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October 9, 2018

# Religious Freedom at Australian Universities

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## Religious Freedom at Australian Universities

Neil Foster<sup>1</sup>

The topic of “religious freedom” has assumed more importance in Australia in the last few years. There are a number of reasons for this, including the increasingly ethnically and culturally diverse nature of Australian society, the shrinking number of persons who express commitment to what was previously the mainstream Christian consensus in society,<sup>2</sup> and a general move in the wider community away from a previously shared set of moral values about issues to do with sexuality and “birth and death” issues.

For all these reasons, and perhaps others, there has been a heightened debate over the extent to which Australian society should support decisions of religious believers to live and act in ways that are mandated by their religion, but which are not usually supported for the community at large, or are unpopular. Given the role of Universities as a key source of general education, and research into important social issues, it is not surprising that some of these matters have started to affect the life of the University.

In this paper I want to outline some of the challenges faced by believers who are part of University communities, and to note how the law and other policies currently deal with these challenges. The paper is not uniformly pessimistic about religious freedom on campus in Australia, but notes that there are areas where arguably change needs to take place to protect this important human right.

Because I work at the University of Newcastle, and this paper is being presented to an audience at that University, most of my examples of law and policy relate to that context. I should say at the outset, however, that in my experience our University has generally supported appropriate academic and religious freedom, and many of the most concerning developments which can be seen from overseas are not present here. But “the price of freedom is eternal vigilance”,<sup>3</sup> and so it is worth being aware of possible future challenges.

### 1. Examples of challenges to religious freedom at Universities

As mainstream Christian views have become more unpopular, there have been various challenges to those views being lived out, or spoken about, at Universities, which are often, of course, made up of people from a more “progressive” end of the political spectrum. Here are some brief examples.

#### a. Challenges due to general religious activities

##### (i) Student challenges

Christian student groups have operated on University campuses for many years, in many cases being the largest active student groups. Those groups, since they exist for the purpose of sharing the Christian gospel with non-believers, and helping Christian students live out their faith, will usually want to ensure that their office-holders at least share the ethos of the group. But this may be challenged by a “secular” student organisation, that thinks that membership and offices in all student groups should be open to all.

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<sup>1</sup> Associate Professor in Law, Newcastle Law School, University of Newcastle; the views expressed here are, of course, my own views and not necessarily those of my institution.

<sup>2</sup> See the most recent census data indicating only about 52% of Australians regard themselves as “Christian”.

<sup>3</sup> As with many striking quotes, there are many disputes about the source of this useful phrase. It certainly was used in 1852 by Wendell Phillips in speaking about the abolition of slavery. This piece indicates it was around in other sources in the earlier part of the 19<sup>th</sup> century: <http://www.thisdayinquotes.com/2011/01/eternal-vigilance-is-price-of-liberty.html> .

This issue came up a few years at the University of Sydney, where the [student newspaper](#) (*Honi Soit*, March 13, 2016) reported that:

The University of Sydney Union (USU) has threatened to deregister the Sydney University Evangelical Union (EU) from the Clubs & Societies program over the latter's requirement that all members must make a declaration of faith in Jesus Christ.<sup>4</sup>

In the end this proposal was dropped after public concerns being expressed about the foolishness of an approach which singled out religious groups, as opposed to other “viewpoint based” groups such as student political clubs, from being able to restrict leadership and membership to those who shared the ethos of the group. Sydney University Union [withdrew its threat](#) to de-register the Sydney University Evangelical Union for its policy requiring members to be Christians.

Nevertheless, this sort of pressure from Universities, and from Student Unions, may be expected to continue. To take one more recent example, from the United States, at the University of Iowa a Christian student group, Business Leaders in Christ (“BLinC”), had been penalised because it would not agree to appoint to its leadership a same-sex attracted student, who said that they would not undertake to comply with the group's commitment to Biblical sexual values. The University claimed that this was a breach of its Policy on Human Rights, forbidding discrimination on the basis of, among other things, sexual orientation. BLinC claimed, however, that the issue was not the student's *orientation*, but their express refusal to modify their *behaviour* to accord with Biblical norms.

