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Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom

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Received: 19 September 2019; Accepted: 15 October 2019; Published: 18 October 2019

Abstract: Australia is the only western democracy without a comprehensive human rights instrument and has only limited protection for religious freedom in its constitution. It was Australia's growing religious diversity—the result of robust political support for multiculturalism and pro-immigration policies in the post-war period—that led to the first public inquiry into religious freedom by an Australian statutory body in 1984. Responding to evidence of discrimination against Indigenous Australians and minority religious groups, the report detailed the need for stronger legal protections. By 2019, Australia's religious freedom 'problem' was focused almost solely on the extent to which religious organizations should be allowed to discriminate against LGBTIQ people. Using the *What's the Problem Represented To Be?* approach to policy analysis, this paper explores the changing representation of the 'problem' of religious freedom by examining all public, parliamentary and statutory body reports of inquiries into religious freedom from 1984 to 2019. In their framing of the problem of religious freedom, these reports have contributed to a discourse of religious freedom which marginalises the needs of both those who suffer discrimination because of their religion and those who suffer discrimination as a result of the religious beliefs of others.

Keywords: religious freedom; Australia; religion; gender and sexuality; discrimination; equality; religious diversity; public inquiries; WPR (*What Is the Problem Represented To Be?*)

1. Introduction

This paper explores the construction of the problem of religious freedom in Australia from a policy perspective. It uses the *What is the Problem Represented To Be?* (WPR) methodology to analyse the reports from public inquires and consultations on religious freedom conducted between 1984 and 2019 by statutory bodies, parliamentary committees and government-appointed expert panels and committees. Also examined are reports from other human rights inquiries that include consideration of religious freedom. While seeking to address 'the problem' of religious freedom—consistently articulated as a (perceived) lack of protection under Australian law—the reports have actually constructed alternative problematisations of religious freedom that have shaped and influenced the ongoing public policy conversations and debates about religion, law and society.

The major questions of the research project are: how has the problem of religious freedom been constructed over time? and what is the effect of these problematisations? This paper does not make an argument for or against better or fewer protections for religious freedom, but rather seeks to challenge the idea that religious freedom is 'fixed', that it has one 'common sense' meaning everyone understands, and that the 'problem' of religious freedom in Australia is just about how to protect it better. To paraphrase Bletsas, what is being studied is not religious freedom '*as it exists as a problem*', but religious freedom '*as it has come to be constituted as one*' (Bletsas 2012, p. 41, emphases in original).

The construction of the problem of religious freedom has a political history and it is part of this history that this analysis seeks to uncover.

The first inquiry into religious freedom was conducted by the NSW Anti-Discrimination Board over five years from 1978 to 1983, with the report released in 1984. By 2017, in the context of the lead-up to and the legislation of same-sex marriage, religious freedom had become the object of often heated public debate and more public inquiries.

While the protection of religious freedom in Australia has been well studied (see for example Parkinson 2007; Hosen and Mohr 2011; Bouma 2012; Evans 2012; Ball 2013; Babie et al. 2015; Baines 2015; Beck 2018), and there have been a number of studies of submissions to inquiries on religious freedom and human rights law (Dunn and Nelson 2011; Nelson et al. 2012; Poulos 2018), this paper is unique in examining all the reports of religious freedom inquiries and broader inquiries which included consideration of religious freedom. In tracing the problematisation of religious freedom over time in policy documents, this analysis describes for the first time how the eventual dominance of one problematisation over another has entrenched a discourse of religious freedom that has privileged the idea of 'belief' and marginalised the experiences of minority religious groups and those who experience religiously framed discrimination.

This paper is presented in four main parts. Section 2 briefly describes the context for religious freedom in Australia and the methodology. Section 3 gives a brief overview of the reports and Section 4 presents the analysis. Section 5 provides a discussion of the results.

2. Context and Methodology

The nature and place of religion and religious belief in Australia has been, since European invasion, the topic of regular debate and varying degrees of controversy. It was given significant attention during the late nineteenth century constitutional convention debates prior to federation (Barker 2019; Beck 2018) with the arguments settling on the recognition of God included in the Preamble, and a section in the Constitution prohibiting the Commonwealth (not the states) from establishing or prohibiting any religion, imposing religious observance, or making religion a qualification for public office (s 116). Since federation in 1901, this constitutional protection for religious freedom has proven 'far from comprehensive', as Evans has noted, 'and the way[s] in which it has been interpreted allow significant scope for government interference with religious freedom' (Evans 2012, p. 92).

Australia is the only western liberal democracy without a comprehensive national human rights instrument. Instead, many of its international obligations are captured in four pieces of federal (Commonwealth) anti-discrimination law (on race, gender, disability and age)[1] and the *Australian Human Rights Commission Act (1986)* which legislates Australia's federal statutory human rights body, the Australian Human Rights Commission (AHRC). The *Sex Discrimination Act (1984)* (SDA) and the *Age Discrimination Act (2004)* (ADA) contain exemptions or exceptions which allow religious bodies, organisations and educational institutions to lawfully discriminate on the basis of otherwise protected attributes in some circumstances when the acts or practices conform to the doctrine, tenets or beliefs of the religion or when they are necessary to avoid 'injury' to the religious sensitivities or susceptibilities of religious adherents.[2] The *Fair Work Act* 2009 prohibits some forms of discrimination on the basis of religion in employment.

All Australian states and territories have a form of anti-discrimination (or equal opportunity) legislation that, with the exception of New South Wales (NSW) and South Australia (SA), include some protections against religious discrimination and vilification.[3] Victoria, Queensland and the Australian

[1] At the time of writing, the Australian Government was drafting a religious discrimination bill.
[2] SDA s 37 and s 38 and ADA s 35.
[3] NSW prohibits discrimination on the basis of 'ethno-religious origin' and SA prohibits discrimination on the basis of religious dress or appearance.

