ABSTRACT

This article addresses the issue of belief discrimination laws in Australia. The limits of existing legislative protections in Australia are examined. Only religious and political beliefs are recognised as protected grounds. Philosophical beliefs such as a belief in climate change or humanism are not protected unless it can be argued that they form part of the accepted canons or tenets of ‘acceptable’ religions or political belief systems. Following some recent clarification and extension of the discriminatory grounds in the UK that recognise a belief in climate change and a belief in Spiritualism, the question is posed as to how such decisions would be decided in Australia. It is concluded by the author that law reform is required by way of a new Freedom of Belief Act. Such legislative amendment would ensure that not only would Australia’s laws then comply with its international obligations, they would also appropriately reflect the diversity of different belief systems of Australians in contemporary society.

INTRODUCTION

An English decision has extended the anti-discrimination protections in that jurisdiction. In 2009, a judge in the Employment Appeal Tribunal in Grainger v Nicholson found that a former employee was able to bring a claim which alleged that he was dismissed due to his heartfelt beliefs around climate change. The assertion was not that his views amounted to a faith-based or spiritual-based belief like religion which relies on the supernatural, or a political opinion, but rather that Mr Nicholson’s views were grounded in scientific evidence and his own moral and ethical imperatives which drove his desire to do something about climate change. As a result of Grainger v Nicholson, it has been clarified that employers in the UK may not discriminate against an employee because of a serious philosophical belief that is worthy of respect, such as a belief in climate change.

The intention of this article is to analyse the extent to which such beliefs would (and should) be protected in Australia. From the outset, the belief in climate change itself is examined in order to appreciate whether such a belief is legitimate and reasonable.

The second part of this paper outlines the human rights and International framework which provide the basis of anti-discrimination laws in Australia, before providing an overview of the existing legislative protections. Whilst individuals are able to

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express reasonably held ‘religious’ and ‘political’ beliefs free from discrimination, not all beliefs are protected. The limits of the existing legislative and common law protections are analysed in order to evaluate whether a belief in climate change could be classified as a type of religious or political belief. The answer will be yes in some instances, but no in others.

It should be noted that unlike the UK, ‘philosophical beliefs’ are not recognised as a valid ground under Australia’s anti-discrimination laws. The decision of *Grainger v Nicholson* and another case involving a belief in Spirituality is explained in order to then compare how such decisions would be decided in Australia. It is interesting to note that whilst a belief in climate change is unlikely to be upheld as a valid belief for the purposes of discrimination law in Australia, a belief in spiritualism which recognises the legitimacy of psychics who can contact the dead, is likely to be recognised.

Arguments will be presented to support the contention that the existing laws are inadequate. As one of the most culturally, racially, linguistically and philosophically diverse societies in the world, it is no longer appropriate to give a higher level of legal protection to political and religious beliefs without also recognising and protecting conscientiously held moral and philosophical views. Even though Australia does not have an enforceable human rights framework, it has agreed to comply with standards set by the International Covenant on Civil and Political Rights and various other International instruments. Not only does the existing law fail to recognise and protect the diversity of beliefs of its community, Australia’s discrimination laws do not adequately conform to international standards.

Finally, recommendations for law reform are made by way of the introduction of a Freedom of Belief Act which would ensure that laws are applied uniformly and equally nationwide and appropriately reflect the diversity of beliefs of all Australians.

**WHAT IS A BELIEF IN CLIMATE CHANGE AND IS IT A VALID BELIEF?**

Arguably there has not been a more significant and pressing issue confronting the human race in the history of civilisation as the problem of global warming and climate change. Not only is global warming a ‘modern’ problem which involves the whole world, it is particularly difficult to grapple with because it is tangled up with difficult issues such as poverty, economic development and population growth.

The fact that the temperature of the earth’s surface has risen since the late 1800s is not generally contentious, but the reason for that increase is still hotly disputed. There are many ‘climate change sceptics’ who challenge the science and do not believe that

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climate change is man-made at all.\textsuperscript{5} Even amongst the ‘believers’, there is no consensus about what type of action is required.

The veracity of the beliefs (that is the science or the politics) are not being analysed here, rather the intention is to recognise that there is a new type of belief that is growing domestically and internationally.

Had the question ‘Are you concerned about the environment’ been posed twenty years ago, few people would probably have answered in the affirmative. Australians were not surveyed about their views on climate change by the Australian Bureau of Statistics (ABS) until 2007/2008. The 82 per cent of Australians who indicated that they were concerned about climate change\textsuperscript{6} are not alone in their concerns. Another survey in 2009 of 27,548 Internet users from 54 countries showed that 37 per cent said they were ‘very concerned’ about climate change.\textsuperscript{7} Whilst statistics such as these should not necessarily be given \textit{too much} credence, they do illustrate that what used to represent a minority view or belief has certainly developed into a more widely held view or concern in 2010.

\textit{International response to the issue of global warming and climate change}

Most countries of the world (192 in total, including Australia) joined the United Nations Framework Convention on Climate Change\textsuperscript{8} (UNFCCC) which commenced in 1994. The parties to the UNFCCC essentially agreed in principle that there was a problem and agreed to begin to consider what could be done at an international and individual country level to reduce global warming. The Kyoto Protocol\textsuperscript{9}, a legally binding instrument agreeing to reduce greenhouse gas emissions worldwide came into force on 16 February 2005. A total of 184 countries, including Australia, have ratified the Kyoto Protocol.\textsuperscript{10}

\textsuperscript{5} For an example of the ‘sceptic view’ see the \textit{The World’s First up-front political party representing climate sceptics}, Climate Sceptics \<http://www.climatesceptics.com.au/about-us/our-policies/>\textsuperscript{10} 10 January 2010.


\textsuperscript{7} Neilson Company Ltd and Oxford University Institute, \textit{Climate Change Concerns Cool: A Canadian Perspective}, (October 2009) \<http://ca.nielsen.com/etc/content/nielsen_dotcom/en_ca>\textsuperscript{10} at 5 January 2010. The number of concerned people had declined from 41% in 2007 and this may be due to the increased concerns about the Global Economic Crisis see: Matthew Jones (Ed), \textit{World Concern about Climate Change dwindling Survey}, (6 December 2009), Reuters India \<http://in.reuters.com/article/topNews/idINIndia-44501320091206>\textsuperscript{10} at 25 January 2010.


\textsuperscript{10} Australia did not ratify the Kyoto Protocol under the Howard (Liberal) government but it was ratified by the Rudd (ALP) government after its election in 2007, effective from 11 March 2008.
More recently, the world community gathered at the United Nations Framework Convention on Climate Change Conference in Copenhagen (COP15) in December 2009, but only limited agreement was reached. A proposal known as the Copenhagen Accord was agreed to between the United States, China, India, Brazil and South Africa at the ‘last minute’ on 18 December 2009.\(^\text{11}\) It remains to be seen how many countries will sign on to the Copenhagen Accord and it will be some time before the true success or otherwise of those negotiations will be known.