The student group succeeded in obtaining a preliminary order from a Federal court staying the proposal to deregister it.<sup>5</sup> They have since been successful in getting the judge to extend the order allowing them to operate on campus, pending a final hearing (presently scheduled for May 2019).<sup>6</sup> One of the reasons that the judge ruled in their favour was that many other “viewpoint based” clubs had also not included a formal commitment to “non-discrimination” in appointing leaders, but none of those other clubs had been penalised. This suggested to the judge that the real reason for the action was a disapproval of the specific doctrines favoured by the Christian club, which the judge said would be a breach of the “free speech” First Amendment rights of the club.

Are there other challenges faced by students? We will comment on some “hate speech” issues below. But another common challenge faced by student groups comes where a University suggests that they should not be involved in sharing the gospel with other students. Sometimes this comes as a refusal to allow groups to hand out advertising materials. So far as I am aware no University has tried to completely ban students from talking to other students about religion, but as bizarre as this sounds, it may be worth noting that some such attempt seems to have been made in Queensland primary schools over the last few years.<sup>7</sup> So it may not be impossible that a rule of this sort might be proposed at Universities. (I should stress that such a proposal would probably be unlawful, for reasons I will note later. But at the moment I am simply providing examples of possible issues.)

<sup>4</sup> See my blog post, “Religious Ethos and Open Membership at Sydney University” (March 17, 2016) at <https://lawandreligionaustralia.blog/2016/03/17/religious-ethos-and-open-membership-at-sydney-university/> commenting on the episode.

<sup>5</sup> See my comment on the case in “Iowa University Christian student group reinstated by Federal judge” (Jan 26, 2018) at <https://lawandreligionaustralia.blog/2018/01/26/iowa-university-christian-student-group-reinstated-by-federal-judge/>.

<sup>6</sup> See <https://www.insidehighered.com/news/2018/08/03/christian-student-group-sues-u-iowa-incites-debate-religious-freedom-and-lgbtq> (Aug 3, 2018).

<sup>7</sup> See my comment in “Can kids tell other kids about Jesus at school?” (Apr 15, 2017) at <https://lawandreligionaustralia.blog/2017/04/15/can-kids-tell-other-kids-about-jesus-at-school/>.

## (ii) Staff challenges

What sort of religious freedom challenges do University staff face? It has to be said that, at least for academics, Australian Universities still generally retain support for the idea of “academic freedom”, that members of academic staff should be allowed liberty to pursue research as their academic judgment sees fit, and to report their views honestly without fear of penalty. It is a little disturbing that it seems to be downplayed somewhat, but at our University we do have a reference in the “Code of Conduct” to this idea:

(30) We promote collegiality by behaving inclusively and openly, and fostering **academic freedom**.<sup>8</sup>

Still, there can be challenges in a staff member expressing their views on a controversial topic in appropriate ways. Of course, Christian staff are committed to serving the educational purposes of the University, and we ought in no way to misuse our position to turn lectures or seminars into evangelistic opportunities. But in my view, it should be clearly acceptable, when teaching areas that involve matters as to which there are differing views in society, for the Christian perspective to be presented as one of those options. And a staff member should feel no compunction to hide their private views when questioned (there have certainly been many staff members from the “progressive” end of the spectrum who have been very open about their Marxist or other critique of orthodox opinions).

There has been one episode recently in Australia where a University academic faced calls to be dismissed because of their religious views. One blog reported it this way:

Dr Steve Chavura, a Senior Research Associate at Macquarie University, has been the subject of calls for his dismissal from the university.

What is Dr Chavura’s sin? Dr Chavura is on the board of the Lachlan Macquarie Institute, a Christian organisation which serves to foster critical thinking and robust Christian contributions to public policy.<sup>9</sup>

In the end Macquarie University, to its credit, paid no heed to the calls for Dr Chavura’s dismissal or discipline for his religious views. But it was telling that someone thought that his mere association with a conservative Christian group could somehow justify this.

## b. Challenges faced due to “hate speech” prohibitions

While the area of so-called “hate speech” is broadly a part of the general issue of challenges to religious freedom, there are enough specific cases on this sort of area that it is worth highlighting as a separate point.