Capital Territory also have comprehensive human rights charters which include the protection of freedom of thought, conscience, religion and belief.

The first public inquiry into religious freedom was held in the context of an increasingly diverse society (linguistically, culturally and religiously),[4] with a shrinking number of people identifying in the triennial national census as Christian and a growing number identifying as 'no religion'.[5] Between 1984 and 2008, there were four religious freedom inquiries and two inquiries on other human rights matters that also addressed religious freedom. The next 11 years (until mid-2019) saw five religious freedom inquiries and nine others considering religious freedom within broader terms of reference. It is important to note that the abuse of religious freedom that was perpetrated on Indigenous Australians by invasion and colonisation, and which continues in the absence of a treaty and as a result of entrenched systemic and structural racism, has only occasionally been the subject of public debate.

In western liberal democracies such as Australia, public inquiries play a significant role in the public conversation about policy, reporting on the community's concerns as expressed in written submissions and oral testimonies, and recommending policy solutions to governments. The three forms of public inquiries considered in this study are those conducted by federal parliamentary committees, federal or state statutory bodies and federal government appointed external panels or committees.

Banks writes that public inquiries usually take place at 'the front end of the policy cycle' providing 'policy-relevant information and advice . . . on a take-it-or-leave-it basis' (Banks 2014, p. 113). That advice is defined by its '"publicness", responding to public terms of reference, drawing on public submissions, and, ultimately, reporting publicly' (Banks 2014, p. 113). He identifies three motivations for governments establishing a public inquiry[6]: to 'vindicate or substantiate a policy course already being followed or intended'; to 'determine how preferred policy directions should be framed or designed'; and/or to 'help establish what the policy approach in a specific area should be, whether by reviewing existing policies . . . or addressing a "new" issue' (Banks 2014, pp. 113–14). In a review and analysis of the literature on public inquiries, Marier found that public inquiries can serve one or more of 'three broad aims: to learn, to adjudicate and to fulfil political motives' (Marier 2017, p. 172).

Assessed against Banks's six forms of contribution to improving 'the politics of policy change' (Banks 2014, p. 116) and Marier's three broad aims, the inquiries in this study have variously served to: add the credibility of outside experts to the government's policy agenda (the religious freedom inquiries conducted by government-appointed expert panels); cool divisive public debate and gain time to develop a response (the inquiries initiated in the shadow of the same-sex marriage debates); and/or provide an opportunity for governments to learn how people are responding to salient issues (some of the inquiries conducted by the AHRC).

In contrast to external committee and statutory body inquiries, parliamentary committee inquiries are located within the executive and bureaucratic arms of government. They can be held at various points in the policy-making process and serve three main roles: 'scrutiny and review; investigative inquiries; and legislative appraisal' (Marsh and Halpin 2015, p. 140).

The work of Banks, Marier, and Marsh and Halpin identifies public and parliamentary committee inquiries as potentially significant processes in the making of public policy. For this reason, the WPR methodology was chosen as an appropriate methodology for examining the problematisation of religious freedom in the inquiry reports. Within the field of critical policy studies, Carol Bacchi

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[4] See for example this commentary by Prof. Andrew Jakubowicz, http://www.multiculturalaustralia.edu.au/library/media/Timeline-Commentary/id/115.The-Blainey-debate-on-immigration-.

[5] The proportion of Australians identifying as Christian dropped from 88 percent in 1966 to 52 percent in 2016; 'no religion' increased from 19 percent in 2006 to 30 percent in 2016; other religions grew from 0.7 to 8.2 percent between 1966 and 2016 (https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~{}2016~{}Main%20Features~{}Religion%20Data%20Summary~{}70, accessed 16 August 2019).

[6] Statutory bodies such as the Australian Human Rights Commission and the Australian Law Reform Commission receive referrals from government and also have the authority to undertake public inquiries on matters relevant to their mandates without government referral.

(including Bacchi 2009, 2012a, 2012b; Bacchi and Goodwin 2016) developed the WPR methodology for examining policy texts from a poststructural critical discourse perspective. The WPR methodology challenges the assumption that the objects of public policy are readily observable and objectively identifiable problems in society. Drawing on the notion of 'problematisation' in the work of Freire and more extensively from Foucault, Bacchi (Bacchi 2012b) understands policy problems and solutions as always politically framed—they are politically constructed discourses in need of critical readings which expose the biases, assumptions, dichotomies, presuppositions, history and silences that lie within the representation of a problem:

> policies and policy proposals give shape and meaning to the 'problems' they purport to 'address'. That is, policy 'problems' do not exist 'out there' in society, waiting to be 'solved' through timely and perspicacious policy interventions. Rather, specific policy proposals 'imagine' 'problems' in particular ways that have real and meaningful effects. (Bacchi and Eveline 2010, p. 111)

WPR understands policy as 'discourse' constructed in the social, historical and political contexts that give it meaning: 'policy must be recognised as a cultural product: it is context-specific. More than this, policy is involved in constituting culture by making meaning: as well as making problems and solutions, *policy discourses make "facts" and make "truths"*' (Goodwin 2012, emphasis added).

Through the application of a series of six questions (with a seventh reflexive prompt for the researcher suggesting a reapplication of the questions to the researcher's own problematisations), WPR enables the researcher to expose how policy problems are represented in a given policy text so that we might better understand how we are governed:

> Rather than accepting the designation of some issue as a 'problem' or a 'social problem', we need to interrogate the kinds of 'problems' that are presumed to exist and how these are thought about. In this way we gain important insights into the thought (the 'thinking') that informs governing practices. (Bacchi 2009, p. xiii)

The six questions are:

WPR1 'What's the problem . . . represented to be in a specific policy or policies?'

