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The Place of the Child in Recent Australian Debate about Freedom of Religion and Belief

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Abstract: Political and legal debate about freedom of religion and belief (FoRB) in Australia has intensified since the same-sex marriage postal survey in 2017. Central to this debate has been children, their parents and institutions (Schools). This paper outlines the place of children in the Australian FoRB since 2017, focusing on the same-sex marriage postal survey debate and subsequent reviews into FoRB. In particular, it highlights the links drawn between same-sex marriage or marriage equality and the Safe School Coalition Australia campaign, the emphasis on parental rights in relation to education about marriage in schools, and the ongoing debate about potential reform to Australia's suite of anti-discrimination laws, including the failed federal Religious Discrimination Bill.

Keywords: freedom of religion; children and religion; church and state; law and religion; right of the child

1. Introduction

In May 2021, Australian parents were shocked to discover that "knives" were being brought into Australian schools–an activity that was apparently being sanctioned by education departments (Turner-Cohen 2021). The "knives" in question were in fact Sikh Kirpans, worn by baptised Sikhs as one of the five markers of faith. What followed was an intense public debate about the balance between safety in schools and freedom of religion and belief (FoRB) of the children who attend those schools (Barker 2021a). Ultimately, the New South Wales Government backed away from its initial ban on the Kirpan, opting instead to permit the wearing of this religious symbol under strict conditions (Taouk 2021).

The Kirpan in schools debate highlights the important role children play in debates about FoRB. While the issues related to Kirpans in schools was resolved relatively quickly in favour of pluralism and inclusion, many other FoRB issues remain. Issues related to gender, sexuality, and marriage have garnered particular prominence in Australia over the last decade. As this article will demonstrate, children and the impact of proposed and, in some cases, successful law reform on children have been central to these debates.

Children, like adults, are rights holders under numerous international, supra-national and national human rights instruments. This includes FoRB. As well as general human rights protections afforded to all people, regardless of age, children are provided specific protection under the *Convention on the Rights of the Child* (CRC). In relation to FoRB article 14 of the *CRC* provides:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs 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.

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However, the nature of FoRB and children is contested. Some argue that they are rights holders now, entitled to fully exercise their FoRB (Barker 2020d). Others argue that although children have a right to FoRB, it is different to that of adults. For example, Feinberg (1980) argued that parents' role was to provide children with a maximally 'open future'. The effect of this is to curtail the parents' ability to include their child in all aspects of religious practice and belief (Feinberg 1980). Still, others emphasise the role of parents in protecting and exercising FoRB rights on behalf of their children (Ahdar and Leigh 2013). Whichever view of the FoRB of children one finds most persuasive, the additional vulnerability of youth makes the exercise of balancing their rights against those of others in the case of a conflict of rights more challenging–not least because children are often unable to act independently to assert and protect their rights.

Finding the right balance for children is particularly challenging in the Australian context. Australia is one of the few, if not the only, western democratic country without a national bill or charter of rights (Chappell et al. 2009), although some states and territories have introduced local Charters of Rights. Political and legal debate in Australia has increasingly included the role of religion and FoRB. The inherent difficulties in finding the right balance between FoRB and protection of children's other rights when religion is involved has been central to many of these debates.

This article will examine the role children have played in legal and political debates about FoRB in Australia beginning with the lead-up to the same-sex marriage (SSM) postal survey in 2017[1]. While issues related to FoRB have been debated for decades, the debate has intensified since the postal survey[2]. It is important to note that while this paper has been framed as being about FoRB and children, it is not children's exercise of FoRB which has been the subject of most of the debate. Instead, it is the rights of their parents and schools and the impact of the exercise of FoRB and other fundamental rights by others on children which has been the focus of FoRB debates in Australia. Even where the individual exercise of religious beliefs or practices has been an issue, the locus of the precipitating event has often been a school[3].

The paper is organised into four parts, Part One sets out the background and context of the paper. Part Two provides an outline of religion in Australia, as well as the legal protections and context for the protection of FoRB. Part Three examines the role of the child, primarily via the parents and institutions (schools) in FoRB debates in Australia beginning with the SSM postal survey in 2017. Finally, Part Four offers some concluding remarks.

2. Religion and Freedom of Religion in Australia

2.1. Religion

According to the 2021 census, the largest religious group in Australia is those that self-identify with Christianity (43.9%). However, those that reported that they had no religion accounted for nearly 40% of the population (38.9%). The remainder (17.2%) is made up of those who self-identify with a minority faith (10%) such as Islam (3.2%), Hinduism (2.7%) or Buddhism (2.4%), and those who did not answer the question[4] (Australian Bureau of Statistics 2022).

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[1] The postal survey was a non-binding, voluntary survey administered by the Australian Bureau of Statistics which asked Australians "Should the law be changed to allow same-sex couples to marry?" The survey was conducted as a political solution to ongoing debate about the legalisation of same-sex marriage. 79.5% of eligible Australians participated in the vote which resulted in a 'Yes' vote of 61.6% and a 'No' vote of 38.4% see https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0 (accessed on 3 November 2022).

[2] Other important debates about FoRB and children include the National School Chaplaincy Program, Religious Education in Schools and the Royal Commission into Institutional Responses to Child Sexual Abuse.