Here one of the problems we face is this contested phrase. If “hate speech” meant “calling for violence against someone on the basis of their identity”, then no Christian would support a right to speak in this way. But sadly, in an example of the common phenomenon of “verbal inflation”, a phrase which all would agree is wrong in its most extreme example, can come to be applied to much more innocent behaviour. For some people, “hate speech” has come to mean “speech implying hatred on the part of the speaker”, and in particular, it is commonly used to refer to “speech which somehow disagrees with a fundamental identity issue of someone”. The most obvious example is the Bible’s teaching that homosexual activity is

<sup>8</sup> See <https://policies.newcastle.edu.au/document/view-current.php?id=204&version=1> .

<sup>9</sup> Murray Campbell, “Calls for Macquarie University to distance themselves from Christian Academic” (March 29, 2017) <https://murraycampbell.net/2017/03/29/calls-for-macquarie-university-to-distance-themselves-from-christian-academic/> .

wrong. To relay that teaching is now sometimes seen as inciting “hatred” for homosexual persons. In this way what seems like a reasonable restriction of speech to avoid physical harm, can change into a way of censoring Biblical moral views.

(i) Students

A student, then, who expresses the Bible’s view, may be accused of “hate speech”. Two prominent examples will suffice.

One comes from the UK, the case of Felix Ngole. To quote from an earlier online comment on the case:

The decision, *Ngole, R (On the Application Of) v University of Sheffield* [2017] EWHC 2669 (Admin) (27 October 2017), was an application for judicial review of an administrative decision made by the Appeals Committee of the University of Sheffield Senate, on appeal from a disciplinary decision (made by a “Fitness to Practice” committee in the Department of Sociological Studies) to in effect expel Mr Ngole from his course of study. In making its decision the FTP committee and the Appeals Committee claimed that they were applying “professional practice” standards laid down by the relevant body which accredited social workers in the UK, the Health and Care Professions Council (HCPC).<sup>10</sup>

The heinous action for which Mr Ngole was dismissed from his post-graduate social work course was that, in a series of comments on the website of a US TV channel, he had explained (after being asked) what the Bible said on homosexuality! The University disciplined him for this:

when these online remarks were brought to the attention of the University authorities, they investigated and concluded that he was not fit to be a social worker. The initial Departmental investigation “had concerns about the condemnation of same-sex sexual relations, or ‘homosexuality’, in the terms used, on a public forum to which people including social work service users could link him by name”.

I understand Mr Ngole’s dismissal is still being appealed through the courts.

The second example is closer to home. The Australian Christian Lobby reports on the case of “Joshua”, a Uni student who had simply offered to pray for a friend who was struggling, was then reported to campus authorities, and unbelievably suspended from his course until completing “counselling” and told not to come onto campus until this was done. There is a video report of the case here: <https://youtu.be/rZbq7kc2rrY>.

Thankfully, the involvement of lawyers organised by ACL meant that the University concerned subsequently completely reversed its disciplinary processes and cleared Joshua’s record.

(ii) Staff

So far as I am aware no staff member at an Australian University has been removed or disciplined for their speech. However, there have been a number of incidents from the US. Let me just cite one. In the middle of the fevered recent debate about the nomination of Judge Brett Kavanaugh to the US Supreme Court, a US professor tweeted to a large number of students that due process required that people not be assumed to be guilty:

Nearly 100 students at the University of Southern California attended a rally at noon on Monday demanding a tenured professor be fired after he sent a reply-all email last Thursday to the student body noting that “accusers sometimes lie.”

<sup>10</sup> See my post, “University student dismissed for expressing Biblical view on homosexuality” (Nov 3, 2017) <https://lawandreligionaustralia.blog/2017/11/05/university-student-dismissed-for-expressing-biblical-view-on-homosexuality/>.

“If the day comes you are accused of some crime or tort of which you are not guilty, and you find your peers automatically believing your accuser, I expect you find yourself a stronger proponent of due process than you are now,” emailed Professor James Moore.<sup>11</sup>

The University so far has not met those demands, but reports indicate that the Dean of the Faculty met with protestors:

“What [Professor Moore] sent was extremely inappropriate, hurtful, insensitive. We are going to try to do everything we can to try to create a better school, to educate the faculty,” said Dean Knott to the crowd.