WPR2 'What deep-seated presuppositions or assumptions . . . underlie this representation of the "problem" (*problem representation*)?'

WPR3 'How has this representation of the "problem" come about?'

WPR4 'What is left unproblematic in this problem representation? Where are the silences? Can the "problem" be conceptualized differently?'

WPR5 'What effects (discursive, subjectification, lived) are produced by this representation of the "problem"?'

WPR6 'How and where has this representation of the "problem" been produced, disseminated and defended? How has it been and/or how can it be disrupted and replaced?' (Bacchi 2018, p. 5).

Public inquiries are generally understood to have the task of 'describing' an identified problem and offering potential policy solutions. They are, therefore, powerful 'problematising activities' (Bacchi 2009, p. xi)—making 'facts' and 'truths' (as per the Goodwin quotation above) as they set the representation/s of the problem in the policymaking process. As policy texts, inquiry reports are, therefore, 'productive or constitutive' and 'through their representations of "problems", produce and reinforce categories of people' (Bacchi and Eveline 2010, p. 112).

To conduct the analysis, each text was read against the six questions to identify the most salient answers. The answers were then compiled into a matrix and every article re-examined (manually, including the use of the coding program NVivo) in order to highlight common themes and differences. This study sought to apply all six questions to each of the reports but because of where most of these inquiry reports are positioned in the policymaking process, questions WPR5 and WPR6 proved most useful in developing a 'historical' reading of the representation of the problem of religious freedom when applied to the cumulative effect of all the reports and are addressed in the Discussion.

3. The Reports

The nine inquiries into the protection of religious freedom and the 11 inquiries into other human rights matters which included consideration of religious freedom are shown in Table 1. Of those 11, five were inquiries on matters related to the protection of LGBTI people (sexual orientation, gender identity and intersex status (SOGII) rights), four were inquiries or consultations on human rights protections more broadly, and two were focussed on race discrimination.

Table 1. The Religious Freedom Inquiry Reports.

Date	Author	Report
1984	NSW Anti-Discrimination Board	*Discrimination and Religious Conviction* (DRC)
1998	Human Rights & Equal Opportunity Commission (HREOC)	*Article 18: Freedom of Religion and Belief* (Article 18)
2000	Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT)	*Conviction with Compassion: A report on freedom of religion and belief* (CWC)
2008	HREOC	*Combating the Defamations of Religions* (CDR)
2011	Australian Human Rights Commission (AHRC, formerly HREOC)	*Freedom of Religion and Belief in 21st Century Australia* (FRB21)
2015	AHRC	'Religious Freedom Roundtable' (RFR)
2017–2019	JSCFADT	*Status of the Freedom of Religion or Belief* (1st & 2nd Interim reports) (SFRB)
2018	Expert Panel (Philip Ruddock, Chair)	*Religious Freedom Review* (Ruddock Review)
2018	Senate Legal and Constitutional Affairs References Committee (SLCARC)	'Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff' (School Exemptions)
Other inquiries that included consideration of freedom of religion or belief		
2003	HREOC	*Isma—Listen: National Consultations on Eliminating Prejudice against Arabs and Muslim Australians*
2008	Senate Standing Committee on Legal & Constitutional Affairs (SSCLCA)	'Effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality'
2009	National Human Rights Consultation Committee (Frank Brennan, Chair)	*National Human Rights Consultation Report*
2011	AHRC	*Addressing Sexual Orientation & Sex and/or Gender Identity Discrimination*
2013	Senate Legal & Constitutional Affairs Legislation Committee (SLCALC)	'Report of the inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012'
2013	SLCALC	'Report on the inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*'
2015	AHRC	*Rights and Responsibilities Consultation Report*
2015	AHRC	*Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*
2015	AHRC	*Freedom from Discrimination: Report on the 40th Anniversary of the* Racial Discrimination Act (2016).
2015	Australian Law Reform Commission (ALRC)	*Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*
2017	Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill	'Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill'

Although recommending the inclusion of religion as a protected attribute in the NSW Anti-Discrimination Act, *Discrimination and Religious Conviction* (DRC) outraged most of the mainstream Christian churches. Accusations included 'bias against mainstream Christian churches' and 'failing to address the crucial issue of the balancing of conflicting rights' (Anglican Church of Australia Diocese of Sydney 1984, p. ii). The Government shelved the report; NSW still lacks legal protection against religious discrimination in law. The next inquiry into religious freedom by HREOC was 14 years later, in 1998. HREOC/AHRC held three more inquiries into religious freedom.[7]

Two parliamentary inquiries considering Australia's domestic and international contributions to the promotion and protection of religious freedom were conducted by the Human Rights Sub-committee of JSCFADT in 2000 and 2017–2019.[8] The latter overlapped with the Australian Government's high-profile Expert Panel (Ruddock) Review in 2018. The Prime Minister at the time, Malcolm Turnbull, established the review as a concession to the right wing of his Liberal party, which had unsuccessfully agitated for extensive amendments for so-called religious freedom protections to the same-sex marriage bill (Hutchins 2017; Grattan 2017). The Senate inquiry into the SDA exemptions allowing religious schools to discriminate against teachers, staff and students on the basis of sexual orientation, gender identity and other protected attributes, was held in response to the significant public concern about the exemptions which emerged after the Ruddock Review recommendations were leaked to the *Sydney Morning Herald* (the Government had been refusing to release the Report). The public outcry indicated that these exemptions were not generally known or understood in the Australian community.[9]

Of the 11 reports from inquiries on other matters that included consideration of religious freedom, five were produced by the AHRC. The first considered racial and religious discrimination against Arab and Muslim Australians post 9/11 and the second, marking the 40th anniversary of the RDA, was broader in scope. The AHRC also held two inquiries on sexual orientation, gender identity and intersex status (SOGII) rights and one on the general protection of human rights in Australia. Four parliamentary inquiries (all by Senate committees), one inquiry by the ALRC and one major national consultation on human rights conducted by a government appointed panel chaired by Fr Frank Brennan SJ, all included consideration of religious freedom.

