Evidence of Absence in the Ruddock Report

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The recommendations made in the Ruddock Report are rather modest when compared to previous reviews of the state of religious freedom in Australia. The Ruddock Panel rejected widespread calls for a general federal human rights act or a specific law protecting religious freedom. What explains the Panel's reluctance? This article argues that the cause was the Panel's extremely narrow definition of what legitimately constitutes evidence of a problem. The Ruddock Report often supports its recommendations of inaction by stating that submissions arguing for change consistently relied on a handful of high-profile cases, involved incidents overseas, or just did not provide numerically impressive evidence of complaints to existing human rights bodies. In addition, the Ruddock Report failed in viewing rights protection as purely reactive (solving an existing problem) rather than prophylactic (safeguarding against plausible and significant future threats). By setting such a narrow standard of acceptable evidence and by neglecting the need for foresight, the Ruddock Report did not properly evaluate the important issues it was asked to investigate.

I. Introduction

The major recommendation of the Ruddock Report is for a federal law banning religious discrimination.[1] Although welcome, this is not exactly brave. Most of the Western world has been banning religious discrimination for decades now. Formal legal equality is a fundamental principle of liberal democracy, and is clearly served by laws prohibiting discrimination on the basis of race, sex, disability, sexual orientation, and many other categories. In the 21st century, there is nothing remarkable about the simple proposition that neither governments nor public accommodations should disadvantage people for their religious convictions. Most states already have these protections in place. Still, in the Australian context, this could be considered a small step forward and should be encouraged.

Apart from this, the report did not really go much further. Indeed, it did not even go as far as previous inquiries. The Ruddock Report did not recommend a Federal Religious Freedom Act (as had been recommended by the Australian Human Rights and Equal Opportunity Commission),[2] nor did it recommend a general Human Rights Act of the type now adopted in Victoria, the Australian Capital Territory, and Queensland.[3] We are told that "the Panel remained unconvinced of the urgent need for such change" and that it had not received "sufficient advice" that there was a problem with how things are currently done.[4] It is as if we are to conclude that Australia is the ideal nation-state: it *has* never infringed anyone's religious freedom, and it *will* never infringe anyone's religious freedom, and so legislation on the matter is unnecessary.

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[1] Philip Ruddock, *Religious Freedom Review: Report of the Expert Panel* (Australian Government, Department of the Prime Minister and Cabinet, May 2018) 5 (Recommendation No 15) (hereafter "Report").

[2] See, eg, Australian Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion or Belief* (1998) v (recommending a federal Religious Freedom Act).

[3] Report, n 1, 41.

[4] Report, n 1, 46.

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In what follows, I am going to argue a simple proposition: the Ruddock Report got it wrong. My argument consists of two main strands. The first is that, through a variety of rhetorical devices, the Report wrongfully excluded several good reasons for thinking that religious freedom needs protection in Australia. The second is that the Report shows a lack of foresight in that it views rights protection as purely remedial in nature, rather than prophylactic. These two strands will be taken in turn.

II. Rhetorical Devices of Exclusion

The Ruddock Report was produced after a long consultative process that involved the receipt of over 20,000 submissions from the public[5] and meetings with over 180 experts and stakeholder organisations.[6] From its own analysis, about two-thirds of the submissions argued that religious freedom was important, with a substantial number asking for stronger protections.[7] In regard to the submissions of experts and stakeholders, the Report says that many "emphasised the need to protect freedom of religion for people of all faiths".[8] Considering the submissions and consultations as a whole, the Report says that "a common characteristic of many of the representations made to the Panel was apprehension, even 'fear'. People of faith were apprehensive that religious freedom may come under threat in Australia".[9]

Yet in the face of these thousands of submissions and extensive consultations, the Report refused to recommend a Religious Freedom or general Human Rights Act. How is this justified? With all due respect to the panel members and their advisors, this is achieved through a clever rhetorical trick: the Report indicates that the Panel took an "evidence-based" approach.[10] This sounds appealing. We want our hospitals to take an evidence-based approach to improving patient care; we want our juries in the courtroom to weigh the evidence carefully before rendering a verdict; and, in an ideal world, policymakers of every stripe would look at the evidence before making decisions. But in the Ruddock Report, this evidence-based approach is used as a tool of exclusion. Repeatedly, the Report implies that only concrete examples personally experienced or witnessed by the submission writer could be considered relevant evidence of a problem.[11] Submissions that raised hypothetical problems,[12] discussed incidents outside of Australia,[13] referenced the same "handful of high-profile events in Australian law",[14] or simply shared concerns and calls for action or protection, without providing "evidence,"[15] were effectively disregarded.[16]

Just on the merits, this approach is puzzling for several reasons.

First, when people give hypothetical examples of how governments can suppress religious freedom, they are not operating in the territory of crazy speculation. Religious freedom has been infringed in Australia before, as token research into the experiences of Jehovah's Witnesses in World War II[17] or of the Stolen

[5] Report, n 1, 114.

[6] Report, n 1, 9.