[3] See for example *Secular Party of Australia Inc v The Department of Education and Training* (2018) and *Arora v Melton Christian College* (2017).

[4] The question about a person's religion is the only optional question on the Australian Census. The Australian Census is conducted once every 5 years. A question about religion has been included in every census since Federation in 1901. Most colonial censuses conducted prior to Federation also included a question about religion. The most recent Census was conducted in 2021. For more information about the history of the religion question in the Australian Census see Frame (2009).

Generation Alpha (0–9 years) and Gen Z (10–24 years) are more likely to identify as having no religion (46.5% and 44.0%) and are more likely to belong to a minority religion (12.8% and 10.0%). However, as the Australian Bureau of Statistics (2017) noted in relation to the 2016 census, '[t]he religious pattern of those under 18 is most similar to the 35–49 year olds, suggesting the form may be completed with their parents' beliefs'. A better indication of the views of younger Australians may come from the statistics for young adults, the youngest of whom may have been completing the census independently for the first time. Millennials (25–39 years) for example, had the highest proportion who did not self-identify with any religion (46.5%). While the Interwar generation (75+) had the largest proportion who identified with a religion other than Christianity (18.6%), this was closely followed by Millennials (14.9%) (Australian Bureau of Statistics 2022).

While the number of Australians identifying with Christianity specifically, and religion more generally, is declining, religion still plays an important role in the lives of many children via their enrolment in non-Government, predominantly religious, schools and the inclusion of religious programs in state-run secular schools. Australian Catholic and independent schools[5] both receive significant funding from the Federal Government, with non-government schools receiving $12.1 billion in funding in 2018–2019. This represents 24.2% of all government funding to schools (Productivity Commission 2021). In terms of enrolments, in 2020, 19.4% of student attended Catholic schools, while 15% attended independent schools (Australian Bureau of Statistics 2021). While education in government schools is secular[6], religion is still present in state schools via both the National School Chaplaincy Program and Special Religious Education (SRE)[7] (Barker 2019b). The NSCP is a federally funded initiative that provides funding for Chaplains to both government and non-government schools. While the program allows for the employment of secular welfare workers, as well as religious chaplains, as former Prime Minister John Howard explained at the time the NSCP was introduced:

> I am calling them chaplains because that has a particular connotation in our language . . . And as you know I'm not overwhelmed by political correctness. To call a chaplain a counsellor is to bow to political correctness. Chaplain has a particular connotation, people understand it, they know exactly what I'm talking about. (ABC News 2006)

The *Education Acts* in all Australian states and territories provide what is various described as Special Religious Education (SRE), Religious Education (RE) or Special Religious Instruction (SRI), on either an opt-in or opt-out basis[8]. These religious classes are usually taught by external providers and focus on specific religious education, usually of the majority Christian religion (Babie 2021a).

2.2. Freedom of Religion

Australians enjoy a comparatively high level of FoRB. In the 2020 Pew report *In 2018, Government Restrictions on Religion Reach Highest Level in More Than a Decade*, Australia received a relatively low 'Government Restrictions Index' score of 1.8 (Majumdar and Villa 2020). This is consistent with the state-religion relationship in Australia, which has variously been described as liberal separation (McLeish 1992; Babie et al. 2019), pragmatic pluralism (Soper et al. 2017) and non-establishment pluralism (Barker 2021b)[9].

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[5] The majority of whom are affiliated with a religion see Independent Schools Australia (2020).

[6] In all states and territories, except Queensland, the state *Education Acts* require that education be secular see *Education Act 2004* (ACT) s 28; *Education Act 1990* (NSW) ss 30 & 33; *Education Act 2016* (Tas) s 125(1); *Education and Training Reform Act 2006* (Vic) s 2.2.10; *School Education Act 1999* (WA) s 68(1)(a).

[7] Special Religious Education (SRE) is also referred to as Religious Education (RE), Religious Instruction (RI) and Special Religious Instruction (SRI). It is usually offered on an opt-in or opt-out basis.

[8] *Education Act* 2004 (ACT) s 29; *Education Act 2015* (NT) s 86; *Education Act 1990* (NSW) s 32; *Education (General Provisions) Act 2006* (Qld) s 76; *Education Act 1972* (SA) s 102; *Education Act 2016* (Tas) s 126; *Education and Training Reform Act 2006* (Vic) s 2.2.11; *School Education Act 1999* (WA) s 69.

[9] For a discussion of the correlation between state-religion relationships and freedom of religion see Durham and Scharffs (2019) and Temperman (2010).

FoRB in Australia is protected via a patchwork of constitutional provisions, state and federal anti-discrimination laws, common law rights and state-based rights charters (Barker 2019b). Babie (2020) has referred to an 'ethos' of protection of FoRB. He argues that

> [t]he ethos is more akin to the 'unwritten' British Constitution, in the sense that it is comprised of two disparate sources: laws properly so-called (constitutional, statute, and common law), and "conventions, understandings, habits, or practices [which] . . . may . . . be termed . . . constitutional morality." Indeed, it may even be the case that this ethos of protection for FoRB may have a wider ambit than any rigidly defined, written protection, such as a proposed Commonwealth Religious Freedom Act. In other words, rather than being found in any one single document, one finds the ethos in a convergence of sources found in many texts the product of legislative and judicial processes: the Commonwealth Constitution, at least one State constitution, Commonwealth, State, and Territory legislation, and in the common law. (Babie 2020) [internal citations omitted].