In terms of free speech on our campus, there are some helpful guidelines in the University’s *Media Policy*

(8) In engaging with the media, expert commentators can expect the support of the University. This does not imply endorsement of a particular view put forward, but means that their right to speak as a University staff member in their area of expertise will be upheld.

(9) The University recognises and respects the concept of academic freedom. It expects that staff and students will accept the responsibility that academic freedom imposes: to ensure that information provided to the media and public is supported by peer-reviewed evidence.<sup>12</sup>

But it would be useful to see a commitment to free speech which also covered a situation where a University staff member commented in private on something which they felt strongly about, even if it wasn’t within their area of expertise, so long as it didn’t breach the law.

There are a number of concerns that have been raised in recent years about a tendency for US Universities to cave in to radical student demands that Universities be made “safe spaces”, by which seems to be meant, places where no student will ever have to be aware that others oppose their lifestyle decisions. Calls for controversial speakers not to even be heard (so-called “no platforming” demands) have also become more common.<sup>13</sup>

But is very encouraging to see that recently a number of Australian University Chancellors have recently spoken out in favour of strong protection of “free speech” on campuses, and against the idea of so-called “safe spaces”.<sup>14</sup> UWS Chancellor Dr Peter Shergold is quoted as saying:

“Universities need safe spaces for students, be they LGBTI or Muslim ... where they can go and talk to each other,” said Dr Shergold, the council’s chairman.

“But university campuses cannot be safe spaces in terms of ideas.

“People should be challenged by ideas, see a diversity of ideas. That’s the heart of the institutional ethos of a university.”

And ANU Chancellor Gareth Evans is also quoted:

“Lines have to be drawn, and administrators’ spines stiffened, against manifestly unconscionable demands for protection against ideas and arguments claimed to be offensive,” Mr Evans said. “Keeping

<sup>11</sup> See “Students Demand Professor Be Fired After He Champions Due Process, Says ‘Accusers Sometimes Lie’” *PJMedia*, 1 Oct 2018 <https://pjmedia.com/trending/students-demand-professor-fired-after-he-champions-due-process-says-accusers-sometimes-lie/> .

<sup>12</sup> See <https://policies.newcastle.edu.au/document/view-current.php?id=107&version=1> .

<sup>13</sup> For helpful review and critique of these movements, see the recent book by Greg Lukianoff and Jonathan Haidt *The Coddling of the American Mind* (Penguin, 2018).

<sup>14</sup> See “University chiefs unite to defend free speech” *The Australian*, Oct 5, 2018 <https://www.theaustralian.com.au/higher-education/university-chiefs-unite-to-defend-free-speech/news-story/96e87108a7a1559e3104997a93322000> .



alive the great tradition of our universities — untrammelled autonomy and untrammelled freedom of speech — is a cause to which university chancellors ... should be prepared to go to the barricades.”

## 2. The Biblical basis for religious freedom

So far, I have noted a number of issues which impact the freedom of Christian students and staff to live out their religious commitments. Let me more briefly spell out some of the reasons why religious freedom is an important value.

One is that the Bible, especially the New Testament, assumes that all people in society should be free to make their own choice about what religion to follow. Now of course, the Bible is in no doubt as to who the true God is, and that Jesus Christ is his Son, and that salvation is only found through him. But the assumption of the Bible is that God does not *coerce* people into faith, but encourages them to freely choose.

While the position of the nation of Israel in the Old Testament was somewhat unique, being a political nation which was meant to be made up of God’s people, when we come to the New Testament the status of being one of God’s people comes solely from putting faith in Jesus Christ. Christians are to take the message of Jesus into the world, but not with weapons or force, but with the aim of persuading people to see the truth (see eg the reference to Paul’s methods of evangelism in the book of Acts, where he sought to “persuade” – Acts 18:4 “Every Sabbath he reasoned in the synagogue, trying to persuade Jews and Greeks.”)

Historically the commitment of Christians to putting the facts before others, so they could make their own choice, led over a period of time to a strong belief that all people should be free to make up their own minds.