4. Analysis

Eight of the nine inquiries into religious freedom identify Australia's 'problem' of religious freedom as the (arguably) weak protection for religious freedom in law.[10] It has been a 'problem' that successive Australian governments have been disinclined to solve, even as they continued to establish inquiries to recommend solutions. All nine religious freedom reports include at least some explanation of the protection of religious freedom under international human rights law, outline Australia's obligations as a signatory to the relevant international treaties and conventions, describe religious freedom protections in Australian law[11] and explore, by drawing on previous research, submissions and oral statements, how Australian laws fall short. The application of WPR1, however, exposes two deeper problematisations—the problem of Australia's *religious diversity* and the problem of *balancing competing rights*—and it is these, rather than inadequate legal protection, which shape the discourses constructed in the reports and the policy recommendations offered to government. The inadequate

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[7] HREOC/AHRC is a Commonwealth statutory body established in 1986 as Australia's national human rights institution.

[8] The Committee released two interim reports (2017 and 2019, counted as one for this study) but did not complete its work before a general election was called for May 2019, and recommended that the inquiry be continued by the next parliament (Joint Standing Committee on Foreign Affairs Defence and Trade 2019).

[9] See, for example, https://www.sbs.com.au/news/morrison-says-religious-schools-should-not-expel-gay-kids-as-ruddock-recommendations-leaked.

[10] The 2018 School Exemptions report acknowledged the lack of positive protection for religious freedom but did not frame its report around this problem.

[11] In the case of the 2017–2019 JSCFADT inquiry, this forms the entire First Interim Report (Joint Standing Committee on Foreign Affairs Defence and Trade 2017).

legal protection of religious freedom is better understood as an assumption or presumption (WPR2) rather than a problematisation—it is where the inquiries start, most of them, literally. Where they finish depends on which of the two problem representations, 'religious diversity' or 'balancing rights' is dominant in framing the report (Table 2). It is important to note that, as described below, both problematisations are present in the political and public conversations surrounding all these inquiries and in the submissions and evidence presented to them: the dominance of one problematisation over the other reflecting the interests at stake in framing the problem in a particular way in order to achieve a particular outcome. This paper identifies that the shift in the dominance of one problematisation over the other in the inquiry reports has had implications for whose voices and experiences are raised to prominence in the consideration of religious freedom as an object of public policy.

Table 2. The dominant problematisation in the religious freedom reviews.

Religious Freedom Reviews		Religious Diversity	Balancing Rights
1984	*Discrimination and Religious Conviction*	✓	
1988	*Article 18: Freedom of Religion and Belief*	✓	
2000	*Conviction with Compassion*	✓	
2008	*Combating the Defamation of Religions*	✓	
2011	*Freedom of Religion & Belief in 21st Century Australia*	✓	✓
2015	'Religious Freedom Roundtable'		✓
2017–2019	*Status of the Freedom of Religion or Belief*		✓
2018	*Religious Freedom Review*		✓
2018	School Exemptions		✓

4.1. Religious Diversity

From 1984 to 2011, the dominant problematisation of religious freedom was 'religious diversity'. The context for the first inquiry into religious freedom in Australia, DRC, was described in the report as increasing migration, growing cultural and religious diversity, fewer people identifying as Christian and increasing numbers of people identifying as not religious (New South Wales Anti-Discrimination Board 1984). This description of the changing nature of Australia's religious identity, usually accompanied by census statistics, remained constant over the years and was central to how this problematisation was framed (WPR3): in an increasingly diverse society, people from minority religious groups were experiencing discrimination, vilification and prejudice, often fed by media hostility and exacerbated by inadequate or counter-productive policy responses from government and low levels of religious literacy in the community and in government, including police forces.

HREOC was motivated to conduct its first religious freedom inquiry, Article 18, in part,[12] by complaints of religious discrimination against members of minority religious groups:

> Australians face the continuing challenge of creating a society in which everyone is truly free to hold a religion or belief of his or her choice and in which cultural and religious diversity is a source of advantage, benefit and good rather than a cause of disharmony and conflict. (Human Rights and Equal Opportunity Commission 1998, p. 2)

The report recommended the development of a federal Religious Freedom Act to protect the freedom of those from minority religious groups, a proposal that HREOC/AHRC has not repeated but which, more recently, has been advocated by conservative religious groups and politicians but rejected by the Ruddock Review as unnecessary.

Two years later, *Conviction with Compassion: A report on freedom of religion and belief* (CWC) framed Australia's growing diversity as causing problems, despite the success of multiculturalism as a policy:

[12] The other reason for the review was the government declaring in 1993 that the UN *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 'a "relevant international instrument" for the purposes of the HREOC Act' (Human Rights and Equal Opportunity Commission 1998, p. 3).

> Minority religious groups within a nation can find themselves in a very difficult position, even in a society as nominally 'tolerant' as Australia. This is especially so for those with beliefs and practices that can be seen as 'strange'. The consequences for the exercise of freedom of religion and belief can be serious. (Joint Standing Committee on Foreign Affairs Defence and Trade 2000, p. 128)

The representation of the religious diversity problem assumes (WPR2) that prejudice arises not only in the *context* of a pluralistic society but as a *direct result* of religious diversity, contributed to by a lack of religious literacy in the community. One of the most common recommendations in the review reports is for more and/or improved education.