**Political conflict in Australia about the response to climate change**

The issue of how Australia should respond to the issue of climate change has also been strenuously debated at a political level domestically in recent times. The federal government’s proposed Emissions Trading Scheme legislation\(^\text{12}\) (ETS) was rejected by the Senate at the end of 2009.

The former opposition Liberal Leader Malcolm Turnbull was toppled in a leadership spill in December 2009 after he agreed to support the government’s ETS. His replacement, Tony Abbott has been reported as saying that while he does believe that climate change ‘is real’ and that humans do make a contribution, the Liberal Party objects to the proposed targets and economic imperatives of the government’s proposed ETS.\(^\text{13}\)

Former Prime Minister Kevin Rudd was also replaced near the end of his first term in office in 2010 by the current Prime Minister Julia Gillard. This was done in part due to criticism of Mr Rudd’s failure to ‘push on’ with the carbon emission or ETS legislative initiatives. It remains to be seen how the new Gillard government will proceed following her very recent appointment after the September 2010 election.

**A working definition of a belief in climate change**

Despite disagreement internationally and domestically about how best to respond to the problem of global warming, a belief in climate change is now a widely held belief that is gaining mainstream acceptance. Many people who are not sure about the science or the politics would prefer to give the planet the ‘benefit of the doubt’ and act accordingly.


\(^{12}\) The Carbon Pollution Reduction Scheme Bill 2009 (Cth).

For the purpose of this examination, the belief in climate change can be articulated as follows:

If it is possible that mankind may be headed towards catastrophic climate change, we are all under a moral duty to lead our lives in a manner which mitigates or avoids this catastrophe for the benefit of future generations, and to persuade others to do the same.\textsuperscript{14}

If it is accepted that a belief in climate change has legitimacy, the next question is; What type of belief is it? It is a religious one, or is it a political issue? Does its classification even matter? The answer to the last question is ‘yes’ when considering how the law does (or should) ensure appropriate legal protections are in place. These issues will be explored in more detail later.

**HUMAN RIGHTS AND ANTI-DISCRIMINATION LAWS IN AUSTRALIA**

Before evaluating the existing legislation, it is useful to first examine the human rights and resulting International obligations that provide the rationale for Australia’s anti-discrimination laws.

*The Human Rights context*

Human rights are the foundation for freedom, justice, peace and respect, and are an essential part of any democratic and inclusive society that respects the rule of law, human dignity and equality.\textsuperscript{15} Human rights belong to individuals by virtue of the fact that they are human beings. All humans are entitled them.\textsuperscript{16}

Whilst there are many grounds that offer protection to individuals against discrimination in Australia, not all are examined in this article. The first of relevance is the right to freedom of thought, conscience and religion.\textsuperscript{17} In a free and democratic society, individuals should be entitled to freedom of thought on all matters, personal conviction and the commitment to religion or belief.\textsuperscript{18}

Another fundamental concept is the idea that everyone should have equality before the law and live free from discrimination.\textsuperscript{19} Anti-discrimination laws seek to promote

\textsuperscript{14}This definition is similar to the definition that was articulated in Grainger PLC and Others v Nicholson [2009] UKEAT 0219_09_0311 at 12.

\textsuperscript{15}Preamble to the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic).

\textsuperscript{16}The United Nations Universal Declaration of Human Rights (UDHR) was the first international recognition that all human beings have fundamental rights and freedoms. The UDHR is not legally binding but Australia was one of the original 48 states who ratified through a proclamation by the General Assembly of the United Nations on 10 December 1948.

\textsuperscript{17}UDHR, art 2.

\textsuperscript{18}United Nations Human Rights Committee, General Comment No 22 (1993).

\textsuperscript{19}UDHR, art 7.
the principle of equal opportunity and are designed to ensure that if a person has a certain characteristic, attribute or belief that is deemed to be protected by law, they should not be discriminated against because of that characteristic, attribute or belief. Whilst the characteristics, attributes and beliefs that are now protected by the law are many and varied according to the different state and federal jurisdictions, the grounds of religious and political beliefs are of the most significance to this analysis.

**Australia’s International obligations**

Various obligations exist regarding the protection of human rights at an international level which Australia has agreed to comply with. Australia has been a party to the International Covenant on Civil and Political Rights (ICCPR) since 1980. Under the ICCPR, everyone has the right to freedom of thought, conscience and religion and is free to have or adopt a religion or belief of their choice. This includes ‘theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief’.21

According to Article 18 of the ICCPR, ‘This right shall include freedom…. to manifest this religion or belief in worship, observance, practice and teaching.’ Article 19 of the ICCPR also provides that everyone shall have the right to hold ‘opinions’ without interference. The ICCPR states that everyone is entitled to equal protection of the law without discrimination on the grounds of ‘religion, political or other opinion’ [emphasis added].22

These rights may also be subject to limitation as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.23 It is not the right to believe, rather the freedom or manifestation of the religious or political practice that can be limited by law.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)24 (the Religion Declaration) stipulates that the joint or shared expression of a community’s beliefs is protected equally with the individual’s rights.25 Various manifestations of religion or belief are articulated in the Religion Declaration.26

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21 ICCPR, art 18.

22 ICCPR, art 26.

23 ICCPR, art 18.3.

24 *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Resolution adopted by the United Assembly and declared 25 November 1981.

25 Special provisions are made in ICCPR, art 27 in relation to minority religions.

26 Religious Declaration, art 6, lists various activities or manifestations of the belief including; establishing and maintaining charitable or humanitarian institutions, writing and disseminating religious publications, teaching of the religion or belief, communicating with individuals and communities on matters of religion and belief and so on.
Other significant human rights obligations come from the workplace standards of the International Labour Organization. Two of the key treaties include the Discrimination (Employment and Occupation) Convention 1958 (the ILO Convention 111) and Termination of Employment Convention 1982 (the ILO Convention 158). Under the ILO Convention 111, discrimination is prohibited on the ground of religious or political beliefs in employment with exceptions when there is employment by religious institution (religious susceptibilities exception) or when the attribute is an inherent requirement of the particular job.

Source of discrimination law in Australia

The Constitution does not provide explicit protection for human rights, nor does Australia have any type of legislative Bill of Rights. The drafters of the Constitution were concerned more with preserving rights of the states in the new federation, rather than the individual rights of its citizens. The only protected human rights in Australia come from Victoria and the Australian Capital Territory which have enacted legislative Charters of Rights.