## 3. Religious freedom as a fundamental human right

In more recent years, especially following the terrible religiously based persecutions carried out by the Nazis in World War II, the international community has adopted a number of statements of fundamental human rights, and one of those rights has been said to be religious freedom.<sup>15</sup> One of these is the *Universal Declaration of Human Rights*, and another is the *International Covenant on Civil and Political Rights* which, in Art 18, provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Note here that religious freedom does not simply extend to “the right to go to church” (though that is important, and challenged in some countries around the world), but also covers the right to “manifest” religion in “observance, practice and teaching”. Appropriate limits can be put on that right to manifest, under art 18(3), but only subject to certain strict requirements spelled out in that sub-article.

It’s important to note that international treaty obligations (even treaties to which Australia has formally committed itself, like the ICCPR) are not binding under Australian

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<sup>15</sup> For my most recent survey of laws on religious freedom, see Neil J Foster. "Religious Freedom in Australia overview 2017 update" *Human Rights Law Alliance* (2017) available at: [http://works.bepress.com/neil\\_foster/112/](http://works.bepress.com/neil_foster/112/) .

domestic law until further implemented in Australian law in some way. So, it is not possible to rely directly on ICCPR art 18 as a remedy. But the courts have often said that a treaty like the ICCPR can at least be “taken into account” in interpreting legislation which contains some ambiguities. And the fact that Australia has acceded to a treaty may give Constitutional power to the Commonwealth Parliament to enact a law which implements the treaty.

Following the same-sex marriage “postal survey” and enactment of amendments to the *Marriage Act* 1961 allowing such marriages, the then-Prime Minister commissioned an “expert panel” chaired by the Hon Phillip Ruddock to enquire into the need to provide stronger protections for religious freedom.<sup>16</sup> The Ruddock Report has now been handed to the Government, but so far the Report has not been made public. It is understood that the Government is planning to release its response to the Report when it releases it publicly. If the Report recommends increased protections for religious freedom, implementing art 18 of the ICCPR under the “external affairs” power would be one possible avenue.

#### 4. The governance of Universities- mix of law and policy

So how is religious freedom legally protected at Universities at the moment? The governance of Australian universities is a complex mix of Federal and State legislation, as well as internal policies of different sorts. In brief, taking our University as an example, we are established formally under an Act of the NSW Parliament, the *University of Newcastle Act* 1989 (NSW) (“UoNA”). Hence our institution is governed by the laws of NSW. We are also, of course, subject to any valid Commonwealth legislation enacted under the powers given to the Commonwealth Parliament in s 51 of the Constitution.

Education as such is not a “head of power” under the Constitution, but the way that taxation and funding operates in Australia means that the State of NSW receives money for the running of the University by way of a grant from the Commonwealth, and the Commonwealth then exercises a high degree of input into educational standards, degree-conferring rules, etc. So far as I am aware the Commonwealth has not so far attempted to attach conditions relating to academic or religious freedom to the grants it makes for the operation of Universities, but in theory this would be possible. It is interesting to note that in recent days the Federal Education minister has urged Universities to have in place policies supporting free speech, especially dealing with the question of who should pay for increased security when topics being discussed at University venues draw a hostile crowd.<sup>17</sup> Presumably it would be possible to include requirements of this sort as a condition of a recurrent Commonwealth grant.

In addition to the above, Universities are empowered to make “subordinate legislation” of different types: “by-laws” approved by the NSW Governor (see eg UoNA s 28), “rules” made by the University Council (UoNA s 29; see the *University of Newcastle By-Law* 2017, cl 20), and various other “policies” and “procedures” made by different internal bodies.

#### 5. Legal protection of religious freedom in NSW

So how is religious freedom protected legally in NSW at the moment? The previously linked lengthy paper gives a broad overview,<sup>18</sup> but I will aim to summarise briefly.

Section 116 of the **Commonwealth Constitution** provides that the Commonwealth Parliament shall not make any law “for prohibiting the free exercise of any religion”, but as a general protection of religious freedom it has a number of weaknesses:

<sup>16</sup> See <https://www.pmc.gov.au/domestic-policy/religious-freedom-review> for the website for the review.