The early religious freedom reports defined the problem as religious diversity because they were focussed on the experiences of prejudice, harassment, vilification and discrimination being suffered by people from minority religious groups, exacerbated for Muslims in the aftermath of the 9/11 terrorist attacks in 2001 (WPR3) (Human Rights and Equal Opportunity Commission 2008). The recommendations to government in the reports were about how to better protect people from discrimination on the basis of religion.

While *Freedom of Religion and Belief in 21st Century Australia* (FRB21) included a chapter dedicated to the religious demographics of Australia, the 2011 report signalled a shift in the discourse of religious freedom to the concerns of those from the 'Christian majority' threatened by support for the rights of various other minority groups:

> The role of Australian governments in managing diversity was often expressed in submissions and consultations in terms of 'the majority', 'the minorities', and their respective rights. Minority faiths called for accommodations for practices that were within common law, and for equality in all matters; the majority expressed concerns about the rights of minorities competing with the rights of the majority.

> The majority is generally a Christian majority … *Managing and/or balancing minority and majority rights* was frequently raised in submissions and consultations, and it was suggested that governments need to be wary of accommodating the rights of minorities at the risk of encroaching on the rights of the majority. (Bouma et al. 2011, p. 53, emphasis added)

The most recent reports to include the religious diversity problematisation are the AHRC 'Religious Freedom Roundtable' (RFR)—little more than a cursory acknowledgement emphasising the need for mutual respect and improved education for religious literacy (Australian Human Rights Commission 2015c); and the Ruddock Review which struggled with a lack of evidence on the extent of discrimination against people from minority religious groups including Indigenous peoples (Ruddock et al. 2018). The lack of attention in these reports to religious discrimination reflects the shift in the problematisation of religious freedom.

In addressing WPR4, DRC was identified as the only report to problematise or interrogate the privilege of Christianity in Australia and how institutional and political power intersect with religious freedom. One of the deep-seated presuppositions that underlies the problem representation (WPR2) in DRC but which is absent in the other reports is that power exercised at the intersection of the religious and the political can negatively affect people who are marginalised in society. The report's starting point for this was with the experiences of Indigenous peoples (a concern that was picked up by HREOC in Article 18 and JSCFADT in CWC and but largely ignored in later reports):

> In the beginning, there were the people, the law and the land, and so it remained for 40,000 years. Then Australia was colonised by an aggressive, white, Protestant civilisation, which had a devastating impact on the intricate web of relationships between Aboriginal men and women and their land. (New South Wales Anti-Discrimination Board 1984, p. 34)

DRC is also unique among the reports in drawing attention to how majority or mainstream religious groups are spared the discrimination suffered by minority religious groups for not dissimilar beliefs and practices:

> Even though mainstream religious groups are regularly accused of "getting away with murder", an expression of resentment about their power, it is the minority religious groups on whom these attitudes principally rebound. They are often castigated for beliefs and practices for which parallels can be easily found in major religious organisations. (New South Wales Anti-Discrimination Board 1984, p. 193)

This is a matter that is left unproblematised in future reports, as is the privileging in the language of law of a Christian understanding of religion, and the law itself which 'allows too much leeway in supporting institutional power under current interpretations of the establishment clause' (New South Wales Anti-Discrimination Board 1984, p. 5).

4.2. Balancing Rights

The first significant recasting of the problem of religious freedom as one of balancing (competing) rights was in 2011 but the seeds for this were sown in the earliest two reports. DRC devoted considerable attention to religion and education, including parents' and children's rights, which were described as

> the thorniest problems . . . for it is in education that we find the most contention about such apparent paradoxes in *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. (New South Wales Anti-Discrimination Board 1984, p. 290, emphasis added)

The Board supported exceptions to anti-discrimination law that allowed religious schools to discriminate in student admissions (on religious grounds) but was concerned about teachers being fired 'because their personal lives and opinions did not reflect orthodox Church practices in such matters as marriage, divorce, abortion and homosexuality' (New South Wales Anti-Discrimination Board 1984, p. 425).

Article 18 was the first religious freedom report to use the notion of 'competing rights'—in relation freedom of expression and freedom from vilification in the section entitled 'Finding the *balance* in Australia law' (Human Rights and Equal Opportunity Commission 1998, p. 132, emphasis added).[13] The majority of the chapter on discrimination addressed the problem of 'reasonable accommodation' in employment, that is, to what extent should employers accommodate the religious practices of their employees, but also the extent to which religious organisations should be able to discriminate against others (on the basis of sexual orientation, gender, marital status and other attributes). In this report, 'accommodation' in employment was not represented as the need to *balance* competing rights (this would come later) but as the need to define the limits to religious freedom *for* the protection of others:

> This inquiry illustrates the importance of limiting the scope of exemptions for religious organisations under anti-discrimination law and in particular of not allowing absolute exemptions which have the potential to encourage prejudice and unfair treatment not related to any relevant belief. (Human Rights and Equal Opportunity Commission 1998, p. 110)

Both DRC and Article 18 stressed the need to limit religious exemptions in order to protect people from discrimination, especially on the basis of sexual orientation.

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[13] CDR contains a single reference to balancing the rights of free speech and freedom from racial vilification in its description of the Race Discrimination Act: 'The RDA, nevertheless, recognises that there is a need to balance rights and values, between the right to communicate freely ('freedom of speech') and the right to live free from racial vilification' (Human Rights and Equal Opportunity Commission 2008, p. 13).