In the absence of positive reference to specific rights in the Constitution, the High Court has found that some rights are implied in the text of the Constitution. This includes the freedom of expression in relation to public and political affairs which is commonly referred to as ‘freedom of political communication’, but the right to

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27 The International Labour Organization, is a division of the United Nations since 1946, focuses on rights and freedoms that should be enjoyed by all workers living in member states. The standards set by the ILO influence Australian legislation and common law.

28 Article 1.1 ILO Convention 111.

29 Article 1.2 ILO Convention 111.

30 The only explicit rights are to trial by jury which is not relevant here (s 80) and a limited freedom of religion (s 116): Australian Constitution. The preamble of Constitution also refers to ‘humbly relying on the blessing of Almighty God’ in order to ‘recommend the Constitution to thousands to whom the rest of its provisions may for ever be sealed in a book’ but in order to ensure secularity of the Australian government, s 116 restricts the legislative powers of the Commonwealth with respect to differentiation on the ground of religion. See Tom Calma and Conrad Gershevitch, Freedom of Religion and Belief in a Multicultural Democracy: an inherent contradiction or an achievable human right? (2009) Media Paper, Australian Human Rights Commission, <http://www.humanrights.gov.au/about/media/papers/freedom_religion20090803.pdf> at 20 January 2009.


32 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 14(1) and the Human Rights Act 2004 (ACT) s 14(1). The legislative provisions in both jurisdictions provide that every person has ‘(a) the freedom to have or to adopt a religion or belief [emphasis added] or his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.’

equality and non-discrimination is not protected constitutionally. Given the lack of Constitutional or other explicit power, the existing anti-discrimination laws derive from the external affairs power in section 51(xxiv) of the Constitution.\(^ {34} \)

'Belief' discrimination legislation in Australia

It is discriminatory in all jurisdictions to treat someone less favourably than another person because of beliefs which are protected by the law. Given the federal nature of Australia’s legal and political system, there are a variety of different state and federal laws that regulate belief discrimination at work.

Although there is no specific over-arching legislation that applies at the federal level (as there is in respect of race, sex and disability)\(^ {35} \), the federal *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOC Act) prohibits breaches of human rights by any Commonwealth body or agency and discrimination in employment or occupation on the basis of ‘religion and political opinion’.\(^ {36} \)

At the federal level, the protection against discrimination based on political or religious beliefs is limited because there is no legal remedy for breach of these sections. If a complaint is made of political or religious discrimination, the Australian Human Rights Commission (AHRC) can only inquire into the alleged acts or practices that may constitute discrimination and require conciliation.\(^ {37} \) If conciliation is not successful, the AHRC may only report the matter to the Attorney General.

With the exception of New South Wales and South Australia\(^ {38} \), all states and territories have legislation that prohibits discrimination in some form or another based on political and religious beliefs. In some cases, political and religious opinions and associated activity or affiliation are also covered. The protected grounds are somewhat inconsistent in that they vary from jurisdiction to jurisdiction.

In Victoria it is against the law to discriminate against someone because of their actual or assumed ‘political beliefs or activities’ or ‘religious belief or activity’.\(^ {39} \) Similar protections exist in Queensland which protects ‘religious belief or religious
activity’ and ‘political belief or activity’. In the Northern Territory the grounds are ‘religious belief or activity’ and ‘political opinion, affiliation or activity’. Tasmania prohibits discrimination on the basis of a ‘religious belief or affiliation or religious activity’. Both Western Australia and the Australian Capital Territory refer to grounds of ‘religious or political conviction’.

There is also some protection in this area to be found in the federal employment laws. Under the new Part 3-1 provisions of the *Fair Work Act 2009* (Cth) and specifically s 351(1), employees and potential employees are protected from adverse action taken (or threatened to be taken) by an employer because of the person’s … ‘religion and/or political opinion…’. This is a broad section which covers all aspects of employment including the selection process, termination and anything in between. Adverse action includes injury during employment such as the denial of promotion or training opportunities, the provision of benefits, altering the position of the employee to the employee’s prejudice or discriminating against the employee.

The new Part 3-1 adverse action provisions have not yet been tested in the area of discrimination, but they only apply to action which is unlawful under an anti-discrimination law in force in the place where the action is taken. As there is no protection for political and religious beliefs in New South Wales and South Australia (other than the religious dress provisions in South Australia), an action under Part 3-1 of the *Fair Work Act* would not be sustainable on those grounds for employees in those states. Another restriction is that the Part 3-1 provisions only apply to ‘national-system’ employees so not all Australian workers can rely on those protections.

The other option under the *Fair Work Act* is the unlawful termination provisions. The explicit object of Part 4-6 Division 2 is to give effect to various ILO Conventions regarding equality and equal opportunity in the workplace. The unlawful termination provisions rely on the external affairs powers of Australia’s Constitution.
for their legitimacy, so all workers are covered by the unlawful termination of employment provisions. Under s 772 of the *Fair Work Act*, an employer must not terminate an employee’s employment for reasons including ‘religion and political opinion’. This section is only available to non-national system employees who are unable to make a claim under the adverse action provisions, and it only relates to termination.

If a worker is entitled to pursue a remedy under sections 351 or 772 of the *Fair Work Act*, there are considerable advantages over the state anti-discrimination provisions in that there is a reverse onus of proof and the discriminatory reason need not be the sole or even dominant reason for the conduct. There are also a wide range of remedies available.

With all of the anti-discrimination provisions, the right to enjoy a non-discriminatory workplace environment is not absolute. There are various exceptions depending on the jurisdiction and relevant legislation. In the area of religion, the common exemptions are the ‘inherent requirements’ or ‘religious susceptibilities’ exemptions. For example in s 351(2) of the *Fair Work Act*, subsection (1) does not apply to action that is taken because of the inherent requirements of the particular position concerned; or if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken in good faith; and to avoid injury to the religious susceptibilities of adherents of that religion or creed. The only exemption in the area of political belief is when an employer is offering employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff or similar employment.

It can be concluded that the only potential grounds that are covered in Australia involving opinions or beliefs are religious and political beliefs. The ground of philosophical belief does not form part of any of the legislative protections.

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50 *Fair Work Act* 2009 (Cth), s 772(f).
51 Once it is establish that certain action has taken place, it is for the employer to prove that the action was not for a prohibited reason: *Fair Work Act* 2009 (Cth), s 361.
52 To make out the contravention, it is sufficient if the prohibited reason is just one of the reasons that motivated the action in question: *Fair Work Act* 2009 (Cth), s 360.
53 A breach of *Fair Work Act* 2009 (Cth), ss 351 or 772 is a civil remedy provision that may be enforced under the general compliance provisions in Part 4-1. Section 539 permits the commencement of Federal Court proceedings or the Federal Magistrates Court. The court may impose a fine of up to $33,000 per breach, or order compensation for any loss suffered. It has other discretionary remedies such as reinstatement available: *Fair Work Act* 2009 (Cth), ss 545 – 546.
54 For example *Equal Opportunity Act* 1995 (Vic), s 18 and *Anti-Discrimination Act* 1998 (Tas), s 53.
THE LIMITS OF THE RELIGIOUS AND POLITICAL BELIEFS GROUNDS

What are protected ‘religious beliefs’?