<sup>17</sup> See “You protest, you pay: Education Minister’s bid to bolster free speech at universities” *Sydney Morning Herald*, 22 Sept 2018, <https://www.smh.com.au/politics/federal/you-protest-you-pay-education-minister-s-bid-to-bolster-free-speech-at-universities-20180921-p5057h.html>.

<sup>18</sup> See Foster (2017), above n 15.



- It does not apply to State Parliaments.
- It has so far been interpreted fairly narrowly by the High Court, but I think there is scope for a more sensible interpretation in the future to provide some better protection.

There is some broad protection for “free speech” on controversial issues through an **implied right of “freedom of political communication”** recognised in a number of recent decisions by the High Court of Australia as a right attaching to all Australian citizens. This right cannot be breached by either the Commonwealth or the States, as it is right which applies against both those levels of government.

In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, for example, the High Court held that a ban on “street preaching” could be justified on “traffic management” grounds, but not if the reason for the ban was related to the content of the message being conveyed. French CJ commented at para [43]:

Freedom of speech is a long-established common law freedom. It has been linked to the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information. (footnotes omitted)

Later in that case, at para [67] his Honour commented that even “religious” matters fell within the protection of the implied freedom:

Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.

All the members of the Court in that case made it clear that a law forbidding communication could be justified for traffic reasons, but not on the basis of some objection to the content of the communication: see per Hayne J at [140]:

[T]he only purpose of the impugned provisions is to prevent obstruction of roads. It follows that the power to grant or withhold consent to engage in the prohibited activities must be administered by reference to that consideration and none other.

So, this freedom may in some cases provide protection for religiously-motivated free speech.<sup>19</sup>

There is however **no general prohibition against discrimination on the grounds of religion** in NSW (unlike most other States and Territories.)

There is limited protection against religious discrimination in **employment**, under the *Fair Work Act* 2009 (Cth). While s 351 of that Act seems to provide a general protection against “adverse action” based on religion, s 351(2) means that it is not operative in NSW, since our local law does not prohibit religious discrimination.

The only other FWA provision providing protection for an action based on religion is a little-used provision of the FWA which was enacted based on Australia’s international law obligations, s 772, which is in Part 6-4, which “contains provisions to give effect, or further effect, to certain international agreements relating to discrimination and termination of employment” (s 769). Under s 772 it is unlawful for an employer to terminate an employee’s

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<sup>19</sup> The limits of this protection are presently being considered by the High Court of Australia in proceedings challenging State laws forbidding any communication about abortions being made within 150 m of abortion clinics- see *Clubb v Edwards*, the documents for the appeal being at [http://www.hcourt.gov.au/cases/case\\_m46-2018](http://www.hcourt.gov.au/cases/case_m46-2018) ; the case is being heard from Oct 9-11, 2018.

job for a range of reasons, including under s 772(1)(f) “religion”. But note that this only applies to termination, and there are strict limitation requirements including the need to file a claim within 21 days of the dismissal (s 774).

While, as noted above, international treaties are not directly enforceable, in at least one decision the Full Court of the Federal Court has been prepared to strike down a State regulation impairing religious freedom (and free speech) on the basis that the courts will **read** general “regulation-making” powers as not intended to unduly interfere with these internationally recognized human rights.<sup>20</sup>

Laws against discrimination on certain grounds do contain what I have elsewhere called “**balancing clauses**” designed to protect religious freedom, although mainly that of religious groups as opposed to that of an individual. Still, these may be useful should some student Christian group policies be challenged. For example, if a Christian student group declines to appoint a person advocating homosexual activity to an executive position, and is alleged to be guilty of discrimination on the basis of sexual orientation, it can probably rely on specific “balancing clauses” in that legislation allowing them to operate in accordance with their beliefs.<sup>21</sup>

An important provision, however, relates **specifically to Universities**, which seems to have been included in most State legislation establishing these. The UoNA, for example, provides as follows in s 24:

**24 No Religious Test or Political Discrimination**

A person shall not, because of his or her religious or political affiliations, views or beliefs, be denied admission as a student of the University or be ineligible to hold office in, to graduate from or to enjoy any benefit, advantage or privilege of the University.

While so far as I am aware this provision (and others like it) have never been referred to in court, it may be a very useful additional religious freedom protection.

## 6. Protection of religious freedom under policy guidelines

What about protections under University policies?