While Section 116 of the *Australian Constitution* ostensibly protects FoRB, it only applies to laws passed by the Federal Government, and has historically been interpreted narrowly by the High Court of Australia[10]. It is usually interpreted as a limit on federal government power, rather than as an individual right, despite textual similarities with the United States of America's first amendment (*Adelaide Company of Jehovah's Witness v Commonwealth* 1943). Section 116 states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required for any office or public trust under the Commonwealth.

In relation to children and schools, the High Court considered federal government funding of religious schools in *Attorney General (Vic); ex rel Black v The Commonwealth* (1981), and the federal funding of a religious chaplaincy program in both non-government and state-run schools in *Williams v The Commonwealth* (2012)[11]. In both cases, the Court found that the funding programs did not breach Section 116[12].

Even if Section 116 did guarantee individual religious freedom, it does not apply to actions by state governments (Babie et al. 2019). Given that a significant number of important intersections between the state and religion, such as education, health, and criminal law, are regulated by state governments, any protection the provision may have offered would be limited in scope.

With the exception of the context of employment[13], federal anti-discrimination law does not currently prohibit discrimination on the basis of religion. The 2018 Religious Freedom Review recommended that the government either amend the *Racial Discrimination Act 1975* (Cth) to include prohibitions on religious discrimination or introduce a standalone religious discrimination act (Ruddock et al. 2018)[14]. As will be discussed below, the Federal Government drafted a *Religious Discrimination Bill* in response to this recommendation. However, the *Bill* failed to pass Parliament.

Federal anti-discrimination law does, however, provide some exemptions from general anti-discrimination provisions for religious bodies and schools. These exemptions permit

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[10] Section 116 has only been considered by the High Court of Australia on a handful of occasions see *Krygger v Williams* (1912) 15 CLR 336; *Adelaide Company of Jehovah's witnesses v Commonwealth* (1943) 67 CLR 116; *Attorney General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559; *Kruger v Commonwealth* (1997) 190 CLR 1 and *Williams v The Commonwealth (2012) 248 CLR 156*.

[11] See also *Williams v The Commonwealth [No. 2]* (2014) 252 CLR 416.

[12] Neither of these cases considered FoRB specifically. *Adelaide Company of Jehovah's Witness v Commonwealth* concerned the so-called separation of church and state clause of section 116 while *Williams v The Commonwealth* considered the prohibition on religious tests for public office.

[13] For the employment context see *Australian Human Rights Act 1986* (Cth) ss 30–35.

[14] At the time of writing this recommendation was under active consideration with a final bill expected to be presented to parliament in late 2021 or early 2022.

religious bodies and religious educational institutions to discriminate in relation to certain otherwise protected attributes such as sex, sexual orientation, gender identity, martial or relationship status, and pregnancy "in order to avoid injury to the religious susceptibilities of adherents of that religion or creed." (*Sex Discrimination Act* 1984, s 38)[15].

Protection for FoRB is stronger at the state and territory level. However, due to differences between jurisdictions, there is significant inconsistency between the protections available for residents of different states (Elphick 2017). As with the federal level, the primary protection for FoRB comes from anti-discrimination legislation. Most states and territories prohibit discrimination on the basis of religion[16]. However, in South Australia discrimination is only prohibited on the basis of 'religious appearance or dress[17], while New South Wales has announced plans to amend the *Anti-Discrimination Act 1977* (NSW) to prohibit discrimination on the basis of religion (Speakman and Ward 2021). Like federal anti-discrimination laws, state and territory anti-discrimination laws also contain exemptions to general prohibitions on discrimination for religious organisations or bodies and religious schools. In the absence of more comprehensive protections for FoRB, these clauses play an important role in balancing rights protected in anti-discrimination laws (Foster 2016). However, it is important to remember, as Aroney (2019) has argued, '[r]eligious freedom and religious discrimination are not exactly the same thing'.

More explicit protection of FoRB is provided in Victoria, Queensland and the Australian Capital Territory via legislative Charters of Rights[18]. Section 46 of the *Tasmanian Constitution* (*Constitution Act 1934* [Tas]) also provides for FoRB, although it is a bit of a mystery how this provision made its way into the Tasmanian Constitution (Museum of Australian Democracy n.d.; Barker 2019b; Babie 2021a, 2021b).

Adding to the patchwork of protections for FoRB in Australia are state-based prohibitions on religious vilification in Victoria, Queensland and Tasmania[19]. Religious vilification was also temporarily prohibited by the Federal Government during the SSM postal survey in 2017 (Barker 2019b). Further, legislative prohibitions on racial discrimination and vilification have been interpreted to include 'religious groups that can establish a common "ethnic origin". This has been interpreted to include Jewish and Sikh people (Ruddock et al. 2018).

FoRB is also weakly protected in Australia via common law principles of statutory interpretation. While views are mixed as to whether the common law contains an express recognition for FoRB (Barker 2020b; Babie 2021b), it is clear that common law principles of statutory interpretation require courts to consider whether any statute purporting to limit FoRB has done so 'in clear and unambiguous terms' (Babie 2021b).