It is very difficult to provide a precise definition of what constitutes a ‘religion’ because of the intangible and wide-ranging nature of the topic. In fact there is ‘...probably no subject in the world about which opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible.’ 55 However, it is generally understood that a religious belief it is a ‘set of beliefs and practices, usually involving acknowledgment of a divine or higher being or power, by which people order the conduct of their lives both practically and in a moral sense.’ 56

Religious belief or affiliation means holding or not holding a religious belief or view which includes simply identifying with, or belonging to a religion and believing in God/s – it also includes adhering to atheism or agnosticism. In other words, not only is a person’s right to believe in a religion of their choice and to practice that belief protected by discrimination laws, their right not to believe is also protected.

Not all beliefs and associated activities which may be labelled as being religious are protected. Although legislation regulates discrimination against religious opinions and activities, it has been left to common law to define the limits and extent of protected beliefs and ‘manifestations’ of those beliefs. In one of the earliest High Court cases interpreting s 116, Latham CJ in Adelaide Company of Jehovah’s Witnesses Inc. v The Commonwealth 57 referred to the difficulty, if not impossibility, of framing an acceptable definition of religion for the purpose of s 116 and commented that it ‘is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character’. 58

There was little exegesis of the concept of religion until the Church of the New Faith v Commissioner of Pay-roll Tax (Vic) 59 (the Scientology case). The Church of the New Faith (now know as Scientologists) had its application for tax exempt status as a ‘religious institution’ rejected by the Commissioner of Pay-roll Tax in Victoria which ultimately led to the High Court appeal. The case was fought throughout on the question of ‘Is Scientology a religion?’ Even though the case was concerned with a financial burden, rather than a personal freedom of religion, it is still useful in understanding the issue of religion when applying to a discrimination context. The

55 Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) [1983] HCA 40; (1983) CLR 120, 133 (Mason ACJ and Brennan J).


59 (1983) 154 CLR 120.
court did not decide on whether Scientology was a religion per se, but it did conclude that ‘the beliefs, practices and observances which were established …by evidence as the set of beliefs, practices and observances accepted by Scientologists are properly described as a religion’.  

The court was asked by the adherents of Scientology to adopt the broad test of religion that had been applied in the United States which involves analogy and criterion and does not necessarily require a theist belief (that is a belief in God/s). The Commissioner for Pay-roll Tax asked the Court to apply the narrow definition of religion that was applied in the United Kingdom, which was much more restrictive than the US criterion approach confining religion to theist beliefs.

Whilst acknowledging that many Western religions do involve the recognition of a god being central to the religion (for example Christianity, Judaism and Islam), the High Court in the Scientology case found that this can no longer be determinative because ‘many accepted religions such as Buddhism are, broadly speaking, agnostic about a god’ and some religions ‘actually den[y] the existence of a personal creator’, for example Theravada Buddhism. Other notable non-theistic religions that are recognised in Australia are Hinduism, Taoism, and Confucianism.

Different opinions as to the definition of ‘religion’ in section 116 of the Constitution were delivered in the three judgements in the Scientology case. According to Chief Justice Mason and Justice Brennan, two elements are required:-

First, there must be a belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

Justices Wilson and Deane on the other hand found that each case must be decided on its facts, but held the following indicia could be used as guiding principles:-

1. One of the more important indicia of ‘a religion’ is that the particular collection of ideas and/or practices involves a belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses.

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60 Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, 130 (Mason AJC and Brennan J).

61 Malnak v Yogi [1979] USCA3 125; (1979) 592 F (2d) 197.

62 South Place Ethical Society; Barralet v Attorney General (1980) 1 WLR 1565 at p 1572; (1980) 3 All ER 918, 924.


64 Ibid at 155 (Murphy J).

65 Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, 137 (Mason ACJ and Brennan J).
2. That the ideas relate to man’s place in the universe and his relationship to this supernatural.

3. The ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance.

4. However loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups.

5. The adherents themselves see the collection of ideas and/or practices as constituting a religion.  

Justice Murphy did not propound a definitive ‘test’. He also disagreed with the proposition that belief in a supernatural Being, Thing or Principle is essential to religion and was of the view that there is ‘no single acceptable criterion, no essence of religion’.  

Could a belief in climate change be a ‘religious belief’?

There are two inquiries here. Firstly, could the belief in climate change constitute a religion by itself and secondly, what if climate change beliefs form part of the practice or canons of an existing (and ‘acceptable’) religion?

Many proponents have argued that a belief in climate change (or environmentalism) is in fact a religious belief by itself, and those arguments come from both sides of the debate. As an illustrative example of some of the different views, Lord Nigel Lawson in the UK has argued that eco-fundamentalism is a worrying new religion and the ‘new priests are scientists (well rewarded with research grants for their pains) rather than the clerics of the established religions’. Lord Lawson compares ‘the threat that we face from the supreme intolerance of Islamic fundamentalism’ to the ‘irrationality and intolerance of eco-fundamentalism’ where, (in his view) ‘reasoned questioning of its mantras is regarded as a form of blasphemy’. This view holds that ‘There is no greater threat to the people of this planet than the retreat from reason we see all around us today’.

Professor Ian Plimer of the University of South Australia has labelled climate change theory as an ‘ascientific, urban, religious, fundamentalist movement’ promoted by academics and activists who would be ‘unemployable outside taxpayer-funded institutes’. According to Professor Plimer:-

66 Ibid at 174 Deane and Wilson JJ).

67 Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, 150 and 151 (Murphy J).

This movement has the elements of failed European socialism and Christianity [because it], imposes guilt on the community, creates fear of damnation, demands appeasement by selling indulgences to the faithful, ignores any contrary information, demonises dissenters..[and]…It’s a great way to keep society controlled by frightening them.  

That environmentalism is in fact a pseudo-religion ‘goes without saying’ according to JR Dunn from the United States. In his article A Necessary Apocalypse, he explains that any religion must have an apocalypse and ‘that’s what global warming is all about…In fact, the apocalyptic is the major fulcrum of environmentalism, the axis around which everything else turns…’ in the same way that some Protestant variants of Christianity are obsessed above all with sin. 