During the 2000s, the balancing rights problematisation developed (WPR3) in the context of proposed and actual anti-discrimination law reform. By that time, the Australian Christian Lobby (ACL) which had formed in 1995 (Maddox 2014) had gained significant political power.[14] While the conservative Howard Government amended the ambiguously worded *Marriage Act 1961* in 2004 to ensure that same-sex marriages would not be legal, the better protection of LGBTIQ people was on the law reform agenda. In 2007, the AHRC released its *Same-Sex: Same Entitlements Report*[15] and 2008 saw a Senate Committee inquiry into the effectiveness of the SDA. As well as recommendations for strengthening and extending protections for women, the Senate Committee also recommended that HREOC conduct an inquiry into 'replacing the existing federal anti-discrimination acts with a single Equality Act' and report on 'what additional grounds of discrimination, such as sexual orientation or gender identity, should be prohibited under Commonwealth law' (Senate Standing Committee on Legal and Constitutional Affairs 2008, p. xviii). In 2009, the Rudd Labor Government amended over 80 laws to remove discrimination against same-sex couples.

In FRB21, in 2011, came the shift from religious freedom being about the right to be free from discrimination *because* of one's religion, to being about the 'right' *to* discriminate against others *in the name of* one's religion; a 'right' threatened by the 'trends' to strengthen anti-vilification laws to better protect religious minorities including Muslims and reform anti-discrimination law to better protect people on the basis of sexual orientation and gender identity (WPR3). FRB21 found significant *conservative* Christian opposition to changing anti-discrimination legislation, especially any watering down of existing religious exemptions as a result of increasing protections granted to other groups in society[16]:

> Across all research data, calls to maintain current exemptions were strongly iterated by faith groups, particularly by Christian churches and organisations. Many participants in consultations identified feeling 'under siege' from those with a secular agenda, and expressed concern about anti-discrimination legislation, proposed changes to current exemptions, and the right to proselytise. (Bouma et al. 2011, p. 34)

While FRB21 presented both representations, the balancing rights problematisation came to dominate future religious freedom review reports. The AHRC's 'Religious Freedom Roundtable', for example, barely addressed issues of discrimination against minority religious groups and further set the language of 'balancing' and 'competing' rights (WPR3):

> Like other human rights it [religious freedom] must be exercised with a mindfulness of the rights of others, and has the potential to intersect and at times compete with other human rights such as equality before the law and government, and the freedoms of those without faith. The role of law should be to seek accommodation of competing rights and enlarge the freedom for all. Care must be taken to balance rights so that neither religious freedom nor any right with which it may intersect is granted an imbalanced privileging so as to permanently impair the enjoyment of the other. (Australian Human Rights Commission 2015a, p. 5; 2015b, p. 2)

The balancing rights problematisation assumes that the granting of equality rights will always be a threat to religious freedom (WPR2). In the earlier reports, these rights included rights for women and people who are divorced. In the later reports it was LGBTIQ rights which are assumed to be incompatible with the right to religious freedom.

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[14] Maddox notes that by 2012, ACL Managing Director, Jim Wallace, had been ranked by *The Power Index* website 'as Australia's third-most influential religious voice on public policy, after Catholic Cardinal George Pell and Sydney's Anglican Archbishop Peter Jensen' (Maddox 2014, p. 133).

[15] https://www.humanrights.gov.au/sites/default/files/content/human_rights/samesex/report/pdf/SSSE_Report.pdf, accessed 16 August 2019.

[16] The inquiry conducted 24 consultations (focus groups) with religious leaders and representatives from various atheist, secularist and rational humanist groups. The ACL organised some of the these consultations (Bouma et al. 2011, p. 9).

The Ruddock Review, set up in the context of the divisive public and political debates about marriage equality but with broad terms of reference, included both problematisations but the 'balancing rights' frame was dominant. The chapter 'Manifestation and Religious Belief' does not cover many of the issues addressed in the earlier reports, for example religious dress, the building of sites of worship, medical and health issues. It focusses entirely on issues that related to the freedom of organisations, especially schools, and individuals (freedom of conscience), to discriminate against others on the basis of sexual orientation, gender identity and relationship status. The majority of the 20 recommendations were proposed solutions to the balancing rights problem—five related to the exemptions in anti-discrimination law allowing religious schools to discriminate and four related to marriage equality, including one that addressed the fears that religious charities would not be able to advocate for 'traditional marriage' without losing their charitable status. Nevertheless, the report failed to appease many conservative Christians, largely by not promoting religious freedom above other rights, especially equality rights (Koziol 2018).

The divisiveness of the balancing rights problematisation in the context of marriage equality is captured in the report of the SLCARC into exemptions for religious schools which includes a 'Dissenting Report of the Coalition Senators' and 'Additional Comments from the Australian Greens'. Just how entrenched the balancing rights problematisation had become is demonstrated by the wording of the recommendation for the improved protection of religious freedom: 'that consideration be given to inserting in law a positive affirmation and protection of religious freedom in Australia that is appropriately *balanced with other rights*' (Senate Legal and Constitutional Affairs References Committee 2018, p. vii).

The JSCFADT inquiry into the status of religious freedom or belief was conducted over the period of the marriage equality debates and the Ruddock Review. The Committee was chaired by one of the conservative government's most well-known Christian conservatives, the Hon. Kevin Andrews MP, who wrote in the Foreword:

> the threats to religious freedom in the 21st century are arising not from the dominance of one religion over others, or from the State sanctioning an official religion, or from other ways in which religious freedom has often been restricted throughout history. Rather, the threats are more subtle and often arise in the context of protecting other, conflicting rights. An imbalance between competing rights and the lack of an appropriate way to resolve the ensuing conflicts is the greatest challenge to the right to freedom of religion.
>
> This is most apparent with the advent of non-discrimination laws which do not allow for lawful differentiation of treatment by religious individuals and organisations. It is also manifested in a decreasing threshold for when religious freedom may be limited . . . While religious exemptions within non-discrimination laws provide some protection, these place religious freedom in a vulnerable position with respect to the right to non-discrimination, and do not acknowledge the fundamental position that freedom of religion has in international human rights law. (Joint Standing Committee on Foreign Affairs Defence and Trade 2017, p. viii)

Balancing rights the wrong way is identified, not merely as an Australian problem, but as the most significant *universal* threat to religious freedom.