One slightly odd thing is that the University used to have a “procedure” that referred to the display of banners and posters, which for some reason was repealed and not replaced during 2017.

However, there is still a reference to this “Banner and Poster” procedure at <https://uonmarketing.zendesk.com/hc/en-us/articles/201209874-Banner-and-Poster-Procedure>, which includes the following:

The policy aims to allow **freedom of expression and the free flow of information**, whilst ensuring that information posted on the campuses is respectful of all individuals, is not defamatory or derogatory, and is consistent with the University’s Code of Conduct.

This is good as an affirmation of the need to support free speech.

<sup>20</sup> See *Evans v NSW* [2008] FCAFC 130, where the regulation prohibited protestors from “annoying” participants in the Catholic World Youth Day celebrations. See also *Aboriginal Legal Rights Movement Inc v South Australia and Stevens* (1995) 64 SASR 551, [1995] SASC 5532 where a similar principle of “legality” protecting religious freedom was said to be operational.

<sup>21</sup> For the Commonwealth sphere, see *Sex Discrimination Act* 1984, s 37; in the State area, see *Anti-Discrimination Act* 1977 s 56. Arguably if the law of the land would allow a Christian group the privilege to run their group in accordance with their religious beliefs, then any attempt by a University to impose a stricter standard might be attacked as beyond the power of the University to make such rules.

The University general *Code of Conduct* includes the following:

(30) We promote collegiality by behaving inclusively and openly, and fostering **academic freedom**.

I noted previously the *Media Policy* which says that:

The University recognises and respects the concept of **academic freedom**.

And cl 3(b) in the *Code of Ethical Academic Conduct Policy*, <https://policies.newcastle.edu.au/document/view-current.php?id=203&version=1>, under Student Responsibilities, says that one such responsibility is:

To act at all times in a way that respects the rights and privileges of others and shows commitment to **freedom of expression**.

The University, for its part, undertakes in cl 2(a) of that Policy

To provide a work and study environment free from discrimination or harassment on the basis of race, nationality, sex, age, political conviction, sexual preference, marital status, **religious belief**, disability, family responsibilities or carers' responsibilities.

It is also good to see that the University *Academic Promotion Policy* <https://policies.newcastle.edu.au/document/view-current.php?id=238&version=1> contains the following:

(9) The promotion process will have regard for the principles of equal opportunity, fairness and social justice. These principles require that there be **no discrimination** against any individual on the basis of personal characteristics such as sex, sexuality, ethnicity, age, disability, cultural background and **religion**.

The University has a general policy designed to forbid discrimination or harassment: *Promoting A Respectful And Collaborative University: Diversity And Inclusiveness Policy* <https://policies.newcastle.edu.au/document/view-current.php?id=88&version=1>.

One important feature is the definition of "harassment" in cl (33):

Harassment means any unwelcome behaviour that intimidates, offends, or humiliates, an individual, or group of people, and occurs because of race, colour, nationality or ethnic origin, **religion**, sex, pregnancy (actual, presumed and/or breastfeeding) marital status, age, disability, transgender status, homosexuality, sexual preference, carer's responsibilities, trade union activity or association, political opinion or irrelevant criminal record or some other characteristic specified under anti-discrimination or human rights legislation.

There are some dangers to free speech in this wide-ranging definition, which sets the bar very low- behaviour simply has to "offend" and be "unwelcome" to someone. (Comments about a Biblical view of sexuality, for example, were alleged to be "offensive" in an action against the Roman Catholic Archbishop of Hobart a few years ago, although the action never proceeded to a final trial.)<sup>22</sup> However, there is a useful linked document which gives examples of the sort of thing that is intended to be caught, and in general terms that document refers to

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<sup>22</sup> See my blog post on the episode, "First they came for the Catholics..." (Nov 13, 2015) <https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/>.

behaviour at the more serious end of the scale.<sup>23</sup> In fact, it is useful to note that item (xii) on the list illustrating “harassment” is:

(xii) making derogatory remarks about someone’s race, **religion** and customs.

## 7. Applying these protections to the challenges

Finally, then, how do these protections currently apply to the challenges identified above? The following is just a general summary of the ways that some of these challenges might be addressed. In each case one possible challenge has been chosen; others could be added.