There has also been some support from environmentalists for the view that environmentalism is akin to a religion. In a widely quoted speech by Michael Crichton who labelled himself at the time as an environmentalist, he said that environmentalism is one of the most powerful religions in the Western World – the ‘religion of choice for urban atheists’. He argued that environmental science had been skewed and exaggerated to the point that it had become faith based, rather than based on fact. This idea was examined further by Professor Richard Linzen. If what you are told is supported by ‘all scientists’ you don’t have to understand the issue anymore – it becomes a faith-based belief. The sceptics can be passed off as a ‘handful of corrupted heretics’. Crichton was of the opinion that as the doomsday predictions of some environmentalists were not backed up by the scientific community, the movement must move away from ‘unquestioning faith’ and back to ‘hard science’. 

Notwithstanding these interesting arguments, a strong belief in climate change and the resulting moral imperative to act in such a way as to minimise the damage of climate change is unlikely to be classified as a protected religious belief according to the tests from the Scientology case. It would fail because climate change beliefs are generally based on scientific knowledge (albeit exaggerated ones if the line of reasoning from Crichton is accepted) and such beliefs are not grounded in any aspect of supernatural faith. 

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71 Professor Richard Linzen, ‘Climate Alarmism: The Misuse of ‘Science’”, (Speech delivered to the National Press Club, Canberra, 3 December 2004).


73 The belief in climate change is not a belief in a ‘supernatural’ Being, Thing or Principle: Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, (Mason ACJ and Brennan J at 137) and (Deane and Wilson JJ at 174).
Another complicated question is whether a claim for discrimination based on religious beliefs could be sustained relying on the argument that environmentalism forms part of the accepted canons of conduct or practices of an already ‘legally recognised’ religion.

It is not surprising that there are a plethora of different points of view regarding environmental ethics and religion, or ‘religion and ecology’. For example, in one the earliest and perhaps more controversial academic examinations of this issue, Professor Lynn White Jr in his 1967 article on Christianity and the Environment wrote that the Western world’s attitude towards nature (which were shaped by the Judeo-Christian tradition and include Islam and Marxism) involved the concept of a dominion – the earth was created for the benefit of man.74 Although it was accepted by White that Christianity was a complex faith and different branches of it differ in their outlook, in general he argued that ‘Christianity’ and Western civilisation as a whole, held a view that humans were separated from the rest of the natural world, and it generally encouraged exploitation of nature for human ends.75

If canons of Christianity are generally accepted as being incompatible with environmentalism, what about Buddhist beliefs? Buddhism was commended in White’s article for its holistic, egalitarian worldview and an environmentally friendly style of life. According to Donald Swearer, whilst the normative position is that the ‘Buddhist worldview’ is inherently eco-friendly and attuned to the natural environment, there are still a number of different positions regarding Buddhism and the environment and not all of them are supportive.76 Swearer concluded that ‘the question of what constitutes “authentic” ecological ethic begs the question of what constitutes “authentic” Buddhism.’ 77

In comparison with the Judeo-Christian beliefs, White also noted that in older traditions, humans were seen as being part of nature, rather than the ruler of nature. For example, in animistic theory, which was adopted as the religious basis for many of the world’s indigenous societies, there was believed to be a spirit in every tree, mountain or spring, and all had to be respected.78

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74 Especially in its Western form, White suggests that Christianity is the most anthropocentric religion the world has ever seen. White Lynn Jr (1967) "The Historical Roots of Our Ecologic Crisis" (1967) Science 15: 1203-1207.


77 Ibid.

78 White, above n. 75.
Animistic religions have some similarity with the belief systems of Australia’s indigenous people. There are many traditional ‘religions’ of the Aborigines and Torres Straits Islanders which vary according to region, but it is suggested that all groups share in common the concern of the Dreaming or Dreamtime as laying foundation to their beliefs. All groups share in common a view that the land and other natural phenomena possess living souls so there is no separation between man and nature according to those beliefs.\(^79\) It is also difficult to separate Australian indigenous religious experience from other aspects of their life, culture and history.\(^80\)

According to the *Scientology case*, it must be shown that the ‘ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance’. Arguably, indigenous Australians who follow an Aboriginal Traditional Cultural Religion could establish that living their life in an environmentally sustainable way, was a practice that is fundamentally at the heart of their traditional ‘religious beliefs’. Likewise, a Buddhist (as well as adherents to some other religions, not covered here) might have similar arguments. It is possible that environmentalism or a belief in climate change could constitute a practice, tenet or belief of an accepted religion in Australian law but the matter has not yet been determined by the High Court.

*Political beliefs under discrimination laws in Australia*

As it appears unlikely that in most cases, grounds of religious beliefs could be successfully sustained relying on the religious grounds, what about political beliefs? The need to protect freedom of political opinion is widely accepted internationally. It is against the law in all jurisdictions (except for New South Wales and South Australia) to discriminate against someone because of their political beliefs or activities and there is also some limited protection under the federal legislation.

Political belief refers to whether a person holds or does not hold a lawful political belief, or whether they participate or refuse to take part in a lawful political activity.\(^81\) This includes holding particular political beliefs, being a member or not of a political party or participating in political action.\(^82\)

Interpretation of political beliefs and opinions vary between jurisdictions.\(^83\) As Victoria and Tasmania legislation are the only states to provide any type of legislative

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\(^81\) *Anti-Discrimination Act 1998* (Tas), s 3.


definition, it has substantially been left to the courts and tribunals to interpret when action has been discriminatory because of a person’s political beliefs. According to *Nestle Australia Ltd v Equal Opportunity Board*84 there are many cases in which the line of demarcation between political and non-political activities will be difficult to draw and will ultimately depend on the facts of the particular case. A belief will not be political simply because a person says or thinks it is.85 The question of what is a political belief must be determined objectively86, taking into account the nature of the activity and belief.

The focus of political discrimination protection has to date been on beliefs or activities which bear on the form, role, structure, features, purpose, obligations or duties of government.87 In *Nestle v EOB*88 the Victorian Supreme Court held that the term political should be given the meaning ascribed to it by common usage, which is concerned with the processes of government, and not in general, the structure and interactions of industrial relations.89 An activity is not political merely because it is motivated by a political opinion. A person’s political beliefs may lead them to do things which are not, by their nature, and when objectively viewed, political. It is the activity itself, which, when viewed objectively must by its nature be political.90 Whilst it is not enough to show that the views or practices accord with a particular political party to establish discrimination, some activities are clearly political in their nature, for example, membership or an affiliation with a political party would be such a case.91

Given the current political debate, the problem of climate change is very much a political issue. Research conducted by Kristy Michaud from the University of California in 2008 also concluded that political ideology and political party identification were highly significant factors in determining how people understand climate change and the threat that it poses (unlike religious affiliation).92

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85 *Nevil Abolish Child Support v Telstra Corporation Limited* [1997] VADT 44.

