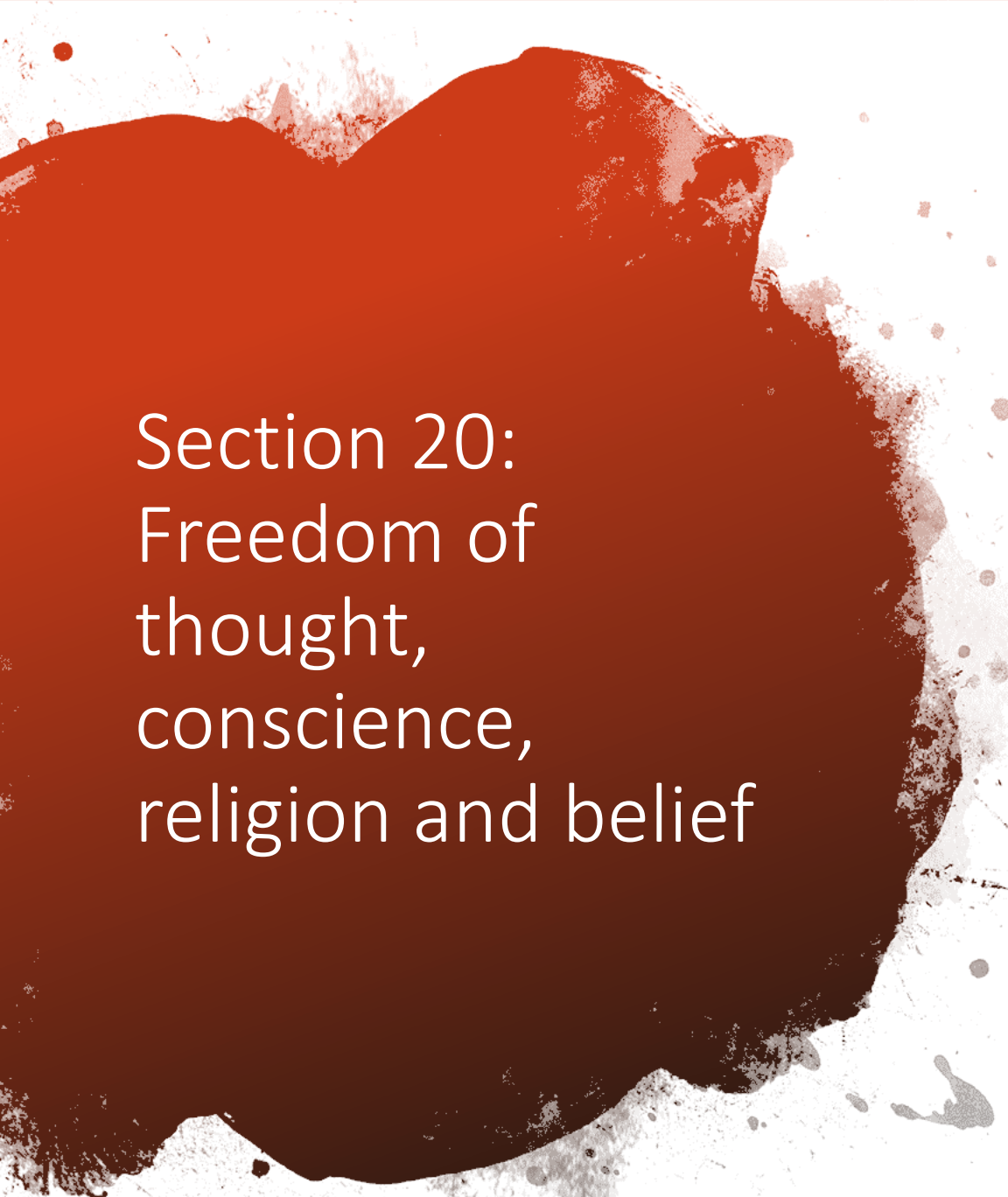
‘Freedom of religion and freedom of expression: Balancing rights’  
Carolyn Evans, Vice-Chancellor



A group of people, including men and women, are walking along a dirt path in a wooded area. They are holding two large flags: the Australian flag on the left and the Torres Strait Islander flag on the right. The people are wearing various clothing, including hats and backpacks. The background is filled with trees and foliage.

## ACKNOWLEDGEMENT OF COUNTRY

*Griffith University acknowledges the Traditional Custodians of the land on which we are meeting and pays respect to the Elders, past and present, and extends that respect to all Aboriginal and Torres Strait Islander people.*



## Section 20: Freedom of thought, conscience, religion and belief

- (1) Everyone has the right to freedom of thought, conscience, religion or belief including –
  - a) A freedom to have or adopt a religion or belief of the person's choice; and
  - b) The freedom to demonstrate that person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or constrained in a way that limits the person's right to have or adopt a religion or belief.