Finally, while Australia does not have a constitutional or legislative right to freedom of speech, political speech is protected via the implied freedom of political communication. In *McCloy v New South Wales* (2015) the High Court stated that the implied freedom is:

> [a] qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors'. It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

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15 For exemptions provided to religious bodies see *Sex Discrimination Act 1984* (Cth) s. 37.

16 See for example *Anti-Discrimination Act 1977* (NSW) s56(d); *Anti-Discrimination Act 1992* (NT) s51(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Anti-Discrimination Act 1998* (Tas) s52(d); *Equal Opportunity Act 2010* (Vic) s 82(2); *Equal Opportunity Act 1984* (WA) s 72(d).

17 *Equal Opportunity Act 1984* (SA) s 85T(1)(f).

18 *Human Rights Act 2004* [ACT]; *Charter of Human Rights and Responsibilities Act 2006* [Vic]; *Human Rights Act 2019* [Qld].

19 *Racial and Religious Tolerance Act 2001* [Vic]; *Anti-Discrimination Act 1991* [Qld]; *Anti-Discrimination Act 1998* [Tas].

In *Attorney-General (SA) v Corporation of the City of Adelaide* (2013), the High Court confirmed that religious speech could be political speech and therefore, political religious speech could be protected by the implied freedom of political communication (Barker 2020c). The Court however missed the opportunity to consider where the line may be drawn between political and non-political religious speech (Barker 2020c; Landrigan 2014).

3. The Place of the Child in Recent Freedom of Religion Debates

3.1. Same-Sex Marriage Debate

In 2017, the Federal Parliament amended the *Marriage Act 1961* (Cth) to, inter alia, change the definition of marriage from 'the union of a **man and a woman** to the exclusion of all others, voluntarily entered into for life' to 'the union of **2 people** to the exclusion of all others, voluntarily entered into for life'(emphasis added) (*Marriage Act 1961* (Cth))[20]. While marriage is an institution only legally available to those over 18[21], the potential impact of the change to the definition of marriage on children was central to the Australian debate on SSM or marriage equality (Gerrard 2020). Indeed, this link is explicit in Australia's common law definition of marriage. In *Russell v Russell* (1976) Jacobs J states that:

> Marriage as a social institution which the law clothes with rights and duties attaching to the parties thereto is primarily an institution of the family. . . . The primary reason for its evolution as a social institution, at least in Western Society, is in order that children begotten of the husband and born of the wife will be recognised by society as the family of that husband and wife.

Also central to the debate were the implications of a 'Yes' vote on FoRB. This can be seen most clearly in the name of the amending Act: *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

SSM had been debated in Australia for over a decade prior to the postal survey debate, which intensified and crystallised into an 'electoral-style campaign', despite significant community opposition to an earlier plan for a non-binding plebiscite on SSM (Thomas et al. 2020). The central role that children were going to play in the arguments from both the 'Yes' and 'No' campaigns became evident almost immediately. The first 'No' campaign ad to air on Australian television featured three mothers speaking about their fears for their children's education in the wake of a 'Yes' vote. The ad explicitly linked SSM to the then relatively recent controversy surrounding the Safe Schools Coalition Australian (SSCA) program. As Thomas et al. (2020) argues, the ad, inter alia, deliberately positioned 'LGBTIQ people with threats to children'.

The SSCA program, which was first introduced in Victorian schools in 2010, and expanded nationally in 2014, aimed to 'promote affirmation and inclusivity of sexuality and gender diverse students through a voluntary teacher training programme . . . with the intention of fostering whole-school improvements in celebrating sexuality and gender diversity' (Rawlings and Loveday 2021; see also Ulman 2017) (internal citation omitted). This led to intense public criticism of the program by conservative political and religious groups, including the Australian Christian Lobby (ACL) (Carden 2018). The media framed this opposition as being based on problematic content which was 'dangerous and risky to students,' as being a problem of political correctness and political discord, and as 'a threat to children, and that children inherently required protection–especially due to their innate innocence' (Rawlings and Loveday 2021). The Federal Government responded by ordering a review of the SSCA program by Professor Bill Louden. Despite Louden's review expressing support for the program, the Federal Government withdrew funding (Carden 2018).

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[20] The original definition of marriage was inserted in 2004 by the *Marriage Amendment Act 2004* (Cth). Prior to that date the definition of marriage was assumed to be restricted to a union between a man and a woman based on the common law definition of marriage in *Hyde v Hyde* (1866).

[21] People aged 16 to 18 may, in exceptional circumstances, marry with the consent of their parents and a magistrate. Under section 95 of the *Marriage Act 1961* (Cth) it is an offence to marry a minor or person not of marriage age.

While the 'Yes' campaign's follow-up ad did not feature children, subsequent ads featured heterosexual nuclear family units, including children. As with 'No' campaign ads, mothers spoke about their children, this time focusing on their role in teaching their children about equality and fairness (Thomas et al. 2020). For the 'Yes' campaign, 'the symbolic violence of having same-sex families called into question and of being depicted as depraved and insalubrious raised significant concerns surrounding the impact of the vote itself on the mental health and wellbeing of children and young people' (Gerrard 2020), and was therefore also central to their campaign strategy.