86 In most cases, the perceptions of the parties will be irrelevant: *Duggan v South Yarra Constructions Pty Ltd* [1987] EOC 92-220.


89 *Nestle Australia Ltd v Equal Opportunity Board* [1990] VR 805.

90 Ibid.


Whilst it would be possible to argue that the belief in human-induced climate change is a ‘political opinion’, it is unlikely for such arguments to succeed in an employment context as a ground for discrimination if the existing authorities are followed under the anti-discrimination laws, due to the narrow interpretation confining actions to government activities. Having said that, a complainant may succeed in an action under the new Pt 3-1 adverse action provisions of the *Fair Work Act* provided that they could establish that the practice in question was by its nature political.

**COMPARATIVE ANALYSIS OF RECENT UK CASES**

There have been two significant cases from the UK which are useful to this discussion. The first *Grainger v Nicholson* involved the belief in climate change, whereas the second *Power v Great Manchester Police* was an evaluation of whether ‘religious beliefs’ in that jurisdiction should be extended to cover a belief in Spirituality. These cases are explained in order to then compare how such decisions would be determined in Australia.

*Philosophical beliefs and *Grainger v Nicholson*

Australia and the UK have different legal protections in the area of workplace discrimination. *The Employment Equality (Religion or Belief) Regulations 2003 (UK)* (the UK Regulations) relate to all aspects of employment including hiring, firing, denial of opportunities such as training or promotion and any adverse terms and conditions of employment.

Under the UK Regulations, it is unlawful to discriminate against individuals based on their ‘religion’ or ‘beliefs.’ The interpretation section of the UK Regulations provides that ‘religion’ means any religion, and ‘belief’ means any religious or philosophical belief. Courts and tribunals must decide which beliefs are protected, and which are not. Discrimination on the ground of political belief is protected in Northern Ireland, but for the rest of the UK it is not.

In *Grainger v Nicholson* the employee Nicholson worked for Grainger PLC, a large property development company. As head of sustainability, Nicholson was employed to help the company with their environmental policy. The employee was critical of some ‘non-environmentally friendly’ practices of management and he was...

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95 UK Regulations, para 3(1)(a). The UK Regulations were amended in 2006 by the *Equality Act 2006 (UK)* s 77(1). Prior to those amendments, for a belief to be established it had to be ‘similar to’ a religious belief. The word ‘similar’ has been removed.

96 UK Regulations, para 2(1).


98 It was alleged that the employer showed contempt for the employee’s environmental concerns by using ‘gas-guzzling’ cars and on one occasion, the CEO flew a staff member to Ireland to deliver his Blackberry left in London.
subsequently terminated on the grounds of redundancy. The employee argued that he was discriminated against and dismissed due to his philosophical beliefs in climate change.  

At first instance the Regional Employment Judge found that a belief in man-made climate change could be a philosophical belief. The employer appealed to the Employment Appeal Tribunal (EAT). The question on appeal was not whether the termination was lawful and/or reasonable (which was to be heard at a later date), rather it was on the question of whether a belief in climate change is capable of amounting to a philosophical belief which is protected by the UK Regulations. In his conclusion in November 2009, Justice Burton found that a belief in man-made climate change, and the alleged moral imperatives, is capable, if genuinely held, of being a philosophical belief for the purpose of the UK Regulations. In order to be protected, the belief must be of a similar cogency or status to a religious belief but it does not have to ‘seek to explain…the existence of the universe, the meaning of life and human destiny’.  

Counsel for the employer argued that environmental views are merely political opinions or a ‘lifestyle choice’ which cannot be compared to a religious or philosophical belief. Justice Burton disagreed and found that whilst a political ‘opinion’ (as opposed to belief) would not be sufficient by itself, just because a belief is founded in a ‘political philosophy or doctrine’, it should not necessarily be excluded on that basis.  

When looking at whether philosophy could be underpinned by a scientific belief, Justice Burton quoted from Bertrand Russell’s History of Western Philosophy and concluded that a belief in climate change, while a political view about science, can also be a philosophical one.

Justice Burton also explained that political and/or philosophically held beliefs are capable of being excluded if they are objectionable. For example, beliefs of a racist or homophobic political party would not be ‘worthy of respect in a democratic society and not incompatible with human dignity’ and therefore excluded. Humanism, pacifism and vegetarianism would meet this description in the UK whereas

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99 The employee contended that his beliefs significantly dictated how he lived his life, what he bought, how he ate, he eco-renovated his house, recycled, refused to fly in planes and so on.


103 Arrowsmith v United Kingdom [1978] 3 EHRR 218.

104 In H v United Kingdom (Application 18187/91) the UK government did not contest that vegetarianism was capable of being a ‘belief’.
‘support of a belief in the supreme nature of the Jedi Knights [a reference to a Camelot-Style Order in the cult film Star Wars] would not’.105

Following Grainger v Nicholson, which relied in part on case law from the European Court of Human Rights, there are five tests that must be established when determining whether a philosophical belief could come under the UK regulations. These are:-

- the belief must be genuinely held (and this is to be established by examination and cross-examination at hearing);
- it must be a belief and not opinion or viewpoint;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance; and
- it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.106

**UK development post Nicholson - the Psychic Grounds**

In another significant decision shortly after Grainger v Nicholson, the extent of the religious or philosophical belief grounds were explored further in the EAT decision of Power v Great Manchester Police.107 In December 2009 the EAT heard a claim by a police trainer Power arguing that his dismissal was discriminatory as it was on the grounds of his belief that psychics could be used in police investigatory work.

The judge in Power dismissed the police authority’s appeal and found that the employee’s belief in Spirituality (that is a belief that there is life after death and the dead can be contacted through mediums) was capable of being a religious belief for the purpose of the UK Regulations. Power gave evidence at the appeal that he had attended a spiritualist church for 29 years. The judge in Power held that; ‘I am satisfied that, in common with other spiritualists, the claimant believes in the existence of a God, that there is a life after death and the dead can be contacted through mediums’.

The EAT took account of the fact that the Claimant was not alone in his beliefs, which were undisputed as genuine, as the number of worshippers of his faith in a 2001 Census was 32,404, which made it the eighth largest faith group in Britain. Like Grainger, the employee did not succeed on the merits of the case, but the way has been cleared for each to bring a discrimination case on these respective grounds.

106 Ibid at 24 (Burton J).
It is worth reiterating that in both cases of *Grainger* and *Power*, the employees still needed to prove that they were discriminated against, and that they were dismissed because of their beliefs and not for any other lawful reason. The analysis for the purpose of this paper is on the acceptance of theirs being valid grounds of discrimination.