4.3. The Other Eleven Inquiries

Eleven inquiries into other human rights issues included consideration of religious freedom. Unsurprisingly, the two race discrimination inquiry reports represented the religious freedom problem as one of religious diversity (Figure 1). Both reports strongly connect discrimination based on race and on religion. Of the four reports of broad-based human rights inquiries, the 2009 National Human Rights Consultation (Brennan et al. 2009) and the 2015 Traditional Rights and Freedom Inquiry (Australian Law Reform Commission 2015) included the religious diversity problematisation. Significantly, the 2013 inquiry report into the draft bill to consolidate anti-discrimination law only

addressed religious freedom as a balancing rights problem (Senate Legal and Constitutional Affairs Legislation Committee 2013). This draft bill was strongly opposed by the majority of churches which regarded 'the perceived failure of the state to properly balance freedom of religion and freedom of speech [in their favour] against the right of individuals to be free from unjust discrimination' as 'a profound threat' (Poulos 2018, p. 130). That all five inquiry reports into LGBTIQ rights would represent the problem as the law needing to balance the rights of LGBTIQ people against the right to religious freedom, demonstrates how entrenched is the thinking and the discourse that religious freedom is threatened by LGBTIQ rights.

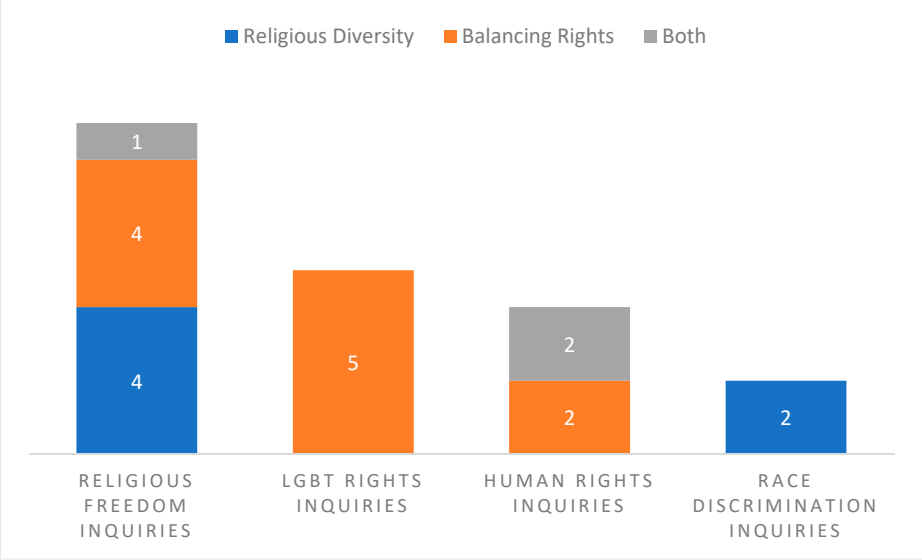

Figure 1. The dominant problem by topic of inquiry.

5. Discussion

In describing the post-structuralist ontology that underlies the WRP approach, Bletsas argues (using the example of poverty) that how we think about policy problems

> is a product of *how we think* far more than it is a product of something enduring in the nature of poverty . . . It is this insight . . . that the "WPR" approach, with its wider poststructuralist premises, is concerned with. It creates a space from which it becomes possible to ask, quite simply, how have taken-for-granted "problems"—whether they are policy problems or conceptual problems such as the structure/agency debate itself—come to be taken for granted? (Bletsas 2012, p. 43, emphasis in original)

The majority of reports examined for this study entrench a way of thinking and talking about religious freedom, and even the nature of religion itself, in policy and public discourse. Applying the WPR methodology to the texts exposes an understanding of religion (individualised, privatised, institutionalised, a set of (otherworldly) beliefs expressed in rituals and codes of behaviour) that is assumed rather than articulated.

Other than identifying the long-understood difficulty of defining 'religion' and offering examples from Australia case law and scholars of religion, none of the reports interrogated the *idea* of religion itself—a constructed category see for example, (Arnal and McCutcheon 2013; Fitzgerald 2011; Smith 1998)—or the notion of 'belief'. FRB21 was the only report to come close, identifying the dominance of the 'Christian and Protestant assumptions about religion' and suggesting that 'considering the changing demographic profile and social character of Australia, new measures are needed as many identify with a religion culturally, not necessarily practising that faith in its organised and official contexts' (Bouma et al. 2011, p. 81). Neither did the reports explore the meaning of 'freedom' or

'religious freedom' and why it is important, other than to articulate the assumptions that: religious beliefs, when they are held, are a fundamental aspect of an individual's identity; religious diversity is (mostly) good for society; religious freedom is important (in a liberal democracy and for individuals) and needs to be protected; and that an individual's decision to *not* hold a religious belief must be respected to the degree that it is protected in law (WPR2, WPR4).

In the very act of assuming shared, common sense understandings of religion, belief, and religious freedom, the reports reify, in the public and policy spheres, historically constructed categories of socio-cultural meaning that promote a particular understanding of belief—that is, as personal claims of truth validated and 'supported by religious authorities and mandated by mainstream (qualifying and ancient) religious texts' (Sherwood 2015, p. 43). And it is those claims to truth which mark the dead immovable weight of 'belief' in human rights discourse and law, setting the ground for inevitable conflict when balancing rights becomes the problematisation of religious freedom.