While religion and FoRB is not explicit in these ads, it is worth considering that the first 'No' campaign ad to air was funded by the ACL (Thomas et al. 2020). Religious groups have long been enjoined to place their religious arguments in secular terms when engaging in public discourse (McBride 2017). As Rawls argued, citizens 'should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality' (Rawls 1996, p. 218). The reframing of religious or moral issues related to children in secular terms has been observed in a number of contexts. For example, in relation to the rise of the Christian Right in the United States of America, Bailey (2002, p. 261) observed that 'prayer in school was repackaged in terms of students' rights, childcare issues were wrapped in the rhetoric of parental choice' and that arguments against abortion were reframed by 'claiming that unborn children have a "right to life".' (Bailey 2002, p. 254). Similarly, Greenawalt (2009) notes that in the context of family law decisions a judge must, in determining the best interests of the child, rely on public reasons, and not those based on religious belief or other philosophical views. In the context of the Australian SSM debate, Poulos (2019) noted that 'opponents of marriage equality make strategic decisions to frame their objections not on arguments about immorality or religious beliefs but on the negative consequences of same-sex marriage to society–it threatens marriage, family, freedoms and rights'. In the American context, Bailey (2002, p. 255) noted that the debate was similarly reframed in terms of 'pluralism, family, and freedom'. An absence of explicit reference to Christianity or religious teachings should not, therefore, be seen as the absence of such motivations or connections. The ACL continues to advocate for 'traditional marriage,' as well as continuing to link SSM to the SSCA program (Australian Christian Lobby n.d.).

Both the 'Yes' and 'No' campaigns used images associated with privilege in Australia. As Thomas et al. (2020) note, the focus of the ads was on heteronormative family structures of the white nuclear family–Mum, Dad and a couple of 'normatively-gendered children'. Added to this litany of privilege is, arguably, an unspoken 'Christian privilege'. As outlined above, and argued by Quinlan (2016), Australia is, and has historically been, a predominantly Christian country. While this is changing, it is still an important feature of the Australian identity. As both Poulos (2019) and Ezzy et al. (2021) observed, a feature of this unspoken Christian privilege is an increasing 'disjunction between the truth claims of Christians and the demands of treating others respectfully in a diverse society' (Ezzy et al. 2021). As Poulos (2019) argues:

> With the increasing legal protections afforded to women and especially LGBTIQ people, most religious groups in Australia are seeing their traditional beliefs and moral codes eroded by society and contradicted in law. In the balancing rights problematisation, the privileged Christian majority . . . becomes the persecuted minority because the truth claims of its beliefs have been challenged in law.

Ezzy et al. (2021) add '"legal protections afforded to members of the religious minorities" to Poulos' list'.

Further, a direct link between so-called 'traditional marriage'[22], the importance of procreation and children, and Australia's 'Christian' heritage has been a prominent feature of arguments against SSM in Australia long before the 2017 postal survey (see Quinlan 2016).

[22] Marriage between one man and women.

For example, Quinlan (2016) argues, inter alia, that a compelling reason to maintain the so-called 'traditional' definition of marriage is the dominance of Christianity in Australia.

The link between FoRB, children and the SSCA program continued during the parliamentary debate on the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* (Cth). During the parliamentary debate, 14 unsuccessful amendments were proposed to the *Bill*. In relation to children, Liberal Senator James Paterson proposed the insertion of a new section, which would have enabled parents to withdraw their children from classes where the school is teaching a view of marriage that is inconsistent with the parent's values regarding marriage (Barker 2019b).

During his argument in support of the clause, Paterson (2017) explicitly linked the amendment to the right of parents to withdraw their children from SRE classes and the SSCA program. While he attempted to suggest that parents may have secular reasons for objecting to the teaching of SSM, his focus was squarely on parental rights and FoRB (Paterson 2017). The right for parents to educate their children in the religion of their choice is protected in international law (Doe 2011). While under article 13(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) education should 'promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups' parents retain the right, under article 18(4) of the *International Covenant on Civil and Political Rights* (ICCPR), to 'ensure the religious and moral education of their children in conformity with their own convictions'. The right of parents, and children, to withdraw from religious education specifically is further articulated in article 5(2) of the *Declaration on the Elimination of All forms of Intolerance and Discrimination based on Religion or Belief* (DEDAW):

> [e]very child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

However, the right to withdraw from other classes is less clear. For example, the European Court of Human Rights has held that parents do not have a right to withdraw their child from secular ethics classes (*Appel-Irrgang v Germany* 2009), nor from mandatory sex education classes (Kjeldsen, Busk Madsen and Pedersen v Denmark 1976). Paterson's suggestion, therefore, that parents should have a right to withdraw their children from classes about marriage is dubious from an international law perspective.

Other speakers made the link between children, SSM, and FoRB even more explicit. For example, speaking in support of the amendment, Liberal Senator David Fawcett linked the amendment to article 18(4) of the *ICCPR* (Fawcett 2017).

