Proportionality in Australian Constitutional Law: Next Stop Section 116?

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The High Court's interpretation of s 116 of the Australian *Constitution*, and in particular the limb prohibiting the Commonwealth from passing laws that prohibit the free exercise of religion, seems relatively settled. It is trite to observe that the section has been interpreted narrowly, consistent with other express human rights protections in the Constitution. Not surprisingly, this has meant that no s 116 challenge to the validity of Commonwealth legislation has ever been successful. There are two main ways in which the interpretation has been narrow. Firstly, the High Court has found that laws potentially offensive to s 116 must have a purpose, or the dominant purpose, of prohibiting the free exercise of religion.[1] The mere fact that a law has this effect is not relevant to issues of constitutionality. Obviously, it is much easier to show that a law has the effect of prohibiting the free exercise of religion rather than that this was the purpose, or dominant purpose, of the law. This approach has greatly narrowed the potential operation of the section. Secondly, the High Court has found that the prohibition is not absolute. This means that even if a law does prohibit the free exercise of religion, the Commonwealth may nevertheless be able to justify the challenged provisions, for example on the grounds of national security.[2] Again, this is quite concordant with the approach to other express rights in the Australian *Constitution*,[3] and also to constitutional interpretation more generally.[4]

However, constitutional waters are never entirely still. Elsewhere, the High Court has utilised with increasing frequency the concept of proportionality.[5] Though it has long been used in Australian constitutional law to interpret so-called 'purposive powers',[6] it has increasingly become accepted in the rights/freedoms context as well. In *McCloy v New South Wales* ('*McCloy*'),[7] a majority of the Court accepted and applied proportionality analysis to interpretation of the implied freedom of political communication.[8] It has subsequently been adopted in relation to s 92 of the Australian *Constitution*,[9] also a rights/freedoms provision.

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[1] *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J), 134 (Gaudron J), 160 (Gummow J, Dawson J agreeing at 60).

[2] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 126-131 (Latham CJ), 149 (Rich J), 155 (Starke J), 157 (McTiernan J), 160 (Williams J).

[3] In relation to s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461, stating that provisions that might otherwise infringe the prohibition on discrimination on the basis of residence might be 'justified' in some way and thereby be held constitutional.

[4] See *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 425 [91] (Gleeson CJ, Gummow, Hayne, Callinan, and Heydon JJ), stating that laws that might otherwise infringe the prohibition against discriminatory taxation might be held valid if 'related to a proper objective'.

[5] Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

[6] *Richardson v Forestry Commission* (1988) 164 CLR 261, 311 (Deane J), 346 (Gaudron J).

[7] (2015) 257 CLR 178 ('*McCloy*').

[8] Ibid 194 (French CJ, Kiefel, Bell and Keane JJ).

[9] *Palmer v Western Australia* (2021) 95 ALJR 229 ('*Palmer*').

https://doi.org/10.55803/F94T

The current Chief Justice is a leading proponent of proportionality analysis in the context of the Australian *Constitution*.[10]

Those justices who apply proportionality analysis, which includes all current members of the High Court apart from Gordon and Gageler JJ, have settled on three aspects: whether the law is suitable, whether it is necessary, and whether it is adequate in its balance. A law will be suitable if it has a rational connection to the purpose of the provision. It must be necessary, in the sense that there is no obvious and compelling alternative means of achieving the purpose with a less restrictive effect on the freedom. And the court will consider whether it is adequate in its balance, given the importance of the measure and the extent to which it restricts the freedom.[11]

Although this framework of analysis was developed in the context of proportionality as applied to the implied freedom of political communication, it was subsequently applied to the express freedom of trade, commerce and intercourse in *Palmer v Western Australia* (*'Palmer'*).[12] This obviously begs the question regarding the use of proportionality for other freedoms in the *Constitution*, including freedom of religion in s 116. Given the embrace of proportionality by a majority of the High Court in relation to both express and implied freedoms in the Australian *Constitution*, it is considered likely that, when the Court next considers a s 116 challenge to a law, it will apply proportionality analysis to that section.[13] This would be a logical, modest progression from where the Court's jurisprudence currently sits. How might proportionality analysis apply to s 116, and what implications might this have for the scope of the provision?

If the Court were to so move, it would consider whether the challenged law was suitable, in the sense of being rationally connected to its identified purpose. Most laws would meet this requirement. However, the second requirement is more difficult to meet – whether the law that impacted on religious freedom was *necessary*. The court would need to be convinced that there was no obvious and compelling alternative available to meet the legitimate purpose of the legislation, in a way that was less invasive of freedom of religion. On paper this is a difficult thing for those supporting the legislation to show. There will often be alternative means of achieving the objectives of legislation other than those chosen by the legislature, and these may be less invasive of the freedom. However, as applied, the High Court has effectively made this requirement easier for defenders of the legislation to meet – it has insisted the alternatives must be *obvious and compelling*.[14] The court has effectively accorded deference to legislative judgments. While this will be applied on a case by case basis, it is considered that potentially this requirement might provide stronger support for freedom of religion than the status quo, by effectively requiring the legislature to demonstrate its laws are minimally invasive of freedom of religion rights, at least where compelling and obvious alternatives exist.

Thirdly, the law must be adequate in its balance. The Court would weigh up the importance of the object of the legislation, bearing in mind its impact on the fundamental right to freedom of religion. This has been approached narrowly, so that the benefit of the law must be *manifestly*

[10] Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85.
[11] *McCloy* (n 7) 195 (French CJ, Kiefel, Bell and Keane JJ).
[12] *Palmer* (n 9).
[13] Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 278-285; Alex Deagon, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46(1) *Federal Law Review* 113, 136.
[14] *Comcare v Banerji* [2019] HCA 23, [35] (Kiefel CJ, Bell, Keane and Nettle JJ), [194] (Edelman J) ('*Comcare*').

outweighed by the adverse impact on the freedom.[15] Some have expressed it as an 'outer limit', only not met where there is a gross imbalance or disproportionality between the benefit of a provision and its impact on fundamental freedoms.[16] Again, while this will be applied on a case by case basis, it might be suggested this test could effectively provide greater protection for freedom of religion than the current approach to s 116 questions. It clearly contemplates consideration of the *effect* of laws on established freedoms,[17] for example, in a manner eschewed by the current approach to s 116. Of course, it remains to be seen whether these possibilities crystallize into real change to the current approach, as would be favoured by those who are concerned that the current interpretation of s 116 accords little to no effective protection of religious freedoms.[18] The possibilities are, however, interesting.

[15] *Comcare* (n 14) [38] (Kiefel CJ, Bell, Keane, and Nettle JJ); *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, [85] (Kiefel CJ, Keane and Gleeson JJ).
[16] *Brown v Tasmania* [2017] HCA 43, [290] (Nettle J); *Comcare* (n 14) [205] (Edelman J).
[17] *Clubb v Edwards* [2019] HCA 11, [72] (Kiefel CJ, Bell and Keane JJ).
[18] Luke Beck, 'The Case Against Improper Purpose as the Touchstone for Invalidity Under Section 116 of the Australian *Constitution*' (2016) 44 *Federal Law Review* 505.