*How would cases such as Grainger and Power be determined in Australia?*

If we look at the *Power* decision first, a belief in religion is a ground that is recognised in Australia. The employee in *Power* argued that he believed in and was a member of the congregation of a Spiritualist Church. Spiritualism has been a legally recognised denomination of religion in Australia since at least 1987. According to the ABS Classification of Religion Groups (ABS Religion Groups Standard) there are nine different affiliated groups associated with the broad classification of Spiritualism. The Associated Christian Spiritual Churches of Australia say that they have a large congregation of followers in Australia and there are dozens, if not hundreds of Spiritualist Churches around the country. Like any religion, there is a broad variation of beliefs across the followers of the practice, for example, some Spiritualists are Christian whereas some Spiritualists are not. Despite the differences, one commentator has suggested that there is agreement amongst adherents of Spiritualism that there is a belief in a higher power (God), a belief in life after physical death and a belief in communication to/from the spirit world.

Applying the test from the Scientology case, a believer in Spiritualism is likely to be able to establish that there is a ‘belief in a supernatural Being, Thing or Principle’ and ‘the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.’ It seems clear that according to existing law in Australia, a belief in Spiritualism would amount to a religious belief for the purposes of discrimination law.

What about a belief in climate change or environmentalism? In the UK, although counsel in *Grainger v Nicholson* for the employer argued that the employee’s climate change views were predominately political, the employee was successful in arguing that his views were not based on any particular political ideology. They *could* have been (if he had been a member of a green political party for example) but that was not

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108 The Associated Christian Spiritual Churches of Australia was proclaimed to be a recognised denomination for the purpose of the *Marriage Act 1961* (Cth), s 26 by the then Governor General Sir Ninian Stephen on 5 February 1987. This has been reaffirmed with each new proclamation since including most recently in the *Marriage (Recognised Denominations) Proclamation 2007* (Cth).


112 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 137 (Mason ACJ and Brennan J).
the case here. The court found that the environmental beliefs that the employee held about ‘anthropogenic climate change’ did in fact form part of a non-politically connected philosophy known as Environmental Ethics.

Had an employee been confronted with the same facts in Australia, they would be advised to argue that their beliefs were political. An employee in Australia could not rely on the philosophical belief argument but might be successful if they are a devoted member of the Greens Party for example.

Whilst the law in Australia is broader in some respects than the UK because a political belief is a stand-alone ground here, it is narrower in that philosophical beliefs are not.

**PHILOSOPHICAL BELIEFS – A CASE FOR LAW REFORM**

The following section provides key arguments as to why Australia’s laws need to be amended to ensure that philosophical beliefs are included as a ground for belief discrimination.

*The existing classifications are problematic and artificial in their application.*

It is clear that the existing protection against discrimination for beliefs in Australia depends entirely on its classification. Religious and political beliefs are protected, whereas non-religious and non-political beliefs are not. Trying to categorise certain beliefs as being a legally protected religion is one challenge, and then, what are the accepted practices and codes of conduct or manifestations of the religion is another. 113 The same questions can be applied to political beliefs. If the law is not changed, then the complex and difficult demarcation between what is “in” and what is “out” will continue to be left to the interpretation of the courts.

The difficulty with this categorisation is that sometimes a religious belief will be the same as a political belief, or it will be the same as a philosophical belief, and sometimes it might even be a mixture of all three. It is also possible for a belief based on moral, ethical or philosophical imperatives may not be connected in any way to religion or politics and these views are not protected. For example, pacifism or any other comparable belief may be based on religious convictions, but equally it may be based on ethical convictions which are not religious but humanist. 114 A vegetarian in Australia would probably be able to argue that his or her beliefs should be protected if they are also a Buddhist, but not if those same beliefs are unconnected to a religion but rather based on some type of naturalistic philosophy. Marxism, which may be regarded as a religion by some, is more generally regarded as a political philosophy

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113 Especially when it comes to religious beliefs, we are requiring our judges to “….venture into a field which is more the domain of the student of comparative religion than that of the lawyer”. *Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, (Wilson and Deane JJ)*.

based on a coherent set of beliefs, without any supernatural or spiritual component, and it would therefore be excluded from the classification.\textsuperscript{115}

With the current classifications, there are also strong incentives to encourage scientifically based belief groups such as Humanists, Rationalists and Secularists to artificially formulate some identification with supernaturalist/religious or faith centred beliefs. Most religions are not static but evolve in belief and structure, and as science has advanced, many religions have also been abandoned or reinterpreted. What might start as a scientific belief may subsequently develop into a religion, especially in response to internal and external pressure such as tax incentives. Scientology is one such example. It is interesting to note that in the UK the ‘Sect. [of] Scientology’ is not defined as a religion (which requires the worship of a deity); it is actually classified as a philosophical belief.\textsuperscript{116}

\textit{The existing classifications do not represent the diversity of beliefs in Australia}

Christianity is still the dominant religion in Australia, but the number of other types of non-Christian religious beliefs has increased. Given the Anglo-Celtic origins of the early settlers, it is not surprising that in 1901 ninety-seven per cent of Australians identified as Christian (predominately Anglican and Catholic) and only one per cent of the population identified as professing non-Christian religions. In comparison, according to the 2006 Census sixty-four per cent of those surveyed self-identified as being from one of the many Christian denominations, whereas six per cent of Australians now practice some type of non-Christian faith.\textsuperscript{117}

Belief in religions overall has declined in Australia, whereas the number of people who have no religion has substantially increased. In 1901, less than one half of one per cent of Australians had no religion whereas that has increased to 19 per cent in 2006.\textsuperscript{118}

Migration has much to do with reshaping the profile of Australia’s religious affiliations since the turn of last century with influences from all over the world. Since 1945 over 7 million migrants have come to Australia. In 2008-2009 alone, over 150,000 people came from 200 countries.\textsuperscript{119} These new Australians have brought with them their philosophies, both secular and religious. Australia is now ‘one of the most culturally, racially, linguistically and philosophically diverse societies in the


\textsuperscript{116} United Kingdom, \textit{Parliamentary Debates}, House of Lords, Daily Hansard, 13 January 2010, 520, (Baroness Thornton, Labour Minister).


\textsuperscript{118} Ibid.

world\textsuperscript{120} and the existing laws do not reflect the variety of beliefs of contemporary Australians.

\textit{It should be “one in – all in”}

Justice Murphy in the Scientology case discussed the problem of trying to differentiate between different types of religious beliefs:\textsuperscript{\textcircled{24}}

The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judgements must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial or privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is “one in, all in”.\textsuperscript{121}

The question here is whether there is any logical basis for the continued exclusion of rationally and conscientiously held philosophical beliefs. It is argued simply that ‘in a free and democratic society ‘freedom of conscience and religion’ should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality.’\textsuperscript{122} It is no longer sustainable or equitable to continue to allow some religious and political beliefs ‘in’ while others are kept ‘out’.