A count of the references to FoRB during the debate on the amendments proposed by Paterson reveals that FoRB was referred to 17 times, often alongside other fundamental freedoms such as freedom of speech. By contrast, Liberal Senator Eric Abetz explicitly argued that SSM was not a fundamental human right:

> What we are embarking upon with this legislation, potentially, is to compromise those fundamental rights in favour of something which has been shown time and again not to be a fundamental human right, namely, same-sex marriage. The international law on that is exceptionally clear. Does that stop a country from legislating for same-sex marriage? Of course not. It is not one of those fundamental international human rights. So what we have here is the Australian legislature seeking to establish a new right and, in so doing, compromising those very basic fundamental human rights that, thank goodness, we were all able to grow up with. (Abetz 2017)

The role of children in the SSM debate is clear when the public debate, including the advertisements for both the 'Yes' and 'No' campaigns, are considered alongside the parliamentary debate. While the impact of the change to the marriage laws on children

were not the only arguments mounted, they were a continuous thread throughout the debate with, in relation to the 'No' campaign in particular, a clear link to religious or so-called 'traditional' views about marriage.

3.2. Religious Freedom Review

On 22 November 2017, in the midst of the public debate on the SSM postal survey, then Prime Minister Malcolm Turnbull announced an inquiry, by a government-appointed Expert Panel, into freedom of religion (the "Religious Freedom Review") (Turnbull 2017; Ruddock et al. 2018). The objective, outlined in the Terms of Reference was to 'examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion' (Ruddock et al. 2018). The Expert Panel made 20 recommendations, six of which related to children and education (Ruddock et al. 2018; Barker 2020a). Despite comprising just 30% of the twenty recommendations, it is these six that garnered the most media attention in the immediate aftermath of the leaking, and eventual release, of the Expert Panel's report (see Topsfield 2018; Barry 2018).

Recommendations 5–8 of the Religious Freedom Review related to exemptions in the *Sex Discrimination Act 1984* (Cth) ("SDA") and other state and territory-based discrimination laws that provide religious schools with exemptions from some aspects of the SDA. These recommendations sought to narrow these exemptions (Elphick et al. 2018), although inaccurate media reporting at the time suggested otherwise (see Barry 2018). Specifically, the Religious Freedom Review recommended the removal of any exemptions relating to race, disability, pregnancy, or intersex status, or on the basis that existing employees had entered into a marriage. Further, the Review recommended that the remaining exemptions in the SDA be amended to require schools to have a publicly available policy 'outlining its position in relation to the matter and explaining how the policy will be enforced' (Ruddock et al. 2018)[23].

Recommendation 9 related to classes that contain 'instruction on religious or moral matters' (Ruddock et al. 2018). The Review recommended that state and territory education departments should 'maintain clear policies as to when and how a parent or guardian may request a child be removed' from these classes and that the policies be 'applied consistently' (Ruddock et al. 2018).

Recommendation 12 dealt with the nexus between schools and the legalisation of SSM, by recommending that the Commonwealth amend the *Marriage Act 1984* (Cth) 'to make it clear that religious schools are not required to make available their facilities, or provide goods and services, for any marriage' (Ruddock et al. 2018). An exemption of this nature already exists in Section 47B of the *Marriage Act 1961* (Cth) for 'bodies established for a religious purpose'. Section 47B permits these bodies to refuse to make their facilities or services available for the solmisation of a marriage or for 'purposes reasonably incidental to the solmisation of marriages'.

While the majority of the recommendations of the Religious Freedom Review were accepted by the Federal Government, at the time of writing none of the recommendations from the Review have sounded in legislative reform–including those relating to children and schools. On the one hand, this might suggest that FoRB issues, including those related to children, are not urgent, however the number of reviews into FoRB and related issues would belie this interpretation of government inaction.

Poulos (2019) has identified nine separate inquiries at both state and federal level, including the Religious Freedom Review, into FoRB prior to 2019, with a further 11 which included considerations of FoRB as part of a wider inquiry into human rights, LGBTI rights, or race discrimination. Perhaps tellingly, 13 of the 20 inquiries, (65%), have occurred since 2011. Further, since the publication of Poulos's study in 2019, the recommendations of the Religious Freedom Review have sparked further public inquiries. There have been five

[23] Section 34(3) of South Australia's *Equal Opportunity Act 1984* (SA) already requires schools to have a publicly available policy; see also Barker (2019a).

public inquiries in addition to those previously identified, taking the count to 18 (72%) inquiries in the last decade[24]. Ten of these (40%) have occurred since (or in conjunction with) the SSM postal survey in 2017[25].

If a lack of importance and attention towards FoRB issues cannot explain government inaction, another explanation may be the complexity of the issue of balancing 'competing rights', particularly in the context of children. A feature of the public inquiries conducted since 2011, including the Religious Freedom Review, is the problematisation of FoRB as being primarily about the balancing of competing rights (Poulos 2019). Prior to 2011, the dominant problematisation of FoRB was religious diversity. As Poulos (2019) explains, '[t]he balancing rights problematisation assumes that the granting of equality rights will always be a threat to religious freedom'. In relation to the Religious Freedom Review, Poulos notes that '[i]t focuses entirely on issues that [are] related to the freedom of organisations, **especially schools**, and individuals . . . to discriminate against others on the basis of sexual orientation, gender identity and relationship status'. (emphasis added)

The emphasis on children and schools, as well as government inaction, makes sense in an environment where the primary problem of FoRB which needs to be 'solved' is the need to balance 'competing' rights. As the New South Wales Anti-Discrimination Board observed (1984):

> the thorniest problem . . . for it is education that we find the most contentious about such apparent paradoxes is determining which rights take priority over others: parents' rights to have their children educated in the beliefs of their choice or no belief at all, religious groups' rights to perpetuate traditions and beliefs by passing their culture on to the next generation, and the right children have to receive an education that adequately prepares them for the world.