Sherwood describes the development of the conception of 'belief' as an essential inner (privatised) core of a person's identity as an enterprise of modernity along with and interdependent with the construction of the categories of 'religious' and 'secular', categories which Arnal and McCutcheon describe as 'alter egos':

> mutually defining terms that come into existence together—what we might just as well call a binary pair—the use of which makes a historically specific social world possible to imagine and move within, a world in which we can judge some actions as safe or dangerous, some items as pure or polluted, some knowledge as private or public, and some people as friend or foe. (Arnal and McCutcheon 2013, p. 119)

Sherwood writes that 'belief' became where the holy resides, separate to science, philosophy and reason—the 'instruments of public reason' (Sherwood 2015, p. 33). Then, framed in western democratic law and human rights discourse, paired with 'religion' and set alongside gender, race, ethnicity, disability, age etc., even as it retained its unique sense of intangibility and vulnerability, it became something more solid, more nonnegotiable, with 'a privileged relationship to essence' (Sherwood 2015, p. 35):

> As a term of nonnegotiation (unlike an "opinion"), the obvious correlate for age, pregnancy, or sexuality in the realm of ideas is belief. Exceptionally and anomalously, religious belief is defined as a mode of thinking that is not, in a sense, chosen. It insists that it must be understood as defining or exceeding the individual . . . Believing is understood as a form of agency that, paradoxically, takes us beyond decision to the point where it becomes that from which I cannot dissociate myself, that which cannot be wrenched apart from me except by violence—and hence a given, like sexuality or race . . . . (Sherwood 2015, p. 35)

It is in light of these circumstances that the law, Sherwood argues, allows religious believers 'to be in conflict with the rights of others' (Sherwood 2015, p. 41) and in particular, because the movement for LGBTIQ rights is the youngest liberation movement, the

> conflict between religion and sexuality (and particularly homosexuality) has become an incendiary cultural flashpoint and a stage for the trial of competing freedoms because *religious belief and (homo)sexuality are more insecure and vulnerable than age, maternity, disability, or race.* (Sherwood 2015, p. 41, emphasis in original)

With the increasing legal protections afforded to women and especially to LGBTIQ people, most religious groups in Australia are seeing their traditional beliefs and moral codes eroded by society and contradicted in law (WPR6). In the balancing rights problematisation, the privileged Christian majority (as identified by the loci of Christian institutional power) becomes the persecuted minority because the truth claims of its beliefs have been challenged in law (WPR6). This reflects what has happened in the US. Tebbe writes,

> Although the campaign for LGBT rights is ongoing … its achievements to date have affected the relationship between the government and those who adhere to certain traditional theologies on questions of sexuality. Expansion of equality law has contributed to a sense among some religious traditionalists that there has been an inversion. They feel they are now the minorities who require protection from an overwhelming liberal orthodoxy. (Tebbe 2017, p. 1)

Over time, the 'belief' (claims of truth) part of 'religion' has become privileged over what is often named the 'expression' of belief (rituals and dress, for example) and over the experiences of marginalisation suffered by those whose lives are regarded as contrary to ('sinful') or inconsistent with those truth-claims (WPR5). Religious freedom becomes defined as the space contested by those who are persecuted by religious believers and religious belief itself as the place where the holy resides, flimsy, fragile, in need of protection and solid, incontestable as the essence of a person.

6. Conclusion

The WPR analysis of the reports from public inquiries into religious freedom has demonstrated that, until recently, the religious freedom 'problem' in Australia was largely understood as caused by the religious diversity that results from immigration—first by invasion and colonisation and then successive waves of immigration bringing to the country a hitherto unexperienced (and beneficial) diversity of religious beliefs, but which unfortunately unleashes religious prejudice and discrimination, necessitating legal (and other) protection. The audible voices were those of the religiously persecuted minorities—Muslims, Jews, Hindus, Jehovah's Witnesses etc. However, in response to the claims made by women and others, but predominantly by LGBTIQ people, for equal treatment under the law, and the readiness of lawmakers to reform laws for that purpose, those voices, and the stories they told of violence, exclusion and harassment, were largely lost. The problem of religious freedom was recast as a 'balancing rights' problem and the voices of persecution were those whose hitherto privileged beliefs were being challenged and undermined by a progressive moral shift in society.

In this problematisation, the religious belief in the 'sinfulness' of people who identify as LGBTIQ, understood to be held by *the majority religion*, is untested precisely because it is a belief of the religion of the majority (defined as such by the religious authorities who determine 'doctrine' on behalf of the state for the practice of the law), unlike, for example, the beliefs that are expressed in the wearing of certain forms of religious dress by people in minority religious groups which are tested every day in Australian society. The democracy's commitment to religious freedom demands, according to this problematisation, that the Christian majority religious believers and institutions (now cast as a religious minority, even with the retention of institutional power) be granted what Sherwood refers to as 'controversial opt-outs on religious grounds from legislation concerning gender and sexual orientation' (Sherwood 2015, p. 41). These religious institutions must be allowed to 'practice' their religious beliefs precisely because they *are* religious beliefs. The 'balancing rights' problematisation, with its foundation in the institutional power of Australian churches, ensures that the rights of LGBTIQ people are tied to the idea of religious freedom, while religious freedom itself remains free from interrogation.

Funding: The preparation of this paper was supported through an Australian Government Research Training Program Scholarship.

Acknowledgments: The author is grateful for the support and excellent feedback of Marion Maddox from Macquarie University. Thanks to Juliet Sheen who was generous both in conversation and in providing access to personal papers relating to the 1984 inquiry and report. Staff and doctoral researchers from the Department of Modern History, Politics and International Relations responded with helpful feedback to an early work-in-progress presentation. The author also acknowledges the very helpful feedback from the anonymous reviewers whose careful engagement and attention has made this a better paper than it otherwise would have been.

Conflicts of Interest: The author declares no conflict of interest.

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