# Scope of Protection

- Thought and conscience much wider than religion or belief but given narrower protection (the right to have).
- Religion and belief narrower but given more extensive protection (to demonstrate ie act in compliance with)
- Note that rights are only held by individuals – this has led to some complexities for religious organisations seeking to protect religious freedom and media organisations.



## Section 21: Freedom of Expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether -

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by the person.

# Right to Demonstrate Religion or Belief: Three Broad Classes of Conflict

- Some laws or government actions may directly target a particular religion/belief for control (occasionally this is disguised but clear from its operation)
  - Some local Councils, for example, have been hostile to Islam in making planning decisions around mosques
- More commonly, the form of regulation has an entirely different purpose, but restricts religious practices or beliefs inadvertently – religious minorities tend to be more at risk of this than majorities whose views are often dealt with in democratic processes.
  - A law that requires motorcyclists to wear helmets is aimed at a legitimate public good but may create a burden for Sikh men who wear turbans
- Conflicts created between rights eg freedom of expression and freedom of religion – our focus today.

# Two Step Process

- Decision-making bodies will need to ask themselves:
  - 1. Has the right been limited?
  - 2. If it has, is it a reasonable limitation under s.13?
- Should look seriously at whether one or both rights have been infringed and how seriously before moving to the limitation – easy to skip this if you are instinctively more sympathetic to one lot of rights holders than another



# Has the Right been Infringed?

- Complex area for religion because some determination needs to be made about what the content of the religion or belief (particularly hard for less 'legalistic' religions).
- Can be tempted to substitute the judgment of the believer for that of the decision-maker. Generally should be avoided:
  - *Haigh v Ryan* [2018] VSC 474: a prisoner who was a Pagan wanted a full pack of Tarot cards but was denied 4 on the basis that they were degrading to women. The Court recognised Tarot as part of pagan practices. High Court has recognised Scientology.
- Can be difficult to draw the line between protected conduct and conduct merely inspired by religion/belief, particularly for the very devout.
- Freedom of expression tends to be a little simpler because a very wide range of expressive conduct is covered but may still be query as to how far expression extends (eg right of police officer to have facial hair not covered: *Kuyken v Chief Commissioner of Police* (2015) 249 IR 327)




# Is the limitation justified?

- Modest amount of case-law under human rights acts in Australia. Extensive consideration by international bodies and other common law jurisdictions which might be useful.
- Conflicts commonly take place between rights and one of them must therefore be limited
- Some common areas of tension with religious freedom:
  - Equality/discrimination rights eg refusal of employment in a religious body on the basis of sexuality
  - Right to life, particularly in medical disputes involving minors (eg refusal of blood transfusion or vaccines)
  - Religious speech that might vilify/offend/undermine another group
- Some common areas of tension with freedom of expression:
  - Free speech that might vilify/offend/undermine a religion or religious people to the point of interfering with religious freedom
  - Rules of professionalism, courtesy, codes of conduct etc
  - Equality and discrimination eg speech that constitutes harassment in the workplace

## Some principles to bear in mind in balancing rights

- There is no hierarchy of rights – can't say that freedom of expression or freedom of religion will always prevail (*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 304: none of the rights in question '*was to be privileged over the other*').
- 'Speaking generally, limitations, when under law (such as by suppression or like orders), may be compatible with human rights where justification is found to be demonstrably necessary after the various rights and interests have been carefully identified and properly balanced' (*PQR v Secretary, Department of Justice and Regulation (No 1)* (2017) 53 VR 45, 66)
- The limitation placed on a right or the way in which a limitation is interpreted should restrict the right 'only to the extent necessary to achieve its purpose' (*Victorian Legal Services Commissioner v McDonald* (2019) 57 VR 186, 189)



# Proper consideration is critical

- Given how hard to balance some of these rights can be, courts are particularly concerned to ensure that decision-makers can show that they took the relevant material into consideration.
- *Haigh* (tarot cards case), court had some sympathy for the outcome reached but held against the prison because ‘There is no indication that the decision-maker carried out that balance or evaluation [of the right compared to the need for the restriction]’ (*Haigh v Ryan* [2018] VSC 474, [74])



# Concluding Comments

- Time to consider circumstances in which people's freedom of religion or expression might be limited within your own workplace (eg Codes of Conduct, rigid rules around clothing or working hours) and consider the reasonableness of those limitations.
- Ensure in your decision-making that impacts on the rights of others that you consider seriously and record your consideration of their rights if you make a decision limiting those rights.
- The courts can be reasonable where it is clear that authorities have seriously tried to protect human rights but the system has been imperfect: *'it can be seen that not every failure or inadequacy will result in a finding that a public authority has contravened a person's human rights. A number of factors will feed into the evaluative judgment of the Court and the circumstances of the case will dictate what those factors are'*. (Inappropriate food for a Muslim prisoner case)

# THANK YOU

- QUESTIONS AND DISCUSSION