Today, in the context of the recommendations made regarding children and schools by the Religious Freedom Review, we might add the right not to be discriminated against in employment and education on the basis of ones (or parents') gender, gender identity, sexuality or marital status.

In the absence of an easy 'solution' the Government has found it impossible to act on the recommendations of the Religious Freedom Review. This is most clearly exemplified in the failed attempt to pass the *Religious Discrimination Bill 2021* as recommended by the Review.

3.3. Religious Discrimination Bill

One of the key recommendations of the Religious Freedom Review was the inclusion, at the federal level, of a prohibition of religious discrimination. As outlined above, while most states and territories prohibit religious discrimination, such a prohibition is notably absent at the federal level.

Recommendation 15

[24] While not strictly public inquiries, the Federal Government also released two exposure drafts of their proposed *Religious Discrimination Bill* during this time. In each case they called for public submissions and conducted public consultations with interest groups and individuals.

[25] Between the leaking of the recommendations in October 2018 and its formal release in December 2018, the Federal Senate Legal and Constitutional Affairs Reference Committee conducted an inquiry into *Exemptions that Allow Faith-Based Educational Institutions to Discriminate Against Students, Teachers and Staff* (Senate Legal and Constitutional Affairs Reference Committee 2018). This was followed in January 2019 when the Federal Senate Legal and Constitutional Affairs Legislations Committee considered a private member's Bill designed to carry out the recommendation from the Religious Freedom Review to remove the exemptions relating to students (Senate Legal and Constitutional Affairs Legislations Committee 2019). The Government also referred recommendations 5–8 of the Religious Freedom Review to the Australian Law Reform Commission (2019). In 2021, the New South Wales parliament conducted a review of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (Joint Select Committee 2021). Finally, while not directly related, the Western Australian Law Reform Commission has recently released its final report of its review of the *Equal Opportunity Act 1984* (WA) (Law Reform Commission of Western Australia 2022).

> The Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

In September 2019, then federal Attorney General Christian Porter launched the first exposure draft of the *Religious Discrimination Bill*. This was followed by a second exposure draft in late 2020. The intervention of the global COVID-19 pandemic saw work on further drafts delayed. The final version of the *Religious Discrimination Bill* was introduced to the federal parliament on 25 November 2021. While the *Bill* passed through the House of Representatives successfully, it ultimately lapsed on 25 July 2022 before passing the Senate after the Government effectively withdrew the *Bill*. Then, Attorney General, Michaelia Cash, argued that amendments to the bill [if] passed by the Senate may have unintended consequences (Martin and Karp 2022).

The amendments in questions were in fact to the Human Rights Legislation Amendment Bill 2021 which, along with the Religious Discrimination (Consequential Amendments) Bill 2021, was introduced alongside the Religious Discrimination Bill 2021. The amendment sought to repeal Section 38(3) and amend Section 37 of the SDA. As explained by the mover of the amendment, the effect of these amendments was to 'remove the exception that allows religious educational institutions to discriminate in connection with the provision of education or training'. (Sharkie 2022)

By the time the *Religious Discrimination Bill 2021* was debated by Federal Parliament in February 2022, these two provisions of the *SDA* had already undergone significant public scrutiny. As outlined above the Religious Freedom Review recommended the narrowing of these provisions. In the immediate aftermath of the leaking of the Reviews' recommendations, inaccurate media reporting portrayed this recommendation as an expansion of these exemptions, leading to significant public outcry (Elphick et al. 2018; Barry 2018). In its 2018 report into *Legislative Exemptions that Allow Faith-Based Educational Institutions to Discriminate Against Students, Teachers and Staff*, the Senate Legal and Constitutional Affairs Reference Committee (2018) were 'pleased to hear various faith-based educational institutions indicate that they have not, would not, and do not wish to expel students on the basis of their sexuality'. The Committee nevertheless felt that 'if it is the case that the exemptions are not being used against students, that is no reason to maintain them. Rather, it is reasonable to remove them as necessary. The Committee did not hear any satisfactory examples of cases in which a school might need these exemptions in order to uphold its religious ethos' (Senate Legal and Constitutional Affairs Reference Committee 2018). As a result, significant momentum had built up in favour of amendments to Section 37 and 38 of the *SDA*. In response, the Government proposed minor amendments, however these did not go far enough for the Opposition and cross bench.

Throughout the preceding debate, members of the House had expressed concern that the effect of the *Religious Discrimination Bill*, and accompanying bills, would be to discriminate against and further marginalise LGBTIQA+ children and their families. Of the 46 members of the House of Representatives who spoke during the Second Reading Speech on the three bills, 36 (78%) expressed concern about the potential negative impact of the *Religious Discrimination Bill* on children and teachers and, in particular, those who identify as LGBTIQA+ and transgender. Many spoke of the need to 'protect children' and expressed disappointment that the rights of children were being pitted against the rights of religious minorities. For examples Labour Party MP Sharon Claydon commented:

> This Prime Minister, this coalition government, should not be asking us to pit children against people with disability and those who are potentially hurt by the flaws in this bill. We shouldn't be pitting those people against members of minority faiths, for example, who will be protected by this bill. What a diabolical

> proposition to be putting to the Australian Parliament. And of course it doesn't have to be that way. (Claydon 2022)

Those who spoke in support of the unamended bill also referred to the issue, defending the role schools played and the right of parents to educate their children in accordance with their own religious beliefs and morals.