\textit{Australia’s laws do not comply with international obligations}

The UK Regulations give effect to UK’s obligations as a member of the European Convention of Human Rights (ECHR).\textsuperscript{123} Although Australia is not a party to the ECHR, it is a signatory to the UDHR, ICCPR, the Religion Declaration and ILO Conventions 111 and 158. In those instruments, the reference is to protection against discrimination on the basis of religion or belief.\textsuperscript{124} The existing classifications do not


\textsuperscript{121} Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120, 150 (Murphy J).

\textsuperscript{122} Morgentaler v R [1988] 1 SCR 30, 36, Supreme Court of Canada, (Wilson J).

\textsuperscript{123} European Convention on Human Rights, art 9(1), provides that ‘Everyone has the right to freedom of though, conscience and religion’, and art 14 prohibits discrimination on the basis of inter alia, ‘religion, political or other opinion’.

\textsuperscript{124} In its draft stages the Religion Declaration only referred to religions but the words “or beliefs” were added to in its final form to ensure protection for non-religious beliefs. Sullivan DJ, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’, (1988) 82 American Journal of International Law 487, p 491 n. 17.
fully satisfy Australia’s international human rights obligations relating to freedom of religion and belief as set out these International instruments.

Recommendations for reform – A new Freedom of Belief Act

Freedom of religion and belief is a fundamental right to be enjoyed by everyone. Discrimination against a person on the basis of religion or belief infringes the enjoyment of that right. As there is currently a patchwork of different protections that exist across Australia, and not everyone is protected, it is now time to make changes to the law to ensure that there is uniformity, consistency and equality.

Despite a recent national review into the adequacy or otherwise of human rights protections in Australia, and a recommendation by the National Human Rights Consultation Committee that Australia should follow the models of the UK, New Zealand, Victoria and the Australian Capital Territory by introducing a federal Human Rights Act, this was rejected by the Labor government. Had a Human Rights Act (HRA) been introduced, all existing laws would have needed to have been reviewed to ensure compliance with the principles of the HRA. Even if a HRA had been introduced, this by itself would not achieve equality due to the inconsistent application of the existing state and territory laws and the lack of remedies available under the federal HREOC Act.

It should also be noted that despite Charters of Rights already being in force in Victoria and ACT and the explicit reference to ‘religion or belief’, the anti-discrimination laws in Victoria and ACT still only refer to ‘religion’ and in some instances ‘religious beliefs’ and other types of ‘beliefs’ are not covered. The Victorian and ACT anti-discrimination laws currently breach the Charters of Rights in those jurisdictions.

In order to build a more socially cohesive and harmonious society, the federal government should enact legislation making discrimination on the basis of ‘religion or belief’ unlawful in the same way that there is specific legislation pertaining to the

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125 There are only limited protections in SA and none in NSW see above n, 38.

126 In December 2008 the Rudd government instigated the National Human Rights Consultation to inquire into the protection and promotion of human rights. The National Human rights Consultation Committee undertook one of the largest consultative process in Australia.


128 The Attorney-General released its response to the NHRCC recommendations by way of introduction of a new Human Rights Framework in Australia on 2 June 2010. Under the new Human Rights Framework, it is proposed that a new Parliamentary Joint Committee on Human Rights be created to ensure that all new Bills and legislative instruments comply with Australia’s human rights. The bill implementing the new Committee was not passed before the federal election in 2010 and its passage is not yet guaranteed.

129 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 14(1) and Human Rights Act 2004 (ACT), s 14(1).
grounds of race, sex and disability. This would ensure protections and remedies are uniformly and equally applied nationwide.

In a new Freedom of Belief Act, a broad interpretation of religion and belief should be given to cover theistic, non-theistic and atheistic beliefs and it should include belief systems of minorities as well as traditional religious beliefs. The suggested definition covers a broad spectrum of personal convictions and matters of conscience, not necessarily requiring a belief in the supernatural. This type of legislation would go further in ‘bringing together people from very different backgrounds and life experiences and thus contribute to community cohesion and mutual understanding.’

Further, legislative change such as the proposed Freedom of Belief Act would ensure Australia’s compliance with its obligations under ICCPR, the Religion Declaration and other International instruments to which it is a signatory. Whether or not something can be considered as a valid religion or belief for protection under the legislation, would still be a matter for the courts.

CONCLUSION

There are well over a hundred broad classifications of different religions in Australia according to the ABS Religion Groups Standard, and at least thirty registered political parties. Whilst ‘being on the list’ doesn’t necessarily equate to legal protection from discrimination, it would help to satisfy the common law tests. Effectively the law now provides that if your beliefs are religious or political they are ‘acceptable’ and worthy of protection, but if your beliefs do not come under those categories, as a society, we do not mind that you might be discriminated against because of your beliefs.

The belief in climate change has been used throughout this article to illustrate a widely held system of belief that is not adequately protected by the law, but there are many other belief systems which, when examined, would also be excluded. Humanism which is ‘a relatively small movement with a growing profile as a secular alternative to religion’ in Australia is one such example. In the 2006 Census 7,633 people self-identified as Humanists. Even though Humanism appears as a category


on the Census under Non Religion, it is not accepted as a valid belief system for the purpose of discrimination law.

This position stands in stark contrast to the UK. The Conservatives in the House of Lords sought in January 2010 (shortly after the decisions of Grainger v Nicholson and Power) to amend the discriminatory protections by removing the term ‘or philosophical’ from the meaning of ‘belief’. In resisting the amendments, Baroness Thornton for the government explained that such an amendment would have the effect of ‘Removing protection…[for] long-recognised belief systems such as humanism’. Further she stated that ‘…many here…would not wish for that – not only those who have humanist beliefs, but those who recognise and appreciate the right of others to be protected for holding that belief’. The amendment was subsequently withdrawn. Such an amendment would be seen as a retrograde step for equality and human rights in the UK, whereas in Australia, we do not even have such protections to remove.

As a diverse and multicultural society with so many different cultural and religious backgrounds, Australians on the whole believe in tolerance and acceptance and this enables us to live in relative harmony and peace. Allowing people the freedom to believe and practise their beliefs ‘lies at the heart of a tolerant and just society’. Whilst religious and political beliefs are certainly worthy of protection in our democratic nation, surely secular and other reasonably held philosophical beliefs are just as worthy. The time has come to ensure that the right to equality before the law is extended to everyone.

134 House of Lords Committee (2nd day), UK House of Lords, Equality Bill (Amendment 20), 13 January 2010.

135 United Kingdom, Parliamentary Debates, House of Lords, Daily Hansard, 13 January 2010, 520, (Baroness Thornton, Labour Minister).