[7] Report, n 1, 114.

[8] Report, n 1, 10.

[9] Report, n 1, 10.

[10] Report, n 1, 104.

[11] Report, n 1, 98.

[12] Report, n 1, 15, 98.

[13] Report, n 1, 98.

[14] Report, n 1, 98.

[15] Report, n 1, 111.

[16] To be fair, Ch 7 of the Report contains qualifications and explanations for why these types of submissions were seen as being of limited use, and should be read in its entirety.

[17] See *Adelaide Co of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 (invalidating government decree that the Jehovah's Witnesses were an "unlawful body").

Generation[18] would show. Why would we think awful things can only happen in the past, and not in the future?

Second, the submissions referencing incidents in other countries, especially other Western liberal democracies, made perfectly rational arguments. Recent events abroad shows that it only takes one election for a racist, Islamophobic demagogue to come into power at the expense of minority religions and perceived "outsiders". And lest we think this is a peculiarly American phenomenon, we can look to the rise of White Christian nationalism, often under the banner of "populism", in several countries in Europe. One often hears the term "American exceptionalism", but it would take a particularly hubristic brand of "Australian exceptionalism" to think this country is somehow immune to the problems plaguing other countries. But unlike most of those other countries, Australia lacks a full constitutional bill of rights allowing the courts to protect minorities from the whims of the majority.

Third, the Panel's refusal to count as "evidence" those submissions discussing the same handful of "high-profile examples in Australian law" continues the trend of exclusion. I do not know exactly what these high-profile examples are – the Report does not discuss them, for some reason – but I can understand why individuals and stakeholders would reference them when they put pen to paper. The high-profile cases are the ones in which accurate information is available and can be easily shared to illustrate a larger point. If the Panel only wanted little-known personal anecdotes,[19] it really should have asked for them.

This hints at yet another major problem with the Report's evidence-based approach. *No one knew about it.* The call for submissions did not specify the types of information that would be useful to the Panel. Nor have past inquiries in this area insisted on such a rigid exclusion of anything that does not constitute a factual account of purely domestic non-high-profile accounts of religious freedom infringement in Australia. The Report explicitly rejects the conclusions of the multiple previous government inquiries on this issue because they operated by "exploring legal frameworks in a way that highlights *potential* statutory encroachments on the enjoyment" of freedom of religion instead of collecting "a complete picture in relation to the day-to-day *experience* of people of faith manifesting their religious beliefs".[20] But the vast majority of submissions were exactly what one might expect from members of the public: broad expressions of opinion and general concern. Discounting them because they did not meet an undisclosed threshold criteria can only be discouraging to the individuals, faith communities, and stakeholders who took the time to share their views with the Panel.

Equally problematic, even when presented with information constituting "evidence", the Report does not do much with it. A quantitative analysis of complaints collected by the Islamophobia Register and a statistical analysis of interfaith cohesion by the Scanlon Foundation provide only a "useful snapshot" in light of the fact that most religious groups do not systematically "collect information on the serious harms and discrimination experienced by their members".[21] Similarly, research listing complaints to State human rights tribunals is set aside because it is unclear how the limited number of formal complaints relate to the Australian experience of religious freedom as a whole.[22]

This, in turn, demonstrates the final problem with the Report's evidence-based stance. We know the Panel only wanted evidence, but it is not clear how much evidence would suffice. Is it fifty incidents, a hundred, ten thousand? Are we in the realm of probable cause or proof beyond a reasonable doubt? The rhetoric of an "evidence-based" approach allows the Panel to pretend that this is an objective, scientific problem of data collection and analysis,[23] when, at its core, what is needed is attention to history, good judgment, and the application of principle. Whether intentionally or not, the Panel gave itself tunnel

[18] See, eg, *Kruger v Commonwealth*, (1997) 190 CLR 1 (dismissing various constitutional challenges to historical removal of Aboriginal children and suppression of their spiritual beliefs).

[19] Report, n 1, 98.

[20] Report, n 1, 99 (emphasis added).

[21] Report, n 1, 100.

[22] Report, n 1, 98–99.

[23] Report, n 1, 6. Recommendation No 17 recommends the Commonwealth begin an extensive quantitative and qualitative collection of information relating to the "experience of freedom of religion" in Australia.

vision, and the Report shows the resulting lack of perception as to why stronger protections for religious freedom are warranted.

III. Humility, Foresight, and the Rights Model

My second argument is that the Ruddock Report was substantively wrong in concluding that Australia does not need a Religious Freedom or Human Rights Act. Once again, this is a problem of limited vision. In the previous part, I argued that the Panel did not look backwards into Australian history to consider times when religious freedom was not respected, and how it explicitly refused to consider the experience of other countries. In this part of the article, my focus is on the Report's failure to look forward.