### (a) General religious activities

#### (i) Students and student groups

Suppose a student Christian group told that it could not limit its membership, or its leadership, to those who adhered to a Christian ethos.

One option would be to ascertain whether a prohibition on “viewpoint-based” membership was being enforced against other religious groups, and other “viewpoint-based” clubs such as a political club or a feminist action group. If not, if the Christian group had been singled out, then this could be said to be in breach of the University general “Promoting” policy noted above, which includes the following statement:

(13) The University does not tolerate any unwelcome or unfair treatment by any person or group of people whilst engaged in activity or business on behalf of or in association with the University, regardless of the day, time or place. Unwelcome or unfair treatment may be expressed through bullying, discrimination, **unlawful discrimination**...

And the following definition of “unlawful discrimination”:

(37) Unlawful Discrimination is when an individual or a group of people, are treated unfairly or less favorably than another person or group on the basis of ... **religion**....

So, to penalise a Christian group for doing something, but not to complain when that thing is done by non-Christian groups, seems to amount to unlawful discrimination. Without going into the details, there are various administrative law remedies that may be invoked if the University fails to act in accordance with its own published policies.

It may also be argued that in such a case the University has breached the law, by reference to s 24 of the UoNA, noted above, which forbids the University from making someone ineligible to “enjoy any benefit, advantage or privilege of the University” on the basis of their “religious... affiliations, views or beliefs”. Clearly it is an advantage for a student club to be recognised by the University and to be able to book rooms and operate on campus. To deny a group such an advantage on the basis of their Christian beliefs would be to breach s 24, and again there would be a range of litigation options, especially in relation to breach of an Act of Parliament.

Of course, it may be that a rule of this sort was rolled out for all “viewpoint” clubs. This would be unlikely (would the feminist club really want someone who was a Donald Trump supporter on their executive?). But if it happened, then perhaps a challenge may be possible under the “free speech” remedies noted below.

<sup>23</sup> See <https://policies.newcastle.edu.au/download.php?id=199&version=2&associated> .

## (ii) Staff

Suppose a staff member threatened with discipline or termination due to their membership of an unpopular religious group.

As above, to do this would arguably breach the University's self-imposed "Promoting" policy, but would also pretty clearly breach s 24 of the UoNA. It would also arguably be actionable in the Federal Court as a breach of s 772 of the *Fair Work Act* 2009.

If there was a threat that a person would not be promoted due to their openly but politely expressed religious views, then this would seem to be a breach of the *Academic Promotion Policy* cl (9) noted above.

## (b) Free speech issues

## (i) Students and student groups

Suppose a student Christian group was told that it could not encourage its members to share the gospel of Jesus with other students.

If this prohibition were simply imposed on the Christian group and not others, the above arguments about religious discrimination would apply.

In addition, however, there would be "free speech" arguments that could be made. The University would arguably be in breach of its own policies in favour of "freedom of expression" (see eg the *Banner and Poster* policy still cited on the website, above.)

In particular it could be argued that the principle of support for free speech is such an important legal value, that Parliament could not have intended to allow the University to restrict free speech in such a way without explicit authority (see the *Evans* case noted above.) Or one could argue that the "implied freedom of political communication" would restrict the limits of any law made under authority of an enactment of the NSW Parliament which would purport to restrict free speech in this way.

## (ii) Staff

Suppose a staff member were told that because of their comments on an internet forum, they would be disciplined or terminated.

Discrimination arguments would be possible here, especially under s 24 UoNA. It would also be possible to argue the "free speech" points noted above. In particular, as it related to a member of academic staff, the University has expressed support for "academic freedom" under its *Code of Conduct* cl (30), and this is likely to be a key point in arguing for academic free speech.

## Conclusion

The above has been a quick survey of some areas that require more unpacking. But one thing that is fairly clear is that, while there is some support for religious freedom on Australian Universities at the moment, there are serious areas where there are uncertainties and gaps. It is to be hoped that the recommendations of the Ruddock Report may prove useful in plugging those gaps and providing a framework where healthy debate on religious issues can take place at Australian tertiary campuses.

9 Oct, 2018