In supporting the amendment to the *Bill* the Leader of the Opposition summed up the sentiment expressed by the cross bench and Opposition throughout the debate: 'No child should be discriminated against. Overwhelmingly, Australians of faith would agree with this too. Australian families are going to wake up in a few hours and look on, with sadness and anger, . . . ' (Albanese 2022). The amendment and the *Bill* passed the House of Representatives, despite opposition from the Government.

While the *Religious Discrimination Bill* was criticised on a number of fronts, it was arguably the concerns about the impact on children which ultimately led to its effective withdrawal by the Government. The Government and its supporters, such as the ACL, could not support the amendments to the *SDA*, which would have had a profound impact on religious schools. As explained by the ACL, from their perspective '[t]aking away protections for Christian schools is a price too high to pay for the passage of the religious discrimination bill. The amendments voted on by Labor, independents and these Liberal MPs unnecessarily interfere with the operation of faith-based schools' (Martin and Karp 2022). On the other hand, those that supported the amendment saw it as crucial to protect LGBTIQA+ children from discrimination in education. As Labor MP Anne Aly explained:

> the principle here is one of equality and understanding that equality is not a finite resource. It can't be a finite resource. If we want equality for ourselves, we must be prepared to extend equality to all others, because equality doesn't work if it's just for you. It's like having two children but only loving one of them. You just can't do that. So it is important that this bill be underpinned by the fundamental principle that all people are worthy of equality, all people are worthy of protection, all people are worthy of freedom and all people are worthy of respect. (Aly 2022)

The ultimate impact of the withdrawal of the *Religious Discrimination Bill* is that Australia still does not have a federal prohibition on religious discrimination, while at the same time religious schools continue to be permitted to discriminate against LGBTIQA+ children. This is despite the fact that leaders and spokespeople for religious schools have made representations that they do not make use of these exemptions in relation to students–yet they remain.

4. Conclusions

During the Second Reading debate on the failed *Religious Discrimination Bill* Greens party leader Adam Bandt argued 'no child in this country should have to wake up to headlines that say they are being traded off as political collateral . . . ' (Bandt 2022). Yet, this is exactly what has happened. As Poulos (2019) has observed, debate about freedom of religion in Australia has been framed as a clash of rights. This clash is particularly evident when the role and place of children in these debates are considered. The debate has descended, as Claydon (2022) noted, into a choice between 'protecting' children and FoRB. Yet, as Aly (2022) argued, equality should mean equality for all otherwise '[i]t's like having two children but only loving one of them'.

The issues relating to the intersection of children, schools and FoRB highlighted in the public and parliamentary debates on SSM, the Religious Freedom Review and *Religious Discrimination Bill* are far from resolved. Religious schools are still able to discriminate against LGBTIQA+ children and their families, while children from religious minorities, such as the Sikh child discussed at the beginning of this article, are still not protected from religious discrimination at the federal level.

Debates about FoRB and religious discrimination are likely to continue in the near future. At the state level, the New South Wales State Government announced they will

amend the *Anti-Discrimination Act 1977* (NSW) (Speakman and Ward 2021), and the Law Reform Commission of Western Australia has recently released its review of the *Equal Opportunity Act 1984* (WA). At the federal level, it is unclear when, or if, the newly elected Labor Government will introduce its own *Religious Discrimination Bill*.

Even if the Government chooses not to revisit the concept of a *Religious Discrimination Bill*, the issues raised in the SSM debate, Religious Freedom Review and *Religious Discrimination Bill* debates have not gone away. A new approach to resolving these issues in the best interests of Australian children will need to be found. One option, proposed by Barker (2021a) in relation to the Kirpan issue and the *Religious Discrimination Bill* (Barker 2021c) is to reframe the issues as a question of the relationship between the state and religion, rather than as a matter of rights. At the moment this is contested, with the relationship variously described as liberal separation (McLeish 1992; Babie et al. 2019), pragmatic pluralism (Soper et al. 2017) and non-establishment pluralism (Barker 2021b). Before new laws such as a Religious Discrimination Act can be discussed a wider public debate about the future of the Australian state-religion relationship needs to take place. Once this debate has taken place, the necessary law reform can follow. Such an approach avoids the clash of rights problem articulated by Poulos (2019) while at the same time providing a new framework for conversations about the state, religion and children. Ultimately, Australia will need to decide on the nature of the relationship between state and religion, and it is this which will determine how issues related to FoRB and children will be determined.

The direction of the debate about FoRB needs to be re-oriented. As Labor MP Clare O'Neil said in her closing remarks during the Second Reading Speech on the *Religious Discrimination Bill*:

> children should not be discriminated against for any reason in this country—they should not. There is not a religious leader in my community who would argue for such a right to discriminate, and I think it's very unfortunate that this debate has descended into a dispute about whether children should be discriminated against. The parliament should not be deliberating on that question; it has a clear answer, and the answer is no. (O'Neil 2022)
>
> This includes both LGBTIQA+ children and religious children alike.

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