In Dante's *Divine Comedy*, fortune-tellers and false prophets are relegated to the Eighth Circle of Hell, where their punishment is to have their heads twisted on their bodies backwards to such an extent that their tears falls on their buttocks.[24] I wish I could have assured the authors of the Ruddock Report that they would not face the same punishment for making some reasonable predictions about the future. One does not have to be a fortune-teller and peer into a crystal ball in order to take sensible precautions against plausible risks. No matter how many or how few concrete examples of religious freedom violations can be accumulated to meet the Panel's evidence-based approach, the possibility of such violations occurring in the future are very real.

The reason the risks are real is not because Australia is a "bad" or an "evil" country, but simply because it is not a perfect country. It never has been, it is not now, and it never will be. Humility forces us to admit that our institutions are fallible, that voters are fallible, and politicians can be fallible. Just like every other country, Australia can be swept by hysteria and fear – whether it is over Scientology in the 1960s, "cults" in the 1970s, the endless chatter a few years ago about banning burkas, or present efforts in some State legislatures to force Catholic priests to break the seal of the confessional, there is no guarantee that we will always get it right. Every democracy has this risk, and although Australia is special, it is certainly not immune to the problem.

The core defect of the Ruddock Report is that it conceives of rights as purely remedial, when in fact they are also prophylactic. Rights are the safeguards built into a system "just in case." They may lie fallow for decades, and will hopefully never be needed. Rights protection is the insurance we hope we never have to use, but we are glad it is there when something goes wrong. Maybe everything is fine in Australian society today and stronger protections for freedom of religion are not necessary right now – but rights are principles that reflect fundamental values meant to endure for generations. They say something meaningful about who we are, or at least, who we aspire to be. We do not have to wait until they are needed, and it is potentially too late, to put them into place. But due to its ignorance of history and disregard for world events, the Ruddock Report never makes reasonable inferences about what could happen in the future. The result is a lukewarm suggestion for further study and data collection.[25]

At one point, the Report blames its inaction on its Terms of Reference. The Report states that "to assess the merits of a Human Rights Act adequately would require consideration of a range of complex issues well outside of its Terms of Reference" but that "[s]pecifically protecting freedom of religion would be out of step with the treatment of other rights".[26] This verges on a Catch-22. In actuality, the terms of reference stated that the Panel *should* "consider the intersections between the enjoyment of the freedom of religion and other human rights" and to "consult as widely as it considers necessary".[27] Although lacking the resources of a Royal Commission, the Panel certainly had the expertise it needed in order to make a credible recommendation on whether Australia needed stronger protections for religious freedom. Previous inquiries, not to mention academic researchers, have been studying these questions for decades.

[24] Dante Alighieri, *Divine Comedy, Inferno* (Henry W Longfellow trans, Arcturus Publishing, 2014) Canto XX.

[25] Report, n 1, 6 (Recommendation No 17).

[26] Report, n 1, 41.

[27] Report, n 1, iii.

On the subject of religious freedom legislation, two related points are worth brief mention. The first concerns the notorious defects in the High Court's interpretation of s 116 – the doctrine that it only applies when the *purpose* of a statute is to deprive someone of their religious freedom. This interpretation is the backdrop to why we have to muddle through with statutory protections that, however written, will never offer the protection that entrenched constitutional rights offer in many other Western liberal democracies.[28] We need federal legislation guaranteeing religious freedom, as recommended by inquiries *prior* to the Ruddock Report, because s 116, as currently interpreted, certainly will not help. Section 116 has never been successfully invoked by a plaintiff before the High Court, and, because the "test" is so easily met, it may never be. Second, the tensions between religious freedom and equality, incarnated in the same-sex marriage debates that gave rise to the Ruddock Review, are exactly the sort of rights-balancing that a comprehensive Human Rights Act is designed to deal with. Instead of a confused, piecemeal approach that covers sex discrimination in one statute, race discrimination in another, and religious discrimination in yet a third, a comprehensive human rights statute allows for a much more rational system of balancing and exemptions.

IV. Conclusion

The flaws in the Ruddock Report are substantial. First, the Panel took an "evidence-based" approach that ended up excluding the vast majority of submissions and consultation, and then it went a step further by concluding that its own inability to find this evidence justified its inaction in not recommending stronger protections for freedom of religion. But when it comes to infringements on religious freedom, the old line is true: absence of evidence is *not* evidence of absence. Second, the Report mistook the purpose of having robust protections of fundamental human rights like freedom of religion. Constitutional and statutory protections are not implemented only to deal with current problems; they are implemented to express the values that a society holds sacred and to help guarantee that, despite the shifting winds of politics, such rights will continue to be respected in the future. Rights are enduring principles meant to persist beyond the controversies of the present, and we know that they are necessary because of the controversies of the past.

Due to its lack of hindsight and foresight, the Ruddock Report represents a step backwards from the progress made in previous inquiries on religious freedom in Australia. It *deserves* the undeserved fate of those previous inquiries: to sit on a shelf somewhere, dusty and forgotten.

[28] One must not overstate the case here; entrenched constitutional bills of rights are not a panacea, and one can certainly accumulate examples of countries where they exist and yet instances of violations of religious freedom can still be found. The point, however, is not that entrenched rights are a perfect solution, but that they provide an additional